

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2012090211

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2013010694

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Eileen M. Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on March 12-14, and 19, 2013, in Van Nuys, California.

Student was represented by Deborah L. Pepaj, Attorney at Law, of Student's Rights Attorneys, who was accompanied each day by her legal assistant, Hamlet Yarijanian. Student's mother (Mother) and father, (collectively, Parents) were present on the first hearing day.

Spanish-language interpreter, Elizabeth Camacho, was available when Parents were present to provide simultaneous interpretation of the proceedings, and English-language interpretation of Mother's testimony and documentation for the record.

Los Angeles Unified School District (District) was represented by Patrick J. Balucan, Attorney at Law, who was accompanied each day by District personnel, Joyce

Kantor, Specialist, Compliance, Support and Monitoring, and Joelle Mervin, legal assistant.

Student filed a request for due process hearing in OAH case number 2012090211 (Student's Complaint) on September 7, 2012. On October 11, 2012, the matter was continued upon the joint request of the parties. On January 23, 2013, District filed a request for due process hearing in OAH case number 2013010694 (District's Complaint). On February 8, 2013, upon District's request, OAH consolidated Student's and District's complaints, and set the dates for the consolidated due process hearing according to the schedule set for Student's due process hearing request.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing the party's joint request for a continuance to file written closing argument was granted. The parties were ordered to file written closing briefs by no later than April 9, 2013. The parties timely filed their written closing briefs, at which time the record was closed and the matter was submitted.

## ISSUES<sup>1</sup>

### STUDENT'S ISSUES

1. Whether District denied Student a free and appropriate public education (FAPE) by failing to meet its child find obligations during the 2010-2011 and 2011-2012 school years by not conducting assessments when it had reason to suspect Student may have had a disability which qualified him for special education and related services.

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<sup>1</sup>At hearing the parties stipulated to the issues as articulated in the Prehearing Conference (PHC) Order. The ALJ may have changed the order or wording of the issues to clarify, not modify, the issues. Issues One and Two are limited to the period of time up to the filing of Student's Complaint.

2. Whether District denied Student a FAPE by refusing Parents' written request, dated October 25, 2011, to assess Student for special education.

#### DISTRICT'S ISSUE

3. Whether District conducted an appropriate speech and language (LAS) assessment, such that Student is not entitled to an independent educational evaluation (IEE) at public expense.

### FACTUAL FINDINGS

#### BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a six-year-old boy who, at all relevant times, resided within District's geographic boundaries with Parents. At home, Parents primarily speak with him in Spanish. Although his father knows some English he is not fluent. Mother speaks Spanish to Student. Parents speak Spanish and Zapotec, a language indigenous to Mexico, with each other, and mostly Zapotec with adult relatives living with them. Mother instructed the adult relatives not to speak Zapotec to Student, but one adult relative only speaks Zapotec in the home and wants Student to know the language. Student's expressive language development in Spanish was delayed. Student could vocalize "ma" and "pa" at 15 months, and gesture, but did not use two word phrases until 36 months, and three word phrases at four years of age. Student's younger brother did not have similar delays. At 18 months Student suffered from asthma, but, although he still took daily medication, serious asthmatic episodes disappeared by five years old, and he did not suffer from any medical condition that interfered with his school day. Student was never diagnosed by any medical professional with a hearing delay.

2. Student was first exposed to the English language at four years of age, beginning in fall 2010, when he attended Manhattan Head Start, a Head Start operated preschool within the District's boundaries. Manhattan Head Start was not a District

program. At Manhattan Head Start Student was also spoken to in Spanish, which concerned Mother as she wanted Student to progress in English.

3. Mother expressed her concern about Student's expressive language development to Manhattan Head Start in June 2011. Mother, who testified at hearing, insisted that she supplied a letter to the administrators of Manhattan Head Start requesting that Student be assessed for special education due to her concerns about his expressive language delays, but the letter was not produced at hearing. Mother spoke Spanish, but she could not read or write Spanish, and relied on other people to prepare her correspondence. Mother did not understand English, and could not independently determine Student's English-language skills. Mother appeared nervous at hearing and confused by many of the questions posed to her, even though she was assisted by a Spanish-language interpreter. For this reason, Mother's representations, as memorialized by the assessors in their reports, or supported by documentation, were carefully considered and respected, however her hearing testimony was given little weight.

4. Mother did not supply District with the letter, or any other documents regarding Student during the time he attended Manhattan Head Start, including her request that he be assessed.

5. For the 2010-2011 school year Mother enrolled Student in a District general education kindergarten, Los Angeles Elementary. Relying on Mother's representation, District designated Student's primary language as Spanish, and identified him as an English-language learner (ELL). Based upon expert testimony, the reference to "primary language" in this decision means that a pupil has been first exposed to and learned the basics of the identified language, here, Spanish, including sentence construction, and syntax. A pupil's primary language never changes, even after

the pupil becomes proficient in a new language, and becomes less proficient, or loses his ability to speak, in his primary language.

6. On September 7, 2011, Student was placed in Ms. Escobar's English language general education kindergarten class, with support from District's English-language Development (ELD) program.

7. On September 16, 2011, District administered the California English Language Development Test, 2011-2012 Edition (CELDT). The CELDT is designed for pupils in kindergarten and first grade, and establishes how well students can listen, speak, read, and write in English. The CELDT characterizes English-language performance as beginning, early intermediate, intermediate, early advanced, or advanced. Based upon his overall test results, Student measured in the early intermediate range when compared to pupils in kindergarten and first grade. English-language speaking skills for ELD-one pupils in the early intermediate range are generally limited to phrases and memorized statements and questions, but may also show increasing ease at responding to more varied communication and learning demands with reduced errors. Their listening comprehension is limited by vocabulary, although they can understand and attempt to follow a few simple oral directions. When speaking they demonstrate a limited range of vocabulary and syntax appropriate to the setting, but make frequent errors, and may not be coherent when they tell a story based on a picture sequence. When reading they recognize a few simple, high-frequency words, and apply basic knowledge of phonics and syntax. ELD-one early intermediate pupils can write by copying some letters of the alphabet legibly.

8. On October 25, 2011, Parents prepared a letter to District, which District received on November 4, 2011, requesting comprehensive psychoeducational, language and speech (LAS), and occupational therapy (OT) assessments, without unreasonable delay. In their letter, Parents reported that Ms. Escobar informed them that Student was

not accessing his curriculum and was behind his same-aged peers in multiple areas. Parents stated that they wanted an IEE. Parents represented that they made a previous request in writing four months earlier, but the letter was delivered to Manhattan Head Start, and District was never supplied with the letter.

9. After District received the letter it interviewed Mother, Student's teacher, and conducted a "screening" in the area of LAS.

10. On November 18, 2011, in response to Mother's request for a LAS assessment, District's LAS pathologist, Robyn Sebastian, who testified at hearing, screened Student for speech and language problems, particularly, in the area of articulation and fluency. Ms. Sebastian spoke with Ms. Escobar, who told her that Student rarely spoke in class, but when he did, his speech was intelligible. Student was reluctant to speak to Ms. Sebastian, but did cooperate after she offered him stickers. Ms. Sebastian observed Student for 30 minutes in his kindergarten class attending to a classroom lesson, and tasks involving story-telling, and imitating single words in English and Spanish. During that time she also conversed directly with Student. Student was 100 percent intelligible in spontaneous speech and was able to produce all sounds in Spanish. She found that he spoke fluently most of the time, without a stutter, and within a normal vocal range. She found that he made articulation errors consistent with his ELL status. He produced two errors in English that were dialect variances common to bilingual speakers, such as the "b/v" and "d/th" sounds. He produced two age appropriate blending errors, such as the nw/ndw in "sandwich" and the s/p in "spaghetti" but blends were not expected to be fully developed until the ages of seven or eight. He produced one atypical error in speech substituting the "m" for "n" in "welcome," but correctly used "m" in other contexts indicating that it was an emerging skill. Student spontaneously named objects in Spanish from a picture book, and described objects and actions using 2-5 word phrases and simple sentences containing

pronouns, verbs, nouns in English; e.g. "I see horse" Student correctly answered "what" and "where" questions about the picture story and imitated sentences of greater length.

11. During her screening, Ms. Sebastian observed that Student required a visual cue to correctly follow her direction to go to his desk, after he went to the door instead. Based on her observations, Ms. Sebastian recommended that his teacher model complete sentences for Student, use visual cues when presenting instructions, and offer praise to encourage him to participate. Ms. Sebastian did not recommend that Student be administered a comprehensive LAS assessment. Instead, she concluded that his language difficulties appeared to be related to his status as an ELL pupil. Ms. Sebastian recommended that Student be screened again in four months, if articulation errors persisted.

12. On November 18, 2011, District provided Parents a written response, denying her request to assess Student, and an IEE at public expense, and explaining that it made its decision after reviewing Student's records, speaking with her and Ms. Escobar, reviewing the CELDT, and Ms. Sebastian's screening. District also represented that it completed an OT screening. In its response District reported that Student scored below grade level expectations in math on a District assessment, but that alone was not a reason for an LAS assessment, as Student was progressing and needed time to develop. District addressed Parents' concerns with Student's progress on his alphabet and numbers through 100. It reminded Parents that Ms. Escobar already advised Mother that the Student was not expected to know the complete alphabet, or count to 100, until the end of kindergarten. District advised Parents that Ms. Escobar recommended that Mother speak in complete sentences to Student, and that Mother ask Student to respond in complete sentences. District advised Parents that they had the right to retain an independent assessor at their own expense, and ask for an IEE at public expense if they disagreed with a District assessment. District included a booklet which set forth

Parents' procedural rights and safeguards entitled, "A Parent's Guide to Special Education Services."

13. District also notified Parents by its November 18, 2011 response, that it was referring Student to a Student Success Team (SST) to address her concerns with Student's low math assessment score. SST's are general education teams which monitor a pupil's progress and recommend general education interventions to assist the pupil. District informed Parents that they would receive a letter inviting their participation, and of the composition of the SST team, which included Student's teachers, support staff, Parents, and a District administrator. The SST team would review Parents' concerns and information they wished to present, records, and work samples, and determine additional supports for Student. District provided Parents with a written copy of the parental rights brochure.

14. Janice Eckstrand, District's special education and resource specialist teacher assigned to Student's elementary school, testified at hearing. She prepared the November 18, 2011 letter to Parents, which was signed by the Principal. Ms. Eckstrand had been working as an educator for 36 years, and was an experienced special education resource teacher providing support in reading, math and writing. Ms. Eckstrand had significant experience administering academic assessments to pupils, which she always administered at the direction of the school psychologist for inclusion in psychoeducational assessments. She obtained all the necessary undergraduate and graduate degrees, and required credentials, and is also a national board certified teacher. She had a clear recollection of her involvement in the SST meeting, and was candid about the limitations of her understanding of Student's classroom performance because, unlike Ms. Escobar, who did not testify at hearing, she did not interact with Student, or review his classroom performance, on a daily basis. Ms. Eckstrand also admittedly was not a speech and language expert, and her anecdotal observations of



Student's language skills were given no weight. Ms. Eckstrand's observations and testing of Student's academic skills were carefully considered because of her extensive experience with teaching academics to special education pupils and administering academic assessments.

15. District sent the letter to the address Parents supplied, but on November 21, 2011, the letter was returned to District by the post office.

16. The first pupil reporting period ended December 2, 2011, and covered Student's performance from the beginning of school. Ms. Escobar reported that Student was well-behaved, had a positive attitude and improved in all areas, but that Student may be retained in kindergarten an extra year, instead of being promoted to first grade. Student received the following grades: a grade of one, or not proficient, in math; a grade of two, or partially proficient, in ELD reading, and general education, listening, and writing; and a grade of three, or proficient, in general education reading, speaking, and ELD writing. Student was partially proficient in other academic subjects and electives.

17. On January 30, 2012, Mother, assisted by a friend, prepared a letter for the District, memorializing her concerns about Student's language problems. Mother stated that she did not receive a response from the District to her October request for assessment, and that Ms. Escobar referred her to the principal. Mother again stated that Student did not speak Spanish well when compared with his peers, and at home he didn't speak with her or his Spanish-speaking peers. It is unknown whether, or to whom, this letter was delivered, but the content of the letter memorialized the concerns Mother directly communicated to the District at the time of the SST meeting, February 1, 2012.

18. On February 1, 2012, Janet Rhee, District's occupational therapist, who testified at hearing, prepared a report of her screening of Student for sensory-motor related problems. Ms. Rhee is a qualified occupational therapist, possessing all the necessary college undergraduate and graduate degrees, state certifications, and

experience, to administer OT assessments and provide OT to elementary school pupils. As part of her screening, Ms. Rhee conducted a classroom observation of Student, and interviewed Ms. Escobar. She concluded that Student demonstrated good neuromuscular skills, balance, and strength to negotiate his classroom and school environment, maintain an upright sitting posture, and make smooth transitional movements with his body, such as sitting and standing. She concluded that Student had adequate sensory processing skills to participate in a busy classroom, work independently at his classroom table, transition between tasks, and tolerate a variety of auditory, visual, and tactile sensory information. She concluded that Student demonstrated adequate visual perceptual and visual motor skills to write and color legibly and within lined paper, locate objects, recognize letters and numbers, and space letters on lined paper. She concluded that Student had adequate fine motor strength and bilateral coordination skills to open folders and bags, carry books, and manage fasteners. Ms. Rhee concluded that Student had adequate self-help skills, and did not require OT to assist him in this area. Ms. Escobar reported that Student could independently take care of himself by using the restroom, washing and drying his hands, and feeding himself.

19. On the same day of Ms. Rhee's OT screening report, District convened the SST to review Mother's concerns and Student's progress to date. In attendance were Mother, Christine Mealey-Ures, the school psychologist, Ms. Eckstrand, Ms. Escobar, and a school administrator. Mother repeated her request for a special education assessment, and communicated her concerns regarding Student's math and speech progress. Ms. Escobar reviewed Student's class records, and maintained that Student was making adequate progress and did not need an assessment. Student knew his letters and sounds, could recognize numbers one through thirty and count to one hundred, and knew 28 of 33 high frequency words. His classroom participation was improving. His

speech was fluid and his use of single words was not a concern. Ms. Eckstrand reviewed Student's work samples and reported that his penmanship and writing were good. She considered his language acquisition typical, in comparison to other pupils she worked with and had assessed.

20. In response to Mother's concerns, and Student's initial problems with math instruction, the SST recommended six weeks of small group instruction during independent work time with the classroom teacher to address his math skills and six weeks of small group instruction with the classroom aide to address phonic skills.

21. District represented that another SST meeting would be held in May 2012.

22. In February 2012, on or after the SST meeting, District also provided Mother with a document referred to as "Parent and Teacher Meeting," where District described Student's progress in math, reading and writing, which it also summarized in the SST meeting document. In the section entitled "Parent and Teacher Plan," a recommendation was made for Mother to read 20 minutes every day, go over the high frequency words in Student's homework folder and have Parents speak to Student in complete sentences. Student was instructed to "pay attention, look and listen," participate in class, return homework to class and keep trying.

23. The second pupil reporting period ended March 16, 2012, and covered Student's performance from December 5, 2011. Ms. Escobar reported that Student had difficulty in kindergarten. Student struggled with attention and focus, and following directions. Ms. Escobar reported that Student had difficulty staying on task, needed to learn to be a better listener and to follow directions "more promptly." Ms. Escobar also reported concerns with Student's "excessive" lateness. Student was late to school 15 days during the second reporting period. Ms. Escobar did not specify how late Student arrived, or whether the lateness resulted in Student missing academic instruction. Student again received a proficient grade of three in general education reading and

speaking, he continued to receive partially proficient grades, or two's, in ELD reading and listening, general education writing, listening, and his academic subjects. His ELD speaking improved from two to three. His math grade improved from one to two. His ELD writing declined from proficient, or three, to two. Ms. Escobar again notified Mother that Student may be retained in kindergarten.

24. The proposed May 2012 SST meeting was never scheduled or held.

25. At the end of the school year, Student improved, but many of Ms. Escobar's concerns about Student remained. In the final reporting period, which covered the period between March 19, 2012, and June 19, 2012, Student showed improvement in reading and math, receiving three's. Student also showed improvement in other academic subjects, receiving three's in history/social science and science. He continued to receive two's in ELD writing, and general education writing, and speaking. Ms. Escobar reported no improvement in his ability to listen or follow directions, and stated that Student had difficulty paying attention and staying on task. Despite his continuing challenges with attention, Ms. Escobar did not recommend that Student be retained, and Mother was notified that Student would be promoted to first grade.

26. Student advanced to Guillermina Cruz's first grade general education class at Los Angeles Elementary on August 14, 2012. Ms. Cruz, who testified at hearing, has been Student's teacher since the beginning of the 2012-2013 school year. Ms. Cruz was a qualified first grade general education and ELL teacher, and testified about her observations of Student within her class. Ms. Cruz's observations about Student's classroom behavior and progress during the relevant time period, were memorialized in the various assessors reports, and to the extent that her observations were contemporaneous in time with those reports, and relevant to the conclusions reached by the assessors, her memorialized observations were given greater weight than her trial testimony. During the first reporting period, ending November 9, 2012, Student received

a mix of proficient grades and partially proficient grades. He was proficient in ELD reading, writing, listening and speaking, and science, health, physical education and art. He was partially proficient in math, history, and reading, writing, listening, and speaking.

#### STUDENT'S INDEPENDENT NEUROPSYCHOLOGICAL ASSESSMENT

27. In August 2012 Student retained Abbe S. Barron, a doctor of dentistry (DMD), and doctor of clinical psychology (Ph.D.), who testified at hearing, to conduct a neuropsychological assessment. Dr. Barron possessed the necessary qualifications to conduct a neuropsychological assessment, and her qualifications were not challenged. She obtained her bachelor of arts (B.A.) in psychology from the University of California, Los Angeles (UCLA), her masters of arts (M.A.) in education in educational and counseling psychology from Boston University, her doctorate of dental medicine from Tufts University, and her Ph.D., in clinical psychology from the California Graduate Institute. As a post-doctoral fellow in psychology with the Reiss-Davis Child Study Center in Los Angeles, California, she conducted comprehensive psychological, educational assessments and provided neuropsychological diagnostic services to school-aged children and young adults with learning disabilities, and attention, memory and developmental disabilities. Dr. Barron has been in private practice since 2007 where she has been conducting assessments for school-aged children and young adults in the areas of attention deficit hyperactivity disorder (ADHD), memory problems, autism and psychological disorders. She has performed approximately 700 assessments. Dr. Barron billed \$4,500 dollars for Student's assessment.

28. Dr. Barron provided comprehensive testimony about the District's and her assessments. She demonstrated her extensive knowledge of the assessment process, and given that Student had not been previously assessed, capably conducted a thorough review of his educational and medical history, observed Student at school and during testing, administered a battery of standardized assessments in a variety of areas,

and produced a thorough report, which detailed her diagnoses and recommendations. Dr. Barron was not a speech and language pathologist, so she recommended that Student be assessed further by an appropriate specialist. Not all of Barron's findings were confirmed or proved to be relevant to the school settings, particularly her observations of a significant lisp, Student's motor deficits, or his social-emotional challenges. Nevertheless, in the areas that were relevant to the school setting, Dr. Barron's findings were given great weight, particularly in consideration of whether Student had a suspected disability during the 2011-2012 school year. Given the timing of her report, Dr. Barron's testimony was persuasive as to whether Student had a qualifying disability during the 2011-2012 school year. Given her demonstrated expertise about test protocols, Dr. Barron's testimony about protocols involving the re-administration of assessments, was given greater weight than contrary expert testimony.

29. Dr. Barron conducted a comprehensive neuropsychological assessment. Dr. Barron administered all standardized assessments in English. As part of her assessment she reviewed Student's educational records, interviewed Student, Mother, and Student's grandparent, and administered standardized assessments, and various assessment measures. Dr. Barron used the services of a Spanish-language interpreter for her interviews with Student and his family. Dr. Barron conducted her interviews with Student, Mother, and Student's grandparent, and administered assessments during four sessions, of approximately two-and-a-half hours in length, in late August and early September 2012. In addition, Dr. Barron observed Student during a math lesson in his classroom and as he transitioned to recess on October 2, 2012, about a month after his first grade school year began. During her observation she also spoke briefly with Ms. Cruz.

30. On October 2, 2012, following her assessment, Dr. Barron prepared a written report. Dr. Barron's report stated that Parents requested Student's assessment

because of their concerns about his long-standing difficulties with significant inattention, and his language difficulties due to delayed speech and expression. Parents stated that Student had a significant lisp and difficulty pronouncing words correctly. Parents stated that they made multiple requests for assessments, which were denied, and that District only evaluated Student informally for LAS articulation. Parents stated that his teacher expressed concerns about him, but that nevertheless, after they requested an assessment, his grades improved.

31. During Parents' interview with Dr. Barron, they informed her of Student's language preferences. They reported that Spanish was spoken to him in the home, but he only knew some Spanish words and phrases. They stated that District designated him as primarily a Spanish-language speaker, but that Student preferred to speak in English. Student spoke English to communicate at school, but also to his father in the home.

32. During Parents' interview with Dr. Barron they informed her that Student's language skills were extremely late; e.g., he used only single words at three-and-a-half, simple phrases at four, and named the primary colors at four. Parents informed Dr. Barron that Student still had difficulty finding the right words to express what he wanted to communicate, using full sentences, pronouncing words, sequencing his ideas, or being understood in either Spanish or English. Student generally did not use words to communicate, but instead, pointed. Parents considered Student impaired because they could compare his difficulties with his younger brother's relative ease with language.

33. During Parents' interview with Dr. Barron, they disclosed Student's health history. Parents disclosed that Student was diagnosed with asthma when he was one, hospitalized at two for the condition, and took medication for the condition continually until he was three. They informed Dr. Barron that Student saw a pediatrician regularly, and that his eyesight and hearing were normal, with no reports of frequent ear

infections. Parents also informed Dr. Barron that Student did not have any feeding or sleeping problems, and that his sleep, appetite and daily routines were “predictable.”

34. Parents informed Dr. Barron that Student’s developmental milestones varied from average to extremely late. Parents informed her that Student’s gross motor skills were delayed as he crawled later than his peers and, as a first grader, still used training wheels on his bicycle. They informed her that Student had average fine motor skills, as he tied his shoelaces at three, and held a pencil at four.

35. Parents informed Dr. Barron of Student’s attention deficits, and challenges with transitions. They reported that, with the exception of exhibiting the ability to attend to what interests him, Student did not listen when spoken to, was easily distracted by sights and sounds, fidgeted and touched everything, was intrusive, and seemed to be “driven by a motor.”

36. Parents informed Dr. Barron of Student’s over sensitivity to noise, textures and light, and his habit of drawing his room curtain down.

37. Parents informed Dr. Barron that Student generally had a happy mood, but that he has been challenged with setbacks in his toileting, which he had mastered at three years of age. Student regressed and requires a diaper during sleep.

38. In her report, Dr. Barron recorded her observations of Student during multiple sessions in her office, with and without Parents. Dr. Barron’s observations were consistent with Parents’ report. Student touched everything he could, investigating the contents of the room, desk, and testing material. He attempted to see the answers to the testing materials. He moved in and out of his seat. He could not sustain his attention for more than 10 minutes without prompting to refocus. He did not consistently follow directions. Overall, she characterized him as impulsive and impatient by his failure to follow through on instructions, reluctance to engage in tasks that required sustained



attention, his excessive movements of his hands and feet and his need to touch everything.

39. Dr. Barron observed that Student's receptive and expressive language skills were poor. He did not use full sentences, needed visual cues to respond, sequenced words incorrectly when required to repeat words, failed to use proper syntax and grammar, and could not retell a story, or tell her about himself or his preferred activities. Student was unable to follow directions without repetition and needed multiple examples. Dr. Barron used English and Spanish (with the assistance of an interpreter) to communicate with Student but he misunderstood directions in both languages. Student demonstrated that he could correctly sound out and read single words. His comprehension was weaker than his reading skills and he needed visual cues for one-word responses. He could count and do simple addition and subtraction using his fingers.

40. Dr. Barron observed Student's motor skills and did not find any remarkable problems. Student was able to write letters although he tended to crowd letters and words.

41. Dr. Barron was effectively able to use incentives to refocus Student. Dr. Barron developed a rapport with Student, who responded well to "prizes" she gave him when he performed well and sustained his attention to tasks.

42. Dr. Barron concluded from her observations of Student during testing that her test results were valid as Student made adequate effort, and was able to participate in all tasks, although he was "prone to distraction."

43. Between August 31 and September 9, 2012, Dr. Barron administered the following assessments in English, according to the testing guidelines, which included widely used and accepted standardized and non-standardized measures of cognitive ability, academic performance, and language, visual and auditory processing:

Stanford-Binet Intelligence Scales-5<sup>th</sup> Edition (SB5)

Wide Range Assessment of Visual-Motor Abilities (WRAVMA)

Woodcock-Johnson Test of Achievement (WJA-III) core and supplemental (Form A)

Expressive One-Word Picture Vocabulary Task (EOWPVT)-  
2011

Receptive One-Word Picture Vocabulary Task (ROWPVT)-  
2011

Developmental Test of Visual Perception (DTVP-2) (selected  
subtest)

Jordan Right-Left Reversal Test

Test of Auditory Processing (TAPS-3)

Comprehensive Assessment of Spoken Language (CASL –  
ages 3-6) (core and extended)

NEPSY-II (assorted subtests)

Stroop Color-Word Interference Test

House-Tree-Person

44. In her report, Dr. Barron provided a detailed analysis of each assessment, including the assessment results, as well as a comprehensive and reasoned opinion,

based upon her review of Student's educational records, her observations, and testing results.

45. Dr. Barron learned from the results of the SB5, a standardized measure of Student's cognitive ability, that Student's nonverbal intelligence quotient (IQ) was a significant strength, in the upper end of high average, in contrast to his low average/borderline verbal IQ. SB5 scores are derived from the sum of tests measuring five major facets of intelligence, including, reasoning, stored information, memory, visualization, and novel problem solving. Student's nonverbal IQ was derived from measures of Student's skills solving abstract picture-oriented problems, recalling facts and figures, solving quantitative problems shown in picture form, assembling designs and recalling tapping sequences. In contrast, the results of tests measuring Student's verbal IQ, ranged from impaired to average, when presented with information in words and sentences, in printed and spoken form. A similar contrast occurred in SB5 measures of Student's fluid reasoning, which assessed his ability to solve verbal and nonverbal problems using inductive and deductive reasoning. Student's nonverbal reasoning was in the superior range, demonstrating that Student could determine the underlying relationships among pieces of novel visual objects and use inductive reasoning without language. In contrast, he scored in the lower end of average in verbal fluid reasoning; e.g., utilizing language to reason from the general to the specific. Similarly, SB5 measures of Student's acquisition of accumulated knowledge acquired at home and at school demonstrated a similar contrast between verbal and nonverbal measures.

46. In addition to the SB5, Dr. Barron learned that Student's oral language skills were limited for his age from the results of the WJA-III, the EOWPT, the ROWVPT, the NEPSY-II, the CASL, and the TAPS-3. In Dr. Barron's analysis, she referenced Student's standard scores in relation to the percentile scores to provide a consistent picture of his relative weaknesses and strengths. The WJA-III measured Student's ability

to access language, including vocabulary, text structure, and pragmatics, in a variety of ways. Student obtained a borderline/low average percentile rank of 10 in the Listening Comprehension cluster. Student obtained a low average percentile rank, in the WJA-II Oral Expression cluster. In the WJA-III measures, Student demonstrated a relative strength in accessing language where he could rely on visual stimulus. Student obtained an average score in Picture Vocabulary, which measured his ability to state precise expressive vocabulary by naming objects from a picture with single words. In contrast, Student obtained a low average percentile rank of 17 in Oral Comprehension, which required him to listen to passages and orally fill in a missing word with a one-word response. Student scored in the borderline range on another WJA-III Receptive Language test, called Understanding Directions, which measured both Student's attention and concentration, by requiring Student to point to pictures after hearing a complex set of instructions. Dr. Barron noted that Student missed important modifiers, especially when given complex directions, such as "or" and "not" and could not keep the information in his working memory as he tended to either do the first or last items and not the middle items. Student obtained an impaired score of below one on Story Recall, which required him to repeat a story verbatim or paraphrase what he just heard.

47. On the ROWPVT Student scored in the average range on this measure of his ability to recognize the meaning of a word by pointing to a picture. He also scored in the average range on the EOWPVT which measured his ability to use words and then retrieve them from memory; however, he had more difficulty in naming categories of objects, than simple objects.

48. Student performed in the borderline or impaired range on other measures of his ability to process oral information. Dr. Barron administered the NEPSY-II subtest, Comprehension of Instructions, which assessed Student's ability to process and respond to verbal instructions of increasing linguistic and syntactic complexity. Student scored in

the borderline range on this measure, demonstrating some basic receptive language comprehension, but having difficulty with comprehension of position and relationships between objects. Dr. Barron administered the NEPSY-II, Narrative Memory test, which required Student to listen attentively to extended prose, to comprehend what he heard and organize and retrieve the information. The Narrative Memory measure tested Student's ability to recall a story two ways, with and without cueing. Using these measures, called the Free Recall total and the Cued Recall total, Student scored in the borderline and impaired range, respectively. From her use of a recognition trial where Student tested in the expected range, Dr. Barron concluded that Student could understand and encode the details of a story, but could not express them well in language. Dr. Barron considered his score on measures of oral language processing to possibly be reflective of a working memory deficit, attention deficit, and challenges with following sequences.

49. Dr. Barron further assessed Student's oral language ability by measuring his phonological awareness and processing. Phonological awareness and processing is important to understand the sound structures of spoken words to decode words and to spell; in other words, to process sound efficiently and develop language proficiency. Dr. Barron used the TAPS-3 subtests of Word Discrimination, Phonological Segmentation and Phonological Blending to measure Student's ability to discern phonological differences and similarities within word pairs, and to synthesize phonemes, or letter sounds. Student scored in the low average, impaired, and lower end of average, respectively. He had increasing difficulty synthesizing words as the number of phonemes increased. Dr. Barron also used the WJA-III to evaluate phonological awareness. Student scored in the borderline range on Sound Awareness which measured rhyming, deletion, substitution and reversal. Student could only point to

pictures that rhymed but could express rhymed words or perform the other measures which required mental manipulation and understanding of rhymed words.

50. Dr. Barron further assessed Student's oral language skills using the CASL, which was designed to assess oral language, knowledge, language processing and skills, for children in educational settings, ranging in age from three to 21 years of age. Based upon Student's performance on the CASL, Dr. Barron concluded that Student was lacking in skills required for formulating and expressing sentences and sentence types, along with the ability to use basic rules involving verb tense, use simple phrases, syntax, to formulate sentences when telling a story, and to use a model sentence to generate a similar one. Dr. Barron found that Student's low average score of 85 in the subtest of Paragraph Comprehension represented his difficulty in the comprehension of language structure, in addition to attention and memory. His low average score of 81 in Pragmatic Judgment, which measured his ability to use language appropriately, showed Dr. Barron that Student understood the situation but could not effectively use language. Student's score in Syntax Construction, which measured his grammatical arrangement of words in a sentence, was in the impaired range, as he was not able to use the rules of syntax construction to formulate and express sentences. Student's score was in the impaired range on the supplementary CASL Sentence Completion test, which measured his ability to complete sentences using nouns, verbs, and adjectives. He also scored in the impaired range on the supplementary CASL Basic Concepts test, which measured his ability to comprehend words he hears which represent basic concepts and relationships. Dr. Barron considered Student's weakness in this area significant for learning as it impacted Student's ability to understand instructions.

51. Dr. Barron recommended a speech and language assessment to address vocal motor coordination skills and language processing. Dr. Barron used the NEPSY-II to assess Student for articulation problems and found that he was in the impaired range

on oral motor sequences. From her conversations with Student, she found he could not articulate fluently during normal conversation and that he had a significant lisp which interfered with his ability to pronounce words he decoded.

52. In contrast to Student's weak oral language and processing skills, Student's reading, math and writing skills were competent. The results of the WJA-III and the Stroop Color and Word Test (Children's Version), demonstrated that Student's overall reading skills were in the superior range and his reading comprehension skills were in the high average range. Student scored in the superior range for print awareness of letters, receptive knowledge of upper and lower case letters, and ability to recognize and decode many words. Student performed in the high average range on the WJA-III, structured writing samples subtest. His spelling in isolation was intact, and stronger than his ability to spell when asked to write sentences. Student's math skills, measured by the WJA-III, were in the average range.

53. Dr. Barron assessed Student's attention and information processing, including divided and sustained attention, through her observations during testing and in the classroom. In the section of her report where she discussed Student's attention issues, Dr. Barron referenced again the disparities in his verbal and nonverbal scores on such measures as the SB-5, the TAPS-3, and NEPSY-II. Student's nonverbal composite cognitive ability, as reflected in the SB-5, was in the high average range, but his verbal cognitive ability was significantly weaker, in the impaired range. Student's ability to access short-term and working memory for words and sentences and to store, sort and recall verbal information in his short-term memory was weak where he was not allowed to repeat vocally stated sentences. He performed much stronger, in the high average range, where he was required to sort visual information in short-term memory and demonstrate those skills through tapping a sequence of blocks. Student's verbal memory and short-term memory in the TAPS-3 and NEPSY-II were in the impaired and

borderline ranges as Student had difficulty holding more than three words or parts of simple sentences correctly.

54. Referring to the same measures for language processing, Dr. Barron assessed Student's memory. Student's overall skills were weak. Student could only provide a few details from recall without cueing and with prompting, but not the salient points of a short story on a structured task of narrative memory.

55. Dr. Barron also used informal and formal tests to measure Student's sensory and fine motor functioning. Dr. Barron considered these functions particularly important with regard to handwriting and printing tasks which required the integration of motor planning with motor memory. Using the WRAVM, Student demonstrated skills in the low average range for motor speed. The NEPSY-II demonstrated that Student performed in the average range, but Dr. Barron observed that he needed visual guidance and that his hand position was poor. He scored in the below average range on the NEPSY-II test for hand positioning. Dr. Barron found that Student had difficulty holding a pencil, and was not always able to monitor his hand movements to ensure that the lines he was drawing remained within boundaries. His drawings were imprecise and immature. On tasks requiring finger-tip tapping, sequencing, and imitating hand positions, he demonstrated difficulty demonstrating fine-motor coordination.

56. Dr. Barron assessed Student's social and emotional functioning with the NEPSY-II, where he scored in the above expected level and superior range on social perception.

57. On October 2, 2012, after completing her formal assessments and clinical observations, Dr. Barron observed Student for 40 minutes at school. Dr. Barron observed that Student exhibited behaviors associated with ADHD. Student was one of 20 pupils, but compared to the other pupils, Student was in "constant motion," in and out of his seat, placing his knee on his chair, and sitting on the floor. When Student was in his seat



he fidgeted with pencils and a zip pouch, which he opened and closed. He did not appear to pay attention to the teacher when she spoke. Ms. Cruz did not redirect Student or any other pupils that were off-task. When he transitioned to recess, he ran to the classroom sink, and bumped playfully into his classmates.

58. Dr. Barron observed Student's work habits and learning patterns during his math lesson. Student relied on visual prompts from the classroom projector to record information in his workbook, and at times, looked at his seatmate and copied her work. He did not participate in reading the word problem aloud with his classmates, or raise his hand to volunteer an answer posed, as other pupils did. He did read with his reading group, but misread the word "crayon" and said "color" and added the word "the" which was not part of the word problem. He did not respond to Ms. Cruz when she twice asked him the same questions about the contents of the first two sentences of the word problem; i.e., the number of crayons. At some point later, after the answer was discussed, he responded correctly with "four blue crayons," but could only explain how he reached the conclusion after the teacher twice asked him if he used his fingers.

59. Dr. Barron recorded her brief discussion with his first grade classroom teacher, Ms. Cruz, at the time she observed Student on October 2, 2012. Ms. Cruz confirmed that Student's conduct was typical of his behavior on any given school day. She was aware of Parents' concerns about Student's level of activity. She explained that he was more settled than he had been at the beginning of the school year which she attributed to his adjustment to a new setting. Ms. Cruz acknowledged that Student was still very active, much more than his peers.

60. Dr. Barron concluded that Student was intelligent, but hampered by significant and long standing difficulties with sustained attention and concentration. She diagnosed Student with ADHD. Dr. Barron's conclusions about Student's attention deficits were primarily derived from her observations during her assessment, Parents'

report, and teacher's comments that Student was significantly more distractible than his peers. She noted that Student's simple attention was intact only on preferred tasks, which did not involve much language. In reaching her conclusion that Student had ADHD, she considered that Student's attention challenges crossed environments, and persisted more than six months, through kindergarten and first grade, and to a degree that was inconsistent with his developmental level. She concluded that his ADHD impacted his education by undermining his ability to access his education, particularly in the areas of receptive and expressive language, which require short-term and long-term memory

61. Dr. Barron also concluded that Student suffered from deficits in language processing and articulation. Dr. Barron concluded, from her observations and Student's poor performance on measures of verbal language, Student's deficits were the result of language processing deficits due primarily to weak auditory working memory.

62. Dr. Barron concluded that Student's social emotional functioning was effected by his impulsive behavior and weak expressive and receptive language skills. As examples, she cited his low frustration, impulsive, acting out behaviors, and internalizing feelings.

63. Dr. Barron referred to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), a standard reference manual for psychologists, to diagnose Student. DSM-IV diagnoses, although informative about possible diagnoses, do not govern special education eligibility. Referring to the DSM-IV, Dr. Barron diagnosed Student with: ADHD; mixed-receptive-expressive Language Disorder and Phonological Disorder; developmental coordination disorder (motor planning), and an Adjustment Disorder.

64. Dr. Barron offered several recommendations for Student's education. She recommended that Student be made eligible for special education under the category

of Other Health Impairment (OHI) due to his ADHD, and speech and language impairment (SLI). She recommended that Student remain in a general education setting. She recommended that Student be provided a trained LAS pathologist to assist him with auditory attention, verbal comprehension, sentence formulation, and organization. She recommended goals to increase his attention span, improve his oral and written language, counseling to remediate his anti-social behaviors related to his language processing and ADHD symptoms; and a behavior support plan focusing on his attention challenges. She recommended programs to improve his language processing, including multisensory and missing word programs, word games, and story-telling exercises, to further develop his syntax, sentence structure and sequencing skills. She recommended mnemonics as a memory technique to increase his ability to retrieve and recall verbal information.

65. At hearing, Dr. Barron clarified her findings. Regarding her diagnosis of ADHD, Dr. Barron confirmed that she elected not to use standardized rating scales or measures expressly designed for ADHD. Dr. Barron maintained that the standardized measures that she did use, including the SB-5, TAPS-3, and NEPSY-II, and Stroop Color (which gave an interference score which was indicative of attention issues) were sufficient. She maintained that her interviews with Parents and her observations, provided a more accurate picture of Student and more reliable bases for diagnosis than other measures, like rating scales. Unlike the administration of rating scales, her interviews with Parents were more accurate as she could ensure that they understood the questions she was asking. On the contrary, rating scales could be misinterpreted by Parents, given their language and cultural differences. Further, she explained that the Behavior Assessment Scale for Children, Second Edition (BASC-2), the rating scale District used, was more appropriate as a measure for executive functioning, not ADHD. In preparation for hearing, in March 2013, Dr. Barron did conduct additional measures of

ADHD, such as IVA + Continuance Performance Test, which she memorialized in a report, but her additional measures, were not given weight because they were not administered prior to the filing of Student's due process complaint, exchanged with the District at an individual education program (IEP) team meeting, or directly relevant to District's LAS assessment for which District filed its complaint.

66. At hearing, Dr. Barron insisted that Student's diagnoses supported special education eligibility, but her response to a direct question about the relationship between her diagnosis for ADHD and special education, confirmed that Student did not require special education merely due to his ADHD. Dr. Barron redirected Student with prompts and observed Ms. Cruz redirect Student with rewards. Dr. Barron essentially conceded that successful general education interventions could be sufficient, but insisted from her observations and testing that Ms. Cruz did not redirect Student every time redirection was required, and that Student required so many prompts and redirection to focus and attend that general education interventions were not sufficient.

67. Student provided District with Dr. Barron's report at or about the time Student filed for due process, September 7, 2012.

#### DISTRICT ASSESSMENTS

68. On October 11, 2012, Student and District entered an agreement for District to conduct assessments in the areas of concern outlined by Dr. Barron, including, a LAS assessment of expressive, receptive and pragmatic language, a psychoeducational assessment, and an OT assessment.

69. Qualified District staff conducted the assessments. Ms. Sebastian, a LAS pathologist, who screened Student when he was in kindergarten, conducted the LAS assessment. Ms. Mealey-Ures, District psychologist, who attended Student's SST meeting in kindergarten, was responsible for the psychoeducational assessment. She directed the work of Ms. Eckstrand, who was also familiar with Student from

kindergarten, and administered standardized achievement tests as part of the psychoeducational assessment. She also directed Liane Velazquez, District bilingual school psychologist to administer Student's bilingual assessment, as part of his psychoeducational assessment. Ms. Rhee, administered the OT assessment. District's Registered Nurse (RN), Teresa Cherie, reviewed Student's health records and screened Student for vision and hearing problems.

70. Ms. Eckstrand, prepared a resource specialist assessment report on November 16, 2012. As part of her assessment, she summarized Student's academic progress in school from her interview with Ms. Cruz, her classroom observations of his math and reading lessons during November, and her observations during testing. She learned from Ms. Cruz that Student adjusted well to his curriculum, teacher and peers, had few academic challenges, and completed classroom work with limited support, although he did not always complete his homework. Ms. Cruz reported that Student read fluently, had a good sight word and academic vocabulary, and performed above benchmark levels. Ms. Eckstrand reported that the curriculum used was tailored to ELD pupils. Student had made progress in reading instruction, acquiring the ability to learn the basic letter sounds and patterns, and blending sound patterns into words. Student could easily read known basic sight words and acquired vocabulary taught in lessons. Student was learning number sense skills, adding and subtracting in two digits, and was learning to recognize place values to one thousand. During her observation Ms. Eckstrand observed Student writing words from dictation and working on weekly spelling words. Student could form simple sentences with correct capitalization and punctuation in writing tasks. In math, Student followed directions, and began work on time, and continued to work to complete the task. Student worked cooperatively, resolving a problem in the lesson. Ms. Cruz praised him for his answer. Overall, during her classroom observation, Student paid attention, followed directions, computed

problems accurately, handled his materials appropriately, followed instruction and kept pace with the class in all areas. During testing, Student was quiet and cooperative, declining to take breaks, and was able to express himself.

71. Ms. Eckstrand administered several portions of the Kaufman Test of Educational Achievement, Second Edition, (KTEA-II), on November 16, 2011, to assess Student's academic performance in word identification, reading comprehension, mathematical computation, math concepts and applications, spelling, written expression, language expression, and oral expression.

72. Student obtained an average score in KTEA-II tests which measured reading. Student obtained an average score of 112 in the letter and word recognition portion of the KTEA-II, demonstrating ease with basic sight and vocabulary words, but resisted trying to read words that he was not familiar with and did not recognize. He obtained an average score of 107 in the reading comprehension portion of the KTEA-II, again quickly and easily reading words he knew, but resisting reading words he did not recognize. He wrote letters from dictation, blended sounds into words, and recognized the letters in upper and lower case forms. He willingly responded to questions about what was in the room, on the wall, and about his preferred activities.

73. Student obtained an average standard score of 108 in the written expression portion of the KTEA-II, which measured tracing, copying, and writing letters from dictation. Student could write grade appropriate size and shaped letters. Student obtained a much lower score of 97, still in the average range, in spelling, writing words, such as "book," "was," and "the" accurately from dictation. Student used appropriate grip and wrote and copied words and sentences without difficulty.

74. Student obtained average scores on KTEA-II math measurements, with a lower score in math concepts and applications. Student obtained average range score or 97 in math concepts and applications portion of the KTEA-II math assessment. He was

able to recognize shapes, identify missing numbers in sequence, follow directions, and determine greater and lesser numbers or objects. Student obtained an average score of 112 in the math computation portion of the KTEA-II. Student remarked that he really liked to count and could count to 100.

75. Based upon the results of the KTEA-II subtests administered, her observations, and teacher report, despite Student's relatively low, but average, scores in math application and spelling, Ms. Eckstrand concluded that Student did not require additional support through special education services to further his acquisition of basic reading, writing, or math skills.

76. At hearing, Ms. Eckstrand clarified her assessment and findings. Student's chief criticism was her omission of the KTEA-II Oral Language Composite, which includes an Oral Expression and Listening Comprehension subtest, and measures a pupils' ability to effectively communicate and to answer questions about passages. Ms. Eckstrand explained that she administers tests at the direction of Ms. Mealey-Ures, and generally, when an LAS pathologist is conducting an assessment she is not asked to administer speech and language assessments. In preparation for the hearing, Ms. Barron administered this composite and found Student's overall ability to be in the borderline/impaired range, with a standard score of 77, and third percentile rank. His oral expression was extremely weak with a standard score of 66. Student's scores on Listening Comprehension were higher, in the low average range, with a standard score of 88, the 21st percentile. When asked how Student could be found to perform well in class, but not on standardized assessments, Ms. Eckstrand responded that Student's performance in class is measured by specific tasks in that class, whereas the KTEA-II measures what academic skills he has acquired when measured against same aged pupils. Ms. Eckstrand added that a pupil, may receive low grades, but still not require

special education. Instead, the pupil might have either missed a skill due to absences, or need more reinforcement to master the skill.

#### DISTRICT BILINGUAL ASSESSMENT REPORT

77. On December 11, 2012, at the direction of Ms. Mealey-Ures, Ms. Velazquez, who testified at hearing, conducted an assessment of Student's auditory processing and language functioning. Ms. Velazquez is a credentialed bilingual school psychologist, and possessed all the necessary qualifications, credentials required of a bilingual school psychologist. She was qualified to administer standardized assessments and to conduct bilingual assessments. Based on District protocol, whenever a pupil is an ELD level one or two, a bilingual psychologist is assigned to supplement the school psychologist's assessments to ascertain whether there is a processing disorder in Student's primary language. Ms. Velazquez was a candid and straightforward witness, and demonstrated that she selected and administered a wide variety of measures. However, her opinion that the deficits she found were due to his ELL status, or low Spanish acquisition, and not a disability, were not adequately explained given his performance on the formal measures, and the consistency with scores on these measures and English-language measures which measured similar skills.

78. Ms. Velazquez observed Student during testing, who, as he did with other assessors, announced his preference for the English language by stating, "I talk English." With prompting, Student responded in Spanish using one word or short phrases with grammatical errors, which Ms. Velazquez considered typical for pupils with a second language. Student would respond in single words in Spanish when asked his favorite food, but when asked in English, would respond in grammatically incorrect phrases, where he mixed the present and past tenses. Student would not respond when he did not know the answers to questions in Spanish. Ms. Valezquez observed that Student



understood verbal directions, but where the materials were presented without visual directions, Student required repetition and prompts.

79. Ms. Velazquez administered the following standardized Spanish language assessments:

Test of Auditory-Processing Skills (TAPS-3) Spanish-Bilingual Edition

Pruebas De Expression Oral Y Percepcion De La Lengua Espanola (PEOPLE)

Woodcock-Munoz Language Survey-Revised Spanish-Form A (Woodcock-Munoz-Spanish)

80. Student had variable scores in the TAPS-3 Spanish-Bilingual subtests, which measured Student's auditory processing. Ms. Velazquez administered subtests which measured his phonological, memory, comprehension and reasoning skills. Student demonstrated a high average ability in the area of word discrimination. Student demonstrated average abilities in phonological blending, number memory forward order, and auditory reasoning. Student demonstrated low average abilities in number memory reversed order, sentence and word memory. Student demonstrated below average abilities in the areas of phonological segmentation and auditory comprehension, where he received standard scores of four, and eight, respectively.

81. Student's scores on the PEOPLE, which measured auditory perception and expression, also varied from average, below average, to well below average. Student demonstrated average ability in the area of auditory sequential memory, which measured his ability to retain and reproduce a series of verbal stimuli. He demonstrated below average abilities in the areas of story comprehension, which measured his ability

to comprehend story information and to recall the story. He demonstrated well below average abilities in auditory association, which measured his word-finding skills within the context of an analogy; sentence repetition, which measured his memory for sentences of increasing word length; and encoding, which measured his name-finding skills. Overall, PEOPLE demonstrated that Student had difficulty accessing the Spanish language to identify and name objects, use antonyms, synonyms, and find words for household items, tools, school materials, and vehicles.

82. Student's scores on the Woodcock-Munoz, demonstrated that he had very limited Spanish oral language ability, with his performance below the median for pupils at the beginning of their kindergarten year on most measures administered. Student demonstrated limited Spanish-language oral abilities on the Oral Language cluster, which measured a broad sample of Student's language competency, including listening and speaking skills, language development, verbal reasoning, and language comprehension. Student demonstrated limited Spanish-language abilities on the Applied Language Proficiency cluster, which measured a broad sample of listening, speaking, reading and writing skills, including language comprehension abilities. Student demonstrated very limited listening ability in Spanish on the Listening cluster, which measured his receptive listening ability, comprehension and linguistic competency. Further, his subtest scores on the Listening cluster showed significant variability with his performance on measures of his ability to understand directions test significantly lower than his verbal reasoning. Student demonstrated very limited Spanish oral expression ability on the Expression cluster, which measured his expressive vocabulary, language comprehension and development, and meaningful memory. Likewise, Student's scores on the Comprehension cluster, which was a combined measure of listening and comprehension skills, demonstrated that tasks beyond an early kindergarten level were very difficult for Student.

83. Student's scores on the Reading and Writing clusters were a little higher, equivalent to late kindergarten and early first grade. In the Reading cluster, which measured letter and word identification skills and the ability to comprehend written passages while reading, Student demonstrated that tasks below mid-kindergarten level were easy for him, while those above beginning of first grade, were difficult. In the Writing cluster, which measured spelling, punctuation, capitalization, and word usage, Student performed like the average pupil near the start of first grade, or grade 1.1. Student demonstrated that writing tasks below the level of late kindergarten level were easy for him, but tasks above grade 1.4 would be difficult.

84. Ms. Velazquez concluded that Student did not present with an auditory processing deficit in his primary language. She also concluded that Student's overall language skills were at age and grade level, when his English-language skills were also considered. Ms. Velazquez acknowledged that Student demonstrated difficulty in the areas of auditory association, sentence repetition, story comprehension and encoding, but reasoned that it "may" be due to limited oral language ability, speaking skills, language development and language comprehension in Spanish. Overall, Ms. Velazquez attributed Student's deficits to his lack of knowledge of Spanish, due primarily to his limited use of Spanish-language in the home.

85. Ms. Velazquez elaborated on her report at hearing. She confirmed that her tests demonstrated that Student had a significant weakness in auditory association, and weaknesses in phonological segmentation, sentence memory and number memory reversed. Ms. Velazquez's testimony confirmed that Student demonstrated weaknesses in her Spanish-language testing that were apparent from Dr. Barron's English-language testing. Although no assessor could be 100 percent sure, which accounted for her use of "may," in her assessment report conclusions, she determined that his deficit was not a disability. She made this determination after consulting with Ms. Mealey-Ures about

Student's English-language test results. From these results, Ms. Velazquez determined that Student was more proficient and could comprehend better in English, than in his designated primary language, Spanish.

#### DISTRICT'S LAS ASSESSMENT

86. Ms. Sebastian, prepared an assessment report, dated December 14, 2013, which consisted of interviews and assessments she administered on October 26, 2012, November 1, 2012 and December 13, 2012, consideration of Ms. Velazquez's assessment findings, and her conclusions regarding Student's eligibility for special education due to a receptive-expressive language disorder. Ms. Sebastian was qualified to administer Student's LAS assessment. Ms. Sebastian worked as a District speech pathologist for three years, on assignment to District elementary schools. Prior to working for District she was a speech pathologist for the Chicago school system. In both Chicago and District, over 90 percent of the pupils she served were ELLs, whose primary language was Spanish. Ms. Sebastian was not bilingual, but used Spanish-language interpreters to administer bilingual assessments, and to interview pupils and their parents, when necessary. Ms. Sebastian has a B.A. in an unrelated field, a M.A. in LAS pathology, all required California licenses and certifications, including a pre-school and elementary school teaching certificate as a LAS pathologist. Ms. Sebastian was a credible witness, not hesitating to concede any weaknesses in her testing, but confident in her results. Although she was qualified and was able to capably articulate her opinion, and explain the differences between her administration of the same test, the CASL, she acknowledged that the use of the CASL within two months of Dr. Barron was an error. More importantly, as Student's speech and language expert Farryl Dickter persuasively testified, Ms. Sebastian's analysis and opinion that Student's progress was typical to an ELL pupil, and not symptomatic of a speech and language disorder, suffered from

assumptions that were not supported by Student's assessments, educational history, or firmly established by Student's family history.

87. Ms. Sebastian's LAS assessment included Student's developmental history, educational history, interviews with Mother, Student, his first grade teacher, Ms. Cruz, observations in the classroom and school playground, and widely-used and accepted formal and informal tests. Ms. Sebastian was not qualified to administer assessments in Student's primary language. Like Ms. Barron, she was assisted by a Spanish-language interpreter to interview Parents and Student. Ms. Sebastian also used the services of her Spanish-language interpreter to administer formal bilingual assessments.

88. Ms. Sebastian's interview with Mother elicited information similar to Dr. Barron's regarding Student's primary home language. Mother primarily spoke Spanish in the home, and reported speaking Zapotec occasionally with Father, but only spoke Spanish to Student. Father spoke Spanish and some English to Student. Other adults in the home spoke Zapotec to each other and were instructed not to speak Zapotec to Student. However, Mother reported that they do speak Zapotec to him occasionally. Family members watch Spanish and English-language television. Student first spoke "pa" and "ma" at 1.5 years, and was primarily vocalizing and pointing, but did speak two word combinations at three years, and three word phrases at four years. Mother reported that Student spoke English in the home with other children, and spoke Spanish to Mother when he wanted something. Mother reported that Student was not fluent in Spanish and typically produced three to six word sentences with incorrect grammar. For example, Student would say in Spanish, "for you me," instead of "who is going to pick me up." Mother rated Student 80 percent intelligible in Spanish. Mother reported that Student plays with his younger brother, but was not sociable with other children in the neighborhood, and that most of the neighborhood children were older than him. Student does not engage with other children in the park, preferring to play ball with her.

She thought he understood multi-step directions but did not want to follow them. Mother did not understand English so she was unsure of Student's English-language skills. However, she observed Student's younger brother to have stronger expressive skills in both Spanish and English than Student.

89. Ms. Sebastian's summary of Student's educational history was generally consistent with Ms. Barron's, except that Ms. Sebastian reached a different conclusion regarding Student's kindergarten progress. Ms. Sebastian reported that Student made progress in all areas and was at benchmark with his kindergarten peers at the end of kindergarten. Ms. Sebastian did not consider discussions as to whether Student should be retained in kindergarten. Ms. Sebastian relied principally on her November 18, 2011, speech and language screening. Repeating her previous conclusions from her kindergarten screening of Student, Ms. Sebastian concluded that Student's greater proficiency with language when given a visual cue was related to his status as an ELD pupil, not the result of a language disorder.

90. Ms. Sebastian was aware of Student's scores on the CELDT, but as of her assessment, she had not received Student's CELDT scores for the 2012-2013 school year.

91. Ms. Sebastian reported on her interview with Student's first grade teacher, Ms. Cruz, who stated that Student was performing at grade level, and was reading 60 words per minute, the reading goal for all pupils to reach by the end of first grade. Ms. Cruz considered Student a positive child well-liked by his peers. Ms. Cruz reported that Student's restless behavior improved from the beginning of school in August 2012. She reported that Student was working on his organization skills, and now only occasionally squirmed or stood up from his chair, behavior typical of other first graders. Student's other challenges with organization were limited to his once weekly failure to bring completed homework to school.

92. Ms. Sebastian reported on Ms. Cruz's observations of Student's classroom language skills. Ms. Cruz maintained that Student understood classroom language and was able to express his ideas. She had observed Student to "occasionally" formulate statements with incorrect grammar, such as asking "take home paper" instead of "Do I take this paper home?"

93. Ms. Sebastian reported on her observations of Student during testing and in the classroom. She reported that Student attended to test items without cues and worked without breaks during 90 minute testing sessions. In Ms. Cruz's classroom, she observed Student with his peers completing independent classroom tasks, socializing with peers, and putting together his homework packet for the upcoming school holiday break. She observed Student smiling at teacher and initiating conversation with a peer at his table, then independently returning to his work. Student, similar to his peers, did occasionally leave his seat to sharpen his pencil.

94. Ms. Sebastian administered informal and standardized tests to assess Student's articulation and intelligibility. Informally, she performed an oral peripheral examination of Student and determined that Student did not have any physical malformations that interfered with speech production. Ms. Sebastian examined Student's physical mechanisms for speech, including his lips, tongue, and hard and soft structures of the palate. She also informally sampled Student's spontaneous speech during her assessment, rating him one hundred percent intelligible in English by unfamiliar listeners, which included Ms. Sebastian and the Spanish-language interpreter who assisted Ms. Sebastian in her administration of various assessments. Ms. Sebastian reported that Student did not make any speech sound errors across 50 spontaneous utterances, and the minor errors he made across numerous hours of testing, did not impact his overall intelligibility. She noted only two speech sound errors across

numerous hours of testing: "bamama/banana," "spuh budge/sponge bob," but no other errors in the production of the "n" sound. No mention was made of a lisp.

95. Ms. Sebastian administered the standardized Goldman Fristoe Test of Articulation (GFTA-2), to assess Student's articulation of consonant sounds in the English language. The assessment was normed for individuals between the ages of two and 21. Student obtained a standard score of 103, in the average range, for articulation of sounds in single words. As in the spontaneous informal sample, in the above paragraph, Student made sound substitutions using "m" for "n." In addition Student made substitutions attributed to dialectical differences between Spanish and English, including "b" for "v," "th" for "d" and "e" for "a."

96. Like Dr. Barron two months before, Ms. Sebastian administered the CASL core composite, which included the Pragmatic Judgment test, Antonyms, Syntax Construction, and Paragraph comprehension. Ms. Sebastian was not made aware of the tests administered by Dr. Barron before she selected the tests she administered, or prepared her report. Although not referenced in the test instructions, according to the test publisher, and standard professional practice, to avoid what is referred to as the "practice effect," or an artificially elevated score, the assessor should wait at least six months before administering the same formal assessment measure again. The CASL manual does provide guidance as to the relative reliability of the scores after two months. According to the manual the later administration was about 93 percent reliable.

97. Student's total score from Ms. Sebastian's second administration of the CASL core composite elevated him from the borderline range identified by Ms. Barron, to the borderline/low average range when compared to the performance of other pupils his age. Student's overall standard score and percentile rank in Ms. Sebastian's second administration of the CASL core composite was raised by 10 points to 84, and 14, respectively. Student obtained a standard score of 86 in the Antonyms subtest, five



points higher than before, and an 18th percentile rank, an increase from his previous 12th percentile point ranking. Student obtained a standard score of 78 in Syntax Construction, a 12 point increase from before, and a seventh percentile rank, which was below average, but an improvement from the previous first percentile rank, which Ms. Barron identified as impaired. Student's standard score of 97 in Paragraph Construction was 12 points higher than his previous standard score of 85, placing him in the 42nd percentile rank, or average, instead of his previous low average 16th percentile rank. In the Pragmatic Judgment subtest Student obtained a standard score of 87, a six point increase from Ms. Barron's testing, which placed him in the average 19th percentile, not the lower average 10th percentile.

98. Student's score on Syntax Construction, although higher in Ms. Sebastian's testing, remained Student's weakest area, and demonstrated that Student continued to be challenged by the rules governing sentence formulation and expression, including basic sentence types and verb tense rules. Ms. Sebastian provided examples of Student's poor application of basic rules of sentence formation. Student omitted the verb "is," in sentences; e.g. "he eating hamburger." Student substituted "is" for "has;" e.g., "the movie is started." Student could not apply regular or irregular past tense verbs; e.g., fly/flew, foughted/fought. Student had difficulty completing sentences with more than one word, as required in certain test questions; e.g., he would say "outside" instead of "walking out the door." Ms. Sebastian concluded that Student's deficits in syntax construction were the result of Student's status as an ELL.

99. Ms. Sebastian administered formal bilingual assessments with the assistance of a Spanish-language interpreter. Ms. Sebastian administered the ROWPVT-Spanish-Bilingual Edition, which, like the English-language version administered by Dr. Barron, was designed for pupils between the ages of two to 18 years of age, and measured Students ability to understand the meaning of single words. This edition also

provided insight into his combined English and Spanish hearing vocabulary. Student obtained a standard score of 92, which was in the average range. Ms. Sebastian administered the EOWPVT – Spanish-Bilingual Edition, instead of the English-language edition Dr. Barron administered, to measure Student’s ability to name objects, actions, and concepts from illustrations, and provide insight into his combined English-Spanish speaking vocabulary. Student obtained a standard score of 122, which was in the above-average range. Student only elected to name items in Spanish 15 percent of the time.

100. Ms. Sebastian administered the Preschool Language Scale -4 Spanish Edition (PLS-4-Spanish), which was used to identify language delays in children between ages zero and six years 11 months. Student obtained a below average standard score of 79, or 8th percentile, in Auditory Comprehension. Student understood rhyming sounds, simple addition and subtraction, adjectives, time concepts, and colors. He had difficulty understanding special concepts, sentences with multiple adjectives and words with the same initial sound. Ms. Sebastian could not administer the Expressive Communication test of the PLS-4-Spanish because Student preferred speaking English, and when prompted to speak solely in Spanish, he either refused to respond, or responded by switching between Spanish and English.

101. Ms. Sebastian informally assessed Student’s English and Spanish language proficiency through conversation, and by having Student tell and retell a story using a picture book. He used nouns, pronouns, adjectives, articles, past and present tense verbs, and several irregular past tense verbs. Student demonstrated problems with word retrieval, appeared to rehearse his responses by whispering to himself before answering, and occasionally switched between English and Spanish. He demonstrated word-retrieval language challenges by counting to himself before answering, “I have four dogs,” repeating phrases “my, and my, and my big brother,” and revising phrases, e.g., “he run because I went he- I went my house.” Student’s syntax was simple and

grammatically incorrect in English. Student had difficulty retelling story events. He could recall stories in the correct sequence, but he did not recall with specificity or use grammatically correct sentences. Ms. Sebastian noted, without examples, that Student's sentences were simple, but grammatically correct in Spanish, with typical fluency.

102. Ms. Sebastian considered Student's English language skills to be age appropriate for an ELL pupil. She noted several errors which she considered typical to English-language learners including omission of possessives and subject pronouns, gender confusion in subject pronouns, use of pronouns with subject nouns, e.g.; "my dad he," overuse of the infinitive "to," verb tense errors, positioning adjectives after nouns; e.g., "shirt blue."

103. Ms. Sebastian assessed Student's pragmatic skills through informal observations and formal, standardized measures. Ms. Sebastian's informal assessment consisted of her observations of Student in the classroom, on the playground, and during her one-on-one assessment. Although she noted Mother's report that Student does not engage with children at home other than his younger brother, Ms. Sebastian reported that Student capably used pragmatic language to interact with peers, his teacher and her. Student used eye contact, asked for help, initiated interaction with peers and adults, maintained friendships within the classroom, and appropriately accepted criticism in the classroom. She observed Student use language to get another person's attention, talk about what he was doing, name objects, greet and play with his peers, ask and answer questions, and tell about events. She also observed Student capably maintain a brief conversation consisting of answering a question, providing additional information, and asking a question. She observed Student initiating a conversation with a classroom peer and accepting a peer's invitation to color together at recess.

104. Ms. Sebastian assessed Student's pragmatic language ability with reference to his average scores in her administration of the CASL, Pragmatic Judgment test, where Student demonstrated that he could use language appropriately in various social contexts. For example, he could greet, tell his name and age, say "sorry," "thank you," request help, "I wanna get down," and ask to play.

105. From her formal and informal assessments of Student, Ms. Sebastian concluded that Student's receptive English-language skills and his expressive pragmatic skills were in the average range. She found his bilingual receptive language vocabulary skills in the average range and his bilingual expressive vocabulary skills in the above average range. She found Student to be 100 percent intelligible by unfamiliar listeners. Ms. Sebastian concluded that his remaining expressive English-language skills were low to below-average range, with particular problems demonstrated in syntax construction.

106. Based upon her assessments and the bilingual psychologist's assessment, she concluded that Student did not qualify for special education under the category of speech and language impairment. She found that Student's problems with syntax construction were the result of his ELL status, not a language disability, and due to typical transference processes between Spanish and English. She found his code-switching, or alternating between English and Spanish within sentences to be typical. She found evidence of his loss of Spanish-language skills as part of ELL, not a disability. Ms. Sebastian found further support for her conclusion from a textbook used in training SLP's about multicultural students, which stated that it was typical of ELL pupils to lose skills in their primary language as they acquire skills in the second language. Ms. Sebastian concluded that Student did not meet the criteria for SLI eligibility for special education.

107. At hearing, Ms. Sebastian elaborated on her assessment. Ms. Sebastian admitted that Student's language development was an important consideration in

distinguishing between a language disorder and a language difference typical of ELL pupils. In reaching her conclusions, Ms. Sebastian did not refer to Student's early reported delays, or reports of his brother's superior Spanish-language acquisition and proficiency. Ms. Sebastian understood that Student had uttered his first two word phrases earlier than Mother reported to Dr. Barron. Ms. Sebastian agreed that a history of delayed language milestones would indicate a language disorder, not a delay typical of an ELL. However, Student did not evidence delay of all milestones as he currently was able to construct eight word sentences typical of a six year old ELL. Ms. Sebastian acknowledged that she did not transcribe all of Student's eight word sentences and make it part of her report, although she retained the recordings, and offered them at hearing. Further, according to Ms. Sebastian, Student's reported language development and family history, suggested that he was exposed to multiple languages, in a sequence learning Spanish, then Zapotec, then English. Ms. Sebastian suggested that Student might not have consistently been provided with the basics in Spanish, so would more easily lose his language skills when learning English.

108. Ms. Sebastian conceded that the CASL should not have been administered after Dr. Barron's assessment, and if she had known, she would not have used it. Nevertheless, she stated that the test/retest reliability was very high, according to the test protocols, about 93 percent within the time period between her test and Dr. Barron's test. Ms. Sebastian took issue with the suggestion that her conclusions were contrary to the CASL manual which contrasted scores for pupils determined to be eligible for special education, and pupils who were not. Student's scores in several areas, including sentence construction and syntax, were consistent with the clinically delayed population depicted in the manual. As the CASL was normed for English-speaking pupils, Ms. Sebastian insisted that the CASL was correctly considered in the context of her observations and interviews.

109. Ms. Sebastian also considered Dr. Barron's overall assessment of Student's receptive and expressive language skills less reliable because she tested him earlier in the year, after a summer break in school, where Student was more exposed to Spanish in the home than English. She also was more confident that the school environment produced more reliable results because Student was familiar with it and more comfortable than he would be in a clinician's office. Most important to Ms. Sebastian was Student's performance with regard to his classroom ELL peers and his commission of the same errors. As to her administration of the Spanish-Bilingual editions of the ROWPVT and EOWPVT, administered in English by Dr. Barron, only a small practice effect from the administration of the bilingual version within 20 days existed, according to the manual, not the approximately 45 days that passed between the two versions here. Further, Ms. Sebastian reported that the Spanish-Bilingual editions provided a more accurate assessment of Student's combined English and Spanish speaking and listening abilities because these assessments were normed specifically for Student's demographic.

110. With regard to her administration of the PLS-4, Ms. Sebastian conceded that this version of the test, published in 2001, was normed for English-speaking pupils, and was not the best version of the test, although it was still valid. A new version, PLS-5, published in 2011, and normed for Student's demographic, was not available to her because District's supply was limited.

111. On December 14, 2012, RN Cherie completed Student's health screening report which consisted of her review of Student's available health records, Student observation and an interview with Mother. Parents reported that Student had allergies to certain foods, and was taking daily medication to treat his asthma, but did not report any recent asthma-related emergencies or other medical conditions, or provide any medical records to District. Mother reported no history of ear infections and no

concerns about his hearing and vision. RN Cherie did not incorporate the language delays recorded by other assessors, or report any developmental delays, other than toilet training. District's nurse screened Student's hearing and eyesight functioning and found no problems.

#### DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT

112. Ms. Mealey-Ures, District's school psychologist, who testified at hearing, was responsible for preparing Student's psychoeducational assessment report. Based upon the mediation agreement, Ms. Mealey-Ures was required to assess and make findings regarding Student's cognitive, behavior and learning strengths and needs, and based upon Dr. Barron's diagnoses, assess whether he was eligible for special education as a pupil with OHI, due to behaviors consistent with ADHD, a specific learning disability (SLD), due to mixed receptive-expressive language disorder, or phonological disorder, and developmental coordination disorder (visual motor integration), and to recommend strategies and support to meet Student's assessed needs. Her report, dated December 13, 2012, considered Dr. Barron's report, the assessments administered by Ms. Eckstrand, Ms. Sebastian, and Ms. Velazquez, and RN Cherie's screening.

113. Ms. Mealey-Ures possessed all the necessary education and credentials as a school psychologist and was qualified to conduct a psychoeducational assessment. Ms. Mealey-Ures has worked as District's school psychologist for 14 years, where she administers assessments and provides counseling for pupils and their parents. For the majority of her tenure she has been assigned to Student's elementary school.

114. Ms. Mealey-Ures reviewed Student's health and developmental history, including Mother's report of his slow language development and his educational history. She noted Mother's concerns as relayed to Ms. Barron, with his delayed speech, inability to express himself, difficulty with pronunciation, and lisp.

115. Ms. Mealey-Ures interviewed Mother as part of her assessment and confirmed Student's language delays, particularly his first words at 15 months, and two word phrases at 36 months. Mother also reported of challenges at home, including Student's frustration, refusal to listen to Parents, and nighttime toileting. Otherwise Student got along well with other people. Mother reported that she had to sit with Student to make sure he completed his homework.

116. As part of her assessment, Ms. Mealey-Ures interviewed Ms. Cruz on November 13, 2012, who reported that Student was making progress and reaching benchmarks for his grade level. Student knew all the letters of the alphabet, comprehended paragraphs at his grade level and was meeting grade level standards in spelling and language arts. Student used short phrases and simple sentences to express himself and followed two to three step directions. He could write and copy independently from the classroom board and from a book. He counted numbers aloud up to 109, and wrote numbers up to 100. He performed simple addition and subtraction without regrouping. He worked best alone or within a small group. His fine motor coordination, gross motor coordination, and spatial relations were proficient. Ms. Cruz also reported that his organization skills, attention span and concentration in the classroom were good, and that he could sustain attention for approximately 20 minutes, which was typical. Student still required prompts at times to follow directions, but he always completed classroom tasks, and his homework was usually completed. He was particular strong in decoding, and was interested in art. Student had good peer relations, was respectful to adults, and behaved appropriately on the playground.

117. Ms. Mealey-Ures observed Student in the classroom, on the playground, and during testing. During her classroom observation, Student got distracted and appeared to be seeking peer and adult attention after he was required to sit with his peers on the rug for an extended period of time. Like other pupils, Student refocused



with ease after prompting from Ms. Cruz. During her observation on the playground, Student participated in an organized sport, followed the game rules, interacted with peers while waiting his turn, demonstrated good sportsmanship, and transitioned to the classroom when the bell ending recess rang. Ms. Mealey-Ures did not observe a lisp during testing. She asked Student simple questions about his age, address, likes and dislikes, and from his answers she concluded that his spontaneous language appeared to be consistent with his ELL level. Student was shy at first but cooperated and remained focused.

118. In addition to the assessments of Ms. Eckstrand, Ms. Velasquez, and Ms. Sebastian, Ms. Mealey-Ures administered additional standardized measures during November 2012, which she considered in her report. She administered the following assessments:

CAS

Test of Visual Perceptual Skills, Third Edition (TVPS3)

(November 9)

Behavior Assessment System for Children, Second Edition

(BASC-2), Teacher Rating Scales, (November 13)

BASC-2, Parent Rating Scales (November 15)

Attention-Deficit/Hyperactivity Disorder Test (ADHDT),

Teacher Rater (November 13)

ADHDT, Parent Rater (November 26)

TAPS-3 (November 15)

119. Student's scores on the CAS, which measured Student's cognitive processes, or intellectual functioning, in four areas, demonstrated that Student had a significant strength in Attention, which included subtests measuring his ability to attend and concentrate. Student obtained a standard score of 118, within the high average range, or 88th percentile. The CAS demonstrated that Student had a relative strength in Planning and Simultaneous processing, which included subtests measuring his ability to successfully complete tasks by making decisions and using effective strategies, controlling his behavior and self-correcting. Student obtained a standard score of 100, within the average range, or 50th percentile. The CAS demonstrated that Student had a relative weakness in Simultaneous processing, which included subtests measuring his ability to work with information in a specific linear order, and to remember the order of words spoken by the examiner. Student obtained a standard score of 81, within the below average range, or 10th percentile.

120. Student's scores on the TVPS-3, which assessed his visual perceptual abilities when measured without motor involvement, demonstrated that with his standard score of 109, his overall visual processing skills were in the average range. TVPS-3 is comprised of seven subtests arranged in the order of difficulty starting with visual discrimination and ending with visual closure. The seven subtests are grouped to create three composite scores. Basic Processes is a composite comprised of the subtests Visual Discrimination, which measured Student's ability to discriminate position, shape, form and color, Visual Memory, which measured Student's ability to recognize one item after a brief interval, Spatial Relationships, which measured Student's ability to perceive the positions of objects, and form constancy, which measured Student's ability to identify a design no matter how it is oriented or sized. In the Basic Processes composite, Student obtained a high average range standard score of 111, the 77th percentile. The Sequencing composite, is comprised of a single sequential memory subtest, which

measured Student's ability to recognize designs in linear order after a brief interval. Student obtained a superior standard score of 130, or 98th percentile. Student's lowest, but still average standard score of 93, or 32nd percentile, in Complex Processes composite, was comprised of the Figure-ground subtest, which measured Student's ability to identify an object from a complex background, where he obtained an average score of 11, and the Visual Closure subtest, which measured his ability to identify a whole figure from fragments, where he obtained his lowest subtest score of six.

121. Ms. Mealey-Ures re-administered the TAPS-3, less than two months after Ms. Barron first administered the same test. Although the test instructions which accompanied the assessment, did not expressly bar retesting within a short period of time, best assessment practices, endorsed by the publisher of TAPS-3, was to wait a minimum of six months before administering the same assessment to avoid the "practice effect," or artificially inflated scores.

122. Student's overall standard scores in the second administration of the TAPS-3 were in the low average standard score of 88, or 21st percentile, an increase from the Ms. Barron's borderline score of 77, or fifth percentile. His score in the Word Discrimination subtest increased one point, to eight, from low average to average. His subtest score in Phonological Segmentation increased dramatically from one to nine, or from below one percentile and impaired, to average. Likewise, his score in Phonological Blending increased from eight, an average score, to 16, a superior score. His Auditory Comprehension skills, measured by reading him passages of increasing length and complexity, and asking him questions, increased from a two, or impaired, to a still below average score of five. Student still could only respond to very few simple questions. Student obtained the same score of six, or low average, in the first and second administrations of the Auditory Reasoning subtest, which required him to access high-order linguistic process and was related to understanding jokes, riddles, inferences and

abstractions. He still could only complete one item. Student's Auditory Cohesion skills, which included subtests in Auditory Comprehension and Auditory Reasoning, were particularly weak, even with the ten point increase from Ms. Barron's administration, to 78, or seventh percentile.

123. In Ms. Mealey-Ures's second administration of TAPS-3, Student's Auditory Memory composite scores remained low, with a score of 80, or low average ninth percentile rank, but increased slightly from Ms. Barron's administration. Student's Sentence Memory subtest score increased from four to five, still below average Student could successfully repeat simple sentences but not sentences of increasing complexity. Student's Word Memory subtest score increased from five to seven, below average to low average. His number memory reversed increased from one, or impaired, to six, or low average. His number memory-forward increased from five, to six, below average to low average.

124. Ms. Mealey-Ures compared Student's results from Ms. Velazquez's administration of the TAPS-3-Spanish, to the English version she administered, and concluded that Student generally demonstrated similar overall weakness in auditory processing skills in relation to his cognitive ability. His scores in the TAPS-3-Spanish version were higher, with a very superior range score in word discrimination, average range scores in number memory forward, phonological blending, and auditory reasoning. Student demonstrated weakness in the TAP-3-Spanish by his low average range scores in word memory, auditory comprehension and number memory reversed, and below average range scores in sentence memory and phonological segmentation.

125. After reviewing Student's low scores in his primary language, Ms. Mealey-Ures adopted Ms. Velazquez's conclusions that Student did not have a processing deficit in auditory processing in his primary language due to his limited Spanish language skills.

126. Ms. Mealey-Ures administered the Woodcock-Munoz-English, which assessed Student's English language competency through various subtests which measured Students' listening, speaking, writing and verbal reasoning skills, and his language development and comprehension. Student obtained an average standard score of 91, or 27th percentile, on his Oral Language-Total which was a broad measure of his oral skills. He obtained a high average standard score of 113, or 81st percentile, in Broad English Ability-Total, which includes his writing skills. He obtained his highest scores in measures of his reading and writing skills. The Reading index, measured his letter and word identification skills and the ability to comprehend written passages while reading. Student obtained a high average standard score of 116, or 86th percentile. Likewise, on the Writing index, which measured spelling, punctuation, capitalization, and word usage, he obtained a high average score of 121, or the 91st percentile. Student obtained more variable scores on the Applied Language Proficiency index, which measured his ability to apply listening, speaking, reading writing and comprehension skills. Student achieved an overall average standard score of 109, 72nd percentile, but as in other assessments, Student had obtained lower scores in subtests testing Story Recall and Understanding Directions, low average scores of 86 or 17th percentile, and 89, 24th percentile, respectively. Ms. Mealey-Ures concluded that his Applied Language Proficiency was fluid. Without detailed explanation, Ms. Mealey-Ures also reported that Student obtained limited to fluent scores in Oral Expression. In her report she listed his total Oral Expression score in the borderline range of low average and average, with a standard score at 90, or 24th percentile.

127. Ms. Mealey-Ures concluded that Student exhibited a common verbal processing deficit in several standardized assessments, including the Woodcock-Munoz-English, the TAPS-3 and the CAS (Successive Processing Scale). Specifically, she confirmed that Student demonstrated deficits in both English and Spanish with using

information in a linear order, understanding implied meaning and making inferences, although Student's auditory cohesion tasks in Spanish were slightly higher, with scores in the low average range. In reaching this conclusion, Ms. Mealey-Ures noted Ms. Velazquez's administration of the Woodcock-Munoz-Spanish, where Student obtained impaired scores in oral expression, listening, story recall, and understanding directions.

128. Ms. Mealey-Ures reported Student's general cognitive ability as average, with reference to his performance on various standardized tests, observations and interviews, and without reference to standardized tests which derive full-scale intelligence scores. Ms. Mealey-Ures summarized Student's strengths and weaknesses noting strengths in areas related to attention, weaknesses in successive processing, and cohesion, and relatively strong skills in phonological processing, including segmentation and blending, reading and writing, and overall visual processing skills.

129. Ms. Mealey-Ures reported that Student's academic performance, as measured in the average to high average by Ms. Eckstrand, was consistent with his classroom performance where he had demonstrated knowledge of all English letters, reached grade-level benchmark for high frequency words, spelling and language arts, uses manuscript writing, writes independently and can successfully copy from a book and the board. In addition, his math skills were at grade level as he could count and write numbers through 100, and add and subtract without regrouping.

130. Ms. Mealey-Ures administered the BASC-2, Teacher Rating Scale and Parent Rating Scale. The BASC-2 uses 139 questions for teacher and 160 questions for Parent to develop a profile of Student's behaviors, and identify possible emotional and behavior disorders, including attention and learning problems. The scales are separated into five areas: Externalizing Problems, including hyperactivity, aggression, and conduct problems; Internalizing Problems, including anxiety, depression and somatization; School Problems, including attention and learning problems; Behavior Symptom Index,

including atypical and withdrawal behaviors; and Adaptive Skills, including adaptability, social skills, leadership, study skills, and functional communication.

131. Mother and Ms. Cruz differed sharply in most of their BASC-2 ratings of Student. In the area of Externalizing problems, Ms. Cruz and Mother agreed that Student was not more aggressive than same aged peers, but otherwise disagreed significantly as to whether Student displayed hyperactive conduct. Mother rated Student at-risk, a significant problem requiring monitoring, but not yet signifying high level of maladjustment. Mother reported disruptive, impulsive, and uncontrolled behaviors at home. Ms. Cruz reported Student to display self-control typical of his same-aged peers. Conduct problems were in the at-risk range to Ms. Cruz, as Student sometimes engages in rule-breaking behavior, such as cheating, deception, and stealing, but to Mother, Student's behavior was typical of same-aged peers. In the area of Internalizing Problems, Mother rated Student in the clinically significant range, or having a high degree of maladjustment. According to Ms. Cruz, Student displayed relatively few anxiety-related behaviors, but Mother reported Student to display worry, nervousness, and fear in the home. Similarly, Ms. Cruz reported Student as average for depression and somatization, but Mother reported Student's depressive behaviors at home as clinically significant and his somatization, or display of several health related concerns, as at-risk.

132. Ms. Cruz and Mother had stark differences in their ratings on the Behavioral Symptoms Index. Ms. Cruz reported Student as average, and generally displaying clear logical thought patterns, and awareness of his surroundings, and Mother reported Student in the clinically significant range for frequent and odd behaviors, and being disconnected from his home environment. Mother also provided clinically significant scores for Student's withdrawal, and unwillingness to make friends, whereas Ms. Cruz did not report any significant concerns, stating that Student easily

develops and maintains friendships, and rarely avoids social situations. Adaptive Skills were at-risk for Mother, and average for Ms. Cruz, with Mother insisting that Student had difficulty adapting to change, and took longer to recover from difficult situations, had difficulty acting in a socially acceptable manner, and had trouble working with others and making decisions.

133. Mother responded to the BASC-2 questions through an interpreter who read the questions to her. Ms. Mealey-Ures marked the responses sheet. Mother's responses to the BASC-2 differed slightly from her interviews with Dr. Barron and Ms. Mealey-Ures, and there were examples of minor inconsistencies between responses. For example, in one response Mother stated that Student often makes friends easily and in another she stated that Student often complains of having no friends. Contrary to her reports to assessors, Mother also responded that Student never wets the bed. Similarly, Mother's report on the BASC-2 that Student never speaks in short phrases that are hard to understand, conflicted with her interview.

134. In the area of School Problems, the BASC-2 also provided information about Student's attention at school and at home. Ms. Cruz reported Student as average, or typical, and Mother reported Student as having difficulty maintaining attention at school.

135. Ms. Cruz also reported Student as average for Learning Problems, with no unusual difficulty comprehending and completing school work. Ms. Cruz also did not find significant problems with Student's Study Skills, reporting that Student exhibited adequate organizational and study skills, and timely completed most homework. Mother's rating scale did not include this category.

136. Mother and Ms. Cruz did agree that Student had problems with Functional Communication. Ms. Cruz rated Student at-risk, and Mother rated Student clinically significant. Both reported that Student demonstrated poor expressive and receptive



communication skills and had difficulty seeking out and finding information independently.

137. Ms. Mealey-Ures administered the ADHDT to Ms. Cruz and Mother, a standardized measurement to assist with diagnosing pupils of ADHD, which is comprised of three subtests: hyperactivity, impulsivity and attention. The ratings measure the degree particular behaviors present a problem to the pupil. Pupils with ADHD generally manifest their symptoms in most situations, including school, work, home and social situations. Although Mother generally rated Student higher for behaviors which contribute to an ADHD diagnosis both Mother's and Ms. Cruz's ratings yielded scaled scores which did not support a diagnosis of ADHD. Mother's standard score of 81, or 10th percentile, meant that Student had a below average probability of having ADHD. Ms. Cruz's standard score of 66, or one percentile, meant that Student had a very low probability of having ADHD.

138. Ms. Mealey-Ures also assessed Student's fine and gross motor abilities. She assessed his visual motor abilities, using the VMI. On the VMI, Student obtained a standard average score of 96, 39th percentile. She reported on his fine motor abilities using Ms. Cruz's reports, and writing samples. Student's writing contained appropriate letter and number formation. She reported on his gross motor abilities from observations on the playground where he ran and played games, bounced a ball, returning it to his opponents, and attempting to outrun them. During testing, he was observed walking up and down stairs, using alternative feet.

139. Ms. Mealey-Ures elaborated on her assessment at hearing. She disagreed with Dr. Barron's conclusion that Student had ADHD, or ADHD that required special education. Ms. Mealey-Ures explained that students with ADHD do poorly with planning and attention, and Student's composite score on the CAS demonstrated that attention was a strength. Student's low average score on the successive measure was considered a

weakness or a less developed skill, not a deficit, although it was significantly lower than the other scores. Ms. Mealey-Ures contrasted her experience with other pupils identified with ADHD, and Student. She noted that Student was capable of attending to tasks for 20 minutes, typical of pupils his age, could transition, and most importantly, could be redirected effectively and quickly. In contrast, pupils with ADHD usually have a problem controlling their behavior, and, unlike Student, have discipline records, which may include reports of being sent to the office. Student was facing emotional difficulties at home according to Mother due to a family situation, but he was happy at school.

140. At hearing Ms. Mealey-Ures responded to Student's critique of her administration of the BASC-2. Ms. Mealey-Ures offered that small differences on the BASC-2 score are not significant and that BASC-2 incorporates an "F index" to correct against an overly negative report. Student failed to supply any evidence that the scores would have changed as a result of these possible errors.

141. Ms. Mealey-Ures was questioned about her administration of the TAPS-3 and a possible suspected disability of auditory processing. Contrary to the publisher's protocols, she saw no inherent problem with re-administering the assessment so soon after Dr. Barron's administration of the assessment. She was not concerned with his relatively low scores in auditory comprehension and reasoning because he had no problem accessing his curriculum, he was not expected to have well developed inferential reasoning skills, and as an ELL, some of his scores might be suppressed. She referred favorably to Ms. Eckstrand's assessment as proof that his academic achievement scores were high and he was capable of accessing his curriculum.

142. At hearing Ms. Mealey-Ures's confidence in her TAPS-3 interpretation, was not supported by best practices. Ms. Mealey-Ures's results were highly inflated when contrasted with Dr. Barron's. Further, as capably explained by Dr. Barron, she ignored

TAPS protocols which required an audiological evaluation where six or seven errors are made in word discrimination, which occurred here.

143. At hearing Ms. Mealey-Ures's interpretation of CAS was contradicted by the publisher's report of Student's scores. According to the publisher, Student's poor successive processing score displayed a significant cognitive weakness and had important implications for diagnosis and eligibility determination. Student's significantly lower, low average score on this scale meant that he had difficulty remembering the order of words spoken by the assessor and comprehending information based on the order of words. Student's score meant that he did better than 10 percent of pupils his age. In contrast, according to the publisher, Student's strength in the other areas of CAS demonstrated an average to superior ability to attend to tasks and avoid distractions.

144. On January 8, 2013, Ms. Rhee, prepared her OT report, which considered the results of standardized assessments, Student's health and educational history, and Mother's concerns, set forth in the other reports, her interview with Mother and Ms. Cruz, and her observations of Student in his classroom, playground, and during testing. When she met with Mother on December 7, 2012, Mother reported her concerns about Student's behaviors at home, including his resistance to completing his homework, tantrums, and his frequent "what" and "why" questions. It appeared that Mother did not understand OT services. After Ms. Rhee explained that OT services addressed fine motor skills, visual-motor coordination and self-help skills, Mother stated that she had no concerns about Student's skills in these areas. She also stated that she had no concerns with his writing, scissoring, or feeding skills. Ms. Cruz reported that Student, like his same-aged peers, could be a little disorganized and his shoes were always untied, but he could tie his shoes independently. She also reported that Student received an advanced score in writing.

145. Ms. Rhee's observations and formal assessments confirmed that Mother was right not to be concerned with Student's fine motor, visual-motor or self-help skills. Student could navigate the classroom and playground, including chairs, ramps, stairs and doorways. He could maintain a seated position. He had good visual perceptual skills to coordinate eye movements and perceptual abilities to perform academic tests, and read. He could maintain a functional grasp to perform writing tasks. He could access motor skills to perform self-care activities such as carrying lunch trays, feeding himself, and using the washroom facilities. He had adequate sensory processing and motor skills to participate in social-related activities with peers, such as standing in line or working in close quarters with his peers. He did not demonstrate any sensitivity to touch, could maintain his balance, and appropriately handle objects. He could use his fine motor skills to write, copy, and manipulate scissors. Ms. Rhee administered the Beery-Buktenica Developmental Test of Visual Motor Integration-Fifth Edition (Beery VMI), a standardized pencil-paper task requiring Student to copy increasing complex designs, which measured Student's ability to interpret and translate visual information into an exact motor response. Student scored in the typical range.

#### IEP MEETING

146. On January 10, 2013, an initial IEP team meeting was held to review the assessments and determine whether Student should be made eligible for special education and related services. All required and necessary individuals were present including Mother, accompanied by her attorney, District administrator, Ms. Cruz, and all assessors, including Ms. Barron, Ms. Eckstrand, Ms. Mealey-Ures, Ms. Sebastian, Ms. Rhee and the school nurse. District's assessments were discussed, and Ms. Barron sharply objected to the conclusions reached by District's assessors. Student's classroom progress was discussed. District representatives determined that Student did not qualify for special education and related services. Parent, assisted by her attorney, disagreed

with the conclusions of District's assessors and District's determination that Student was not eligible for special education.

147. After the IEP team meeting, Parent, through her attorney, requested an IEE at public expense in the area of speech and language. District declined Student's IEE request and, as required, filed for due process within a reasonable time (approximately two weeks) to seek a determination that Ms. Sebastian's assessment was appropriate.

#### STUDENT'S EXPERT'S CHALLENGE TO MS. SEBASTIAN'S ASSESSMENT

148. Farryl Dickter, a licensed SLP and educational therapist, who testified at hearing, was retained by Student to prepare an independent assessment to support his challenge of Ms. Sebastian's LAS report, and District's determination that Student did not qualify for special education as a pupil with a SLI. Ms. Dickter possessed all the necessary qualifications required of an SLP and educational therapist. Ms. Dickter obtained a B.A. from the University of California, Berkeley, a M.A. in education in LAS pathology and special education from Boston University. She obtained a certificate of clinical competence from the American Speech Learning and Hearing Association (ASLHA), has been licensed and credentialed by the State of California since 1975 as a LAS pathologist and an aphasia teacher. Ms. Dickter has worked as an educational therapist since 1983, providing individual and group speech, language and educational therapy, pragmatic skills training, community workshops, and assessments on behalf of both Students and Districts. For six years prior to opening her own business, Ms. Dickter was the program specialist and clinical supervisor for the Los Angeles County Office of Education's aphasia program. Ms. Dickter has extensive experience conducting LAS assessments for both school districts and pupils. Ms. Dickter presented as a credible witness, demonstrating a depth of knowledge and experience, candor, comfort and confidence when responding to questions, particularly those which touched on the distinction between language deficits related to Student's ELD status and a language

disability. Further, in critiquing Ms. Sebastian's assessment, Ms. Dickter capably used the LAS assessment she administered to Student to support her opinion that District's LAS assessment was inappropriate.<sup>2</sup> Ms. Dickter's testimony was given great weight in determining whether District appropriately assessed Student in the area of LAS. Ms. Dickter did not conduct a classroom observation, which was a factor in weighing her testimony, but to the extent Ms. Dickter's testimony and report were considered in determining whether Ms. Sebastian's assessment was appropriate, it was not essential that she personally observe Student.

149. Ms. Dickter prepared her report on February 22, 2013. Ms. Dickter did not challenge Ms. Sebastian's assessment of Student's articulation and acknowledged that it was not an area of concern. Ms. Dickter challenged the basic tenet of Ms. Sebastian's opinion that Student's deficiencies particularly in syntax and auditory recall, were a consequence of his status as an ELL pupil, and not a language disorder. She also used assessment measures which challenged Ms. Sebastian's assessment of Student's receptive and expressive oral language. Ms. Dickter selected English-language assessments after reviewing District's LAS assessment report which found that he was more proficient in English. She reviewed District's PLS-4 results which found Student's expressive communication and total language scores in the borderline range, the eighth

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<sup>2</sup> Ms. Dickter's assessment was not provided to the January IEP team and therefore was not considered at that time as part of the IEP team's deliberations. Ms. Dickter's assessment was admitted as support for her expert testimony, which generally challenged Ms. Sebastian's assessment that Student was not eligible for special education as a pupil with a language disorder. Ms. Dickter's expert testimony, supported by her report, was also relevant to determine whether Student was denied a FAPE, and any compensatory remedies.

and ninth percentile, respectively, and Student's borderline/low average range CASL Core Composite.

150. Ms. Dickter read the other assessor reports, which included multiple observations of Student in his current educational setting. Ms. Dickter also considered Student's performance in her clinic against his classroom challenges, and concluded that Student's performance was optimized in her clinic, because, in contrast to his classroom, he received one-on-one attention, with less distractions, and continuous opportunities and reminders to refocus.

151. Throughout her testing Ms. Dickter observed Student's inconsistent attention, his need for continuous prompts to refocus, particularly on tasks involving only auditory stimulus. He had even more difficulty with lengthy auditory tasks. On tasks that involved visual stimulus, his attention appeared stronger and more consistent, and he was more persistent in his attempts to think through the task and respond.

152. Ms. Dickter also considered Student's developmental history, finding Mother's reports of late language acquisition at home significant. Student's failure to use sentences until age four is related to continued language delay, or language disorder, at age six. Also significant to Ms. Dickter was Student's difficulty acquiring his primary language.

153. Ms. Dickter administered 10 subtests comprising the Clinical Evaluation of Language Fundamentals (CELF-4), a standardized assessment based upon an average standard score of 10, which measured several functions of receptive and expressive oral language. In the Concepts and Directions subtest, which measured the ability to listen to multiple details and understand the vocabulary concepts and terms generally in oral directions, while looking at visual stimulus, Student obtained a below average range standard score of five. Ms. Dickter found it significant for classroom learning, that Student did not understand important instructional terms like before, after, except and

between, and unlike his same-aged peers, could not comprehend, sequence or follow short directions.

154. In the Sentence Structure subtest, which measured the ability to comprehend increasingly long and more complex syntax, Student obtained a severely delayed standard score of four. Ms. Dickter considered his limited ability to process information delivered in short, simple sentences, indicative of a language problem, not a bilingual language delay. Student appeared confused by items requiring comprehension of tense. Teachers do not speak only in short, simple sentences. Where pupils are confused by tense, they have difficulties with classroom instruction which requires them to sequence events and determine cause and effect.

155. Ms. Dickter identified a language disorder, related to a strong gap between Student's receptive and expressive abilities, particularly deficits arising from his lack of an available language. Ms. Dickter determined that Student had very strong nonverbal intelligence, from his ability to make relationships between two items from two pictures, in the receptive portion of the Word Classes subtest. Student obtained a superior standard score of 14. He received a perfect raw score, rare for pupils his age. Student obtained a much lower, but average standard score of nine, on the expressive portion of the Word Classes subtest. Ms. Dickter referenced his word retrieval problems, poor vocabulary, and need to gesture. To one question involving why body parts went together he stated "for to grab the mama by the hand and to eat for your table." Ms. Dickter dismissed his average score due to the atypical quality of his language usage which was characteristic of a language disorder, not a language delay.

156. Ms. Dickter identified Student's severely delayed ability to absorb simple auditory information without visual stimulus, leading her to conclude that Student was not absorbing teacher-led classroom instruction, which was generally much longer than 10 minutes. Ms. Dickter administered the Listening to Paragraphs subtest, which



measured the ability to listen to a one-paragraph story designed for pupils his age, without picture clues. Student received a severely delayed standard score of three, and demonstrated an inability to concentrate on tasks without visual cues, or to fully express his answers because he couldn't formulate sentences with the proper tense and syntax. As in other measures of Student's expressive abilities, Student could not fully express his ideas because of his inability to complete sentences using correct syntax.

157. Student's difficulties using language were further demonstrated in other subtests of the CELF-4. Student received a severely delayed score of three, the first percentile when compared with same-aged pupils, on the Word Structure subtest, which measured the ability to use appropriate grammatical words and forms, one word at a time. He could not use grammatical forms used regularly by pupils his age.

158. Ms. Dickter dismissed Student's ELL status as a factor in his low score on Word Structure. Ms. Dickter noted his failure to add appropriate final sounds such as "s" to the endings of words, as a characteristic of auditory processing/language delay because the end sound is the quietest part of the word which can be missed by pupils with auditory processing challenges. Ms. Dickter noted that Student's preference for the present tense, and inability to express past or future tense, critical for communication, and to follow, sequence and process cause and effect, was a highly suspicious pattern, which interfered with his access to curriculum. Ms. Dickter acknowledged that as an ELL Student may be slower to acquire grammar, but Student's gap was far greater than was typical of a pupil learning a second language.

159. Student low scores on other CELF-4 subtests, specifically normed for bilingual pupils, reinforced Ms. Dickter's opinion that Student had a language disorder for which special education was required. In the Recalling Sentences subtest, which measured Student's internalized use of grammar and syntax, by requiring him to repeat one sentence exactly as spoken, Student obtained a significantly delayed standard score

of one, or the first percentile when compared with his same aged peers. Once the sentences became longer, Student would not respond at all. As a result, Student could not retain oral directions, process the questions, or use a common classroom tool of repeating the directions. In Formulated Sentences, a subtest which measured Student's ability to use a specific word in a well formed sentence on command, Student obtained an impaired range, standard score of six, or the ninth percentile, when compared with same-aged peers. According to Ms. Dickter, Student's problems were not limited to the problems ELL pupils have with using the details of grammar. Student could not piece together a cohesive sentence which conveyed a meaning, but instead "rambled" with multiple fragments, or strayed off topic.

160. Student's language samples supported Ms. Dickter's opinion. When asked to use "and" to describe a family planting with pets playing, Student responded, "And the person is planting he woman because the dog is fighting with the cat." When asked to use "gave" in a sentence describing breakfast, Student responded, "They gave the food because the morning they eat cereal and soup and everything you want." As such, Ms. Dickter concluded that Student had a language disorder because, unlike his same aged peers, and ELL pupils, who might not use the word correctly due to a language delay, Student could not construct a complete and sensible thought.

161. Ms. Dickter administered an Oral Language sample, which revealed the same deficits in her administration of the CELF-4, but, in her view, also uncovered "some significant" pragmatic language challenges because, among other things, he was off topic, confused who did what to whom, and stated things that made no sense to the listener. He spoke of the dog that belonged to the person who drove him to the examination: "[Dog] scared of snakes because he went to kill the people, the dogs and the cats and everything." He made certain semantically incorrect statements "the persons are better because they are nice." Referring to the white board, "who drew for

you the board." When shown a toy he asked "what that means" instead of "how does that work."

162. Ms. Dickter also concluded that Student's difficulty responding to auditory information without visual cues was due either to slow auditory processing, or an attention problem. She reached this conclusion primarily from her administration of the Listening to Paragraphs test which required auditory comprehension without visual aids, and her comparison between the Listening to Paragraphs subtest, and Student's better performance on Ms. Sebastian's CASL Paragraph Comprehension test, which included pictures, and where Student performed in the average range. In the Listening to Paragraphs subtest, stories were of five to ten minutes in length. By the third story, Student lost focus, or "tuned out," and Ms. Dickter determined Student either had attention or information processing deficits.

163. Based upon her review of Student's developmental history, District's and her own assessments, and Student's language sample, Ms. Dickter concluded that Student met the requirements of the DSM-IV criteria for a severe receptive and expressive language disorder, with pragmatic components. She recommended that Student be provided with intensive language therapy, two to three hours weekly, over a period of two years. She recommended goals for receptive language, which focused on developing Student's ability to listen to sentences of increasing complexity, process key ideas from auditory input, respond to specific questions asked, and to ask questions when he is confused. She recommended goals for expressive language to assist Student in developing appropriate sentences to describe the main action, and convey a story in the appropriate sequence using past and future tenses. She recommended that his language progress be measured through a detailed language sample requiring him to respond "on demand," and which counted the number of utterances clearly stated, sampled his language when describing complex pictures, and retelling a story. She

recommended that strategies be used to address his difficulties with word retrieval, grammar, and word tense. She recommended that appropriate responses be modeled for Student.

164. At hearing Ms. Dickter elaborated on her disagreement with Ms. Sebastian and District. She explained that her one-on-one assessment provided the best vehicle to obtain the best language sample from pupil, to show his optimal capabilities. She disagreed that it was necessary to observe Student as he had been observed numerous times and she had access to the reports.

165. Ms. Dickter strongly objected to District's position that Student's receptive and expressive language delays were due to his ELL status, and not a disability. When pressed about Student's ELL status Ms. Dickter maintained that Student's demonstrated weakness in the Spanish-language was evidence that he had no functional primary language. According to Ms. Dickter, not one report confirmed that Student had a primary functional language system. According to Ms. Dickter, the assessments administered which measure Student's receptive and expressive language ability, revealed serious delays in Student's designated primary language, not just English. Ms. Dickter disagreed with the suggestion that Student may have not developed a primary language, or would suffer a language loss, to such a significant degree, by his exposure to multiple languages at home. Ms. Dickter explained that a pupil acquires one primary language, from which the basic rules of sentence structure and syntax are learned. If typical, Student would have been functioning in his primary language by age four. If Student had developed typically, he would have been able to relate a story about an adult who was not present in the room. He would have been able to construct a four word sentence with correct syntax. As her oral language samples confirmed, Student could not converse typically for his age in his primary language. Ms. Dickter maintained that the absence of complete oral language samples from Ms. Sebastian's report was a

significant gap. Ms. Sebastian only included limited samples from her tests, but did not include samples of Student speaking spontaneously or having “real-life” conversations. Further, when primary language development proceeds typically, pupils are able to transition appropriately to a second language. Student’s inability to recall verbal information, without visual stimulus, was particularly troublesome. According to Ms. Dickter, memory and language are linked, and interventions for speech and language will appropriately address deficits which appear to be memory-related. She acknowledged that the rote nature of first grade may mask Student’s disorder; however, based upon the classroom observations she reviewed Student did have problems understanding directions, as demonstrated by his silence when asked a question, his inability to repeat what he just learned, and his looking at his peers for guidance. Ms. Dickter concluded that Student required interventions to ensure that he developed the appropriate foundations for more complex reading and writing tasks, required in later grades.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioner has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion for Issues One and Two, and District has the burden of persuasion for Issue Three.

### ISSUE ONE: WHETHER DISTRICT MET ITS CHILD FIND OBLIGATIONS DURING THE 2010-2011 AND 2011-2012 SCHOOL YEARS.

2. Student contends that District failed to meet its child find obligations during the 2010-2011 school year. In Student’s closing brief, Student argues he should prevail because District failed to provide any evidence in response to his allegation that

it met its child find obligations. With regard to the 2011-2012 school year, Student contends that District failed to meet its child find obligations to identify and assess Student because it had sufficient information of suspected disabilities from Parents' request for assessment, and Student's classroom performance. Student contends that District's failure to meet its child find obligations was not only a procedural violation, but resulted in the loss of an educational benefit to Student, and denied Student a substantive FAPE. As such, Student maintains that District is required to pay for Dr. Barron's assessment in the amount of \$4,500 dollars.

3. District maintains that Student did not provide any evidence that it failed in its child find obligations during the 2010-2011 school year. Further, District maintains that it met its child find obligations during the 2011-2012 school year, when it responded to Parents' request for an assessment, conducted screenings, and formed an SST. District further contends that Student failed to demonstrate that he was eligible for special education during the 2009-2010 and 2010-2011 school years, or anytime, and was denied a substantive FAPE.

4. 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).) "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].)

5. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) *Rowley* also made clear that the IDEA does not provide for an "education...designed according to the parent's desires." (*Id.* at p. 207.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

6. 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.)

7. 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 District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. 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.) Procedural violations may constitute a denial of a FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

8. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a) (2006).)<sup>3</sup> This duty is commonly referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivision (a).<sup>4</sup> The IDEA and the Education Code do not specify which activities are sufficient to meet a school district's child find obligation, and there is no requirement that a school district directly notify every household within its boundaries about child find. However, California law obligates the school district to establish written policies and procedures for use by its constituent local agencies for a continuous child find policy. (Ed. Code § 56300, subd. (d)(1).) The school district must actively and systematically seek out "all

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<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

<sup>4</sup> Instead of the term "evaluate," which is found in the IDEA, the Education Code uses the term "assess."



individuals with exceptional needs, from birth to 21 years of age," including children not enrolled in public school programs, who reside in a school district or are under the jurisdiction of a SELPA. (Ed. Code, § 56300.)

9. The school district's duty for child find is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1196. ("*Cari Rae S.*"); *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.) Under the IDEA, where District fails to meet its child find obligations to conduct an initial assessment, Parents' recourse is to file for due process to compel an assessment. (*Letter to Anonymous*, (OSEP 1992) 19 IDELR 498.)

10. A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Cari Rae S., supra*, 158 F. Supp. 2d at p. 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) Where districts have no reasonable basis for suspecting that a child has a disability it can elect not to conduct an evaluation. (*Letter to Williams* (OSEP 1993) 20 IDELR 1210.)

11. The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*See Adams v. State of Oregon* (9<sup>th</sup> Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

12. Before any action is taken with respect to the initial placement of pupils with exceptional needs, pupils must be assessed in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.352(f); Ed. Code § 56320.) 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.) School districts must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether a child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) Once the parent has provided consent to District's assessment plan, the district has 60 days to complete the assessment and hold an IEP meeting.(Ed. Code, § 56344(a).)

13. For purposes of special education eligibility under the IDEA, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, OHI, a specific learning disability, deaf-blindness, or multiple disabilities, 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).) A student meets the eligibility requirement for a specific learning disability if he has 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 has a severe discrepancy between intellectual ability and achievement. (Cal. Code Regs., tit. 5, § 3030, subd. (j000).)

14. ADHD is not, by itself, a specified disability that qualifies a child for special education. However, a child with ADHD can be eligible for special education if by reason of ADHD, the child meets the criteria for OHI, emotional disturbance, or specific learning

disabilities. (Ed. Code § 56339, subd. (a).) A student meets eligibility as a student with OHI if he has limited strength, vitality, or alertness, due to chronic or acute health problems. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) A student can qualify for eligibility as OHI if he has ADHD, because his disability-related distractibility can cause him to have limited alertness with respect to his educational environment, which can then demonstrate a need for special education and related services. (34 C.F.R. §300.8(c)(9).);

15. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.) The difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that the difficulty results from any of the following disorders: (1) articulation disorders, such that the child's production of speech significantly interferes with communication and attracts adverse attention; (2) abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; (3) fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (4) inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the child's language performance level is found to be significantly below the language performance level of his or her peers; and (5) hearing loss which results in a language or speech disorder and significantly affects educational performance. (*Ibid.*) Similarly, under federal law, a speech or language impairment means a communication disorder, such as stuttering, impaired articulation, language impairment, or a voice impairment, that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(11).)

16. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria: (A) The child scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or (B) The child scores at least 1.5 standard deviations below the mean or the score is below the seventh percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances which is recorded or transcribed and analyzed, and the results included in the assessment report. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

17. A pupil shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).)

18. A child is eligible for special education services if an IEP team determines that the child meets one of the educational eligibility categories, and if the IEP team determines that the adverse effects of the disability cannot be corrected without special education and related services; that is, that the degree of impairment "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, §§ 56026, subd. (b); 56333, 56337; Cal. Code Regs., tit. 5, § 3030.)

19. Thus, if Student exhibited any of the criteria described above for finding either an OHI based upon ADHD or a speech and language impairment during the

relevant time frames, (after determining that the prevailing factor was not Student's ELL status), and the disorder adversely affected his educational performance to the extent that special education was required, Student would meet the eligibility criteria. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

20. The case of *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, 1110 (*Hood*), demonstrates that a child may have a qualifying disability, yet not be found eligible for special education, because the student's needs can be met with modification of the general education classroom. In *Hood*, the due process hearing officer and the reviewing court looked to the child's above-average success in the classroom, as shown by the child's grades, and the testimony of teachers as evidence that the child's needs could be met in a general education classroom without specialized education and related services. (*Ibid.*)

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

#### Analysis of Issue One

22. Student did not meet his burden of persuasion that District failed to have procedures in place to fulfill its child find obligations during the 2010-2011 school year when he attended Manhattan Head Start, a preschool within the boundaries of the District, but which was not a District program. As set forth in Legal Conclusion Eight, District was required to have written policies and procedures in place to seek out pupils residing within its boundaries to meet its obligation to locate, identify, and serve pupils

with special needs. As set forth in Legal Conclusion One, Student had the burden of proof on this issue. Student offered no evidence about District's written policies and procedures, or the absence of written policies and procedures, or alternatively, District's failure to implement its written policies and procedures. Student did not designate or question witnesses about District's child find obligations, submit documents, or otherwise provide evidence that he was denied the necessary documentation to meet his burden of persuasion. (Factual Findings Two and Three.) As Respondent, District had no obligation to provide affirmative evidence that it complied with its child find obligations.

23. Student did not meet his burden of persuasion that District failed in its child find duties by ignoring information it acquired during the 2010-2011 school year which put District on notice of Student's suspected disabilities and its duty to assess. As set forth in Legal Conclusions Eight, District's child find practices do not extend to personally contacting each pupil within its boundaries. District's child find obligations to particular pupils, as set forth in Legal Conclusions Nine, are continuous and are triggered when it acquires information which suggests a pupil has a suspected disability. Student offered no evidence that Mother contacted District and supplied it with any information about Student during the time he was enrolled in Head Start and prior to his enrollment in Los Angeles Elementary at the start of the 2011-2012 school year. Student pointed to Parents' October 25, 2011, request for assessment, which District received on November 4, 2011, where they referred to a previous request. However, Student provided no credible evidence that Mother delivered the previous request to District. On the contrary, based upon the reference to the previous request in her October 25, 2011, letter, and her testimony at hearing, she established that the most likely recipient of her letter, if anyone, was Head Start. As the evidence established, when Mother enrolled Student in Los Angeles Elementary, she did not supply any

educational records from Head Start or communicate to District about her concerns with Student's educational progress or developmental delays, as she later did with multiple assessors. (Factual Findings One through thirteen.)

24. Student met his burden of proof that District failed in its child find obligations when it failed to assess Student in all areas of suspected disability during the 2011-2012 school year. District's duty to assess based on its child find obligations was not immediate. School began on September 7, 2011, and Mother did not supply District with any information about Student's performance at Head Start in writing, or to Ms. Escobar. Shortly after Student enrolled, Student was assessed as an ELL, and found to be an early stage ELL, with many English-language acquisition challenges. Student's ELL status, without more, did not automatically place District on notice of a suspected disability. Parents referred Student for an assessment on October 25, 2011. District received the letter on November 4, 2011. Although District's child find duty was independent of Parents' referral, the mere fact of a parent referral placed District on notice that it should investigate the possibility of a suspected disability requiring a special education assessment. Parents' referral letter notified District of their concern about Student's academics as reported to them by Ms. Escobar. Parents did not mention their concerns about his delayed Spanish-language acquisition. District responded quickly to Parents' letter by performing screenings, reviewing Student's classroom records, and interviewing his teacher. During Ms. Sebastian's screening she noted that Student had some confusion with verbal directions, and from her interview with Ms. Escobar, that Student was not responding to questions. From her recommendations to Ms. Escobar that she speak to him in full sentences and encourage him to respond, she acknowledged that his skills needed to improve. However, Student just started kindergarten, and had no other known educational, developmental, or medical history. As such, as set forth in Legal Conclusions 17, his struggles with academics, or with

English-language acquisition, at this early juncture, without more, did not give rise to a suspicion of a disability. Notably, District prepared a written response memorializing their understanding of Parents' concerns about Students' academics, and District's efforts to identify any basis for suspecting a disability for which assessments would be appropriate. Parents were provided with their procedural safeguards, and notified of District's SST meeting where Student's academic progress would be reviewed. As such, at the outset of the 2011-2012 school year, District did not violate its child find obligations. District's efforts were understandable, given Student's ELL designation, Mother's apparent concerns only with academics, and the absence of Student's previous school records or any information of suspected deficits from Mother.

25. District failed its duty to assess, however, when it had information of a suspected disability by the second reporting period December 5, 2011, and no later than February 1, 2012, the day of Student's SST meeting. Shortly after Ms. Sebastian's screening, on December 2, 2011, Student's first report card indicated that he might be retained an extra year in kindergarten due to his poor academic performance. The second reporting period covered Student's performance from December 5, 2011 to March 16, 2012. As memorialized in Ms. Escobar's comments, during this reporting period, Ms. Escobar was also becoming concerned about Student's struggles with attention, focus, following directions, and difficulty staying on task. Ms. Escobar complained of Student's tardiness but there was no specific reference to missed academic instruction, and there was no evidence that this factor alone accounted for his attention challenges, and difficulty with directions. District convened the SST in the middle of this reporting period on February 1, 2012. By this time, Student's deficits were on full display as evidenced by District's admonition to Student to pay attention, look and listen, and participate, and its continued concern that Student be spoken to in complete sentences, as memorialized in its recommendation to Mother. Significantly, by



the SST meeting, Mother also expressly advised District about Student's speech and language deficits. As such, as early as December 5, 2011, but no later than February 1, 2012, District was required to obtain Parents' consent and assess Student in all areas of suspected disability. Assuming Mother would have provided consent if presented with an assessment plan at the beginning of the second reporting period, or at the SST meeting, District would have completed the assessments within 60 days and held an IEP meeting, anywhere between mid-February, if an assessment plan was signed in December, 2011, (excluding school holidays), and around April 1, 2012, if an assessment plan was signed at the February 1, 2012, meeting.

26. Student met its burden of proof that District committed a procedural violation when it failed to timely assess Student in all areas of suspected disability. The more credible testimony of Dr. Barron and Ms. Dickter identified serious language-related deficits which could not be reconciled with Student's ELD-one status even in kindergarten, given Student's primary language delay. Ms. Dickter's testimony that Student did not have a functional primary language was acknowledged by Ms. Escobar when she recommended that Mother speak to Student in full sentences. In addition to Student's impaired syntax, Dr. Barron and Ms. Dickter found significant audiological processing deficits, and deficits in receptive language skills required to understand oral instructions, and storytelling. In contrast, District's position was that Student's ELD-one status did not support a suspicion of a disability. District's assessors, including its bilingual assessor, Ms. Velazquez, concluded that Student's ELD-one status was responsible for his deficits, even when Student scored poorly in both Spanish and English measures. When Student scored poorly in Spanish-language measures in comparison to his peers, Ms. Velazquez concluded that his Spanish-language acquisition was poor; when he scored poorly in English, she concluded that it was due to his ELD status. District's conclusion that Student did not have a language-related disorder given

his developmental history was contradicted by Ms. Dickter's more persuasive testimony and report. Additionally, Dr. Barron credibly testified that audiological testing should have been offered by District after Student performed poorly on certain language measurements, including the TAPS-3. District did not refer Student for audiological testing to rule out an audiological impairment or processing disorder which would impact Student's ability to understand oral instructions or tasks, like storytelling.

27. Dr. Barron's diagnosis of ADHD in kindergarten did support a suspicion that Student had this disability during kindergarten given Ms. Escobar's reports of Student's behavior. Dr. Barron's report supported her diagnosis with observations of Student in his classroom shortly after he began first grade, her observations during testing, and Ms. Cruz's confirmation that Student was more active than his peers at that time. That Dr. Barron's diagnosis was later contradicted by Ms. Mealey-Ures's testing, particularly two measures of the CAS, and school-based observations as first grade progressed, did not relieve District from the obligation of assessing him for attention-related disabilities. Dr. Barron's identification of suspected motor and sensory delays requiring OT services was more doubtful, as it was not supported by any classroom observations during kindergarten, Ms. Rhee's screening, Mother, or later assessments, including Ms. Rhee's. Likewise, her identification of suspected social-emotional issues was not evident in the classroom setting during kindergarten, or supported by later results from the BASC-2, even given certain conflicts between Mother's interview statements and her responses to the BASC-2.

28. District's failure to meet its child find obligations, like its failure to assess upon parental request, as set forth in Issue Two, was a procedural violation, but did not rise to a substantive violation, as set forth in Legal Conclusions Seven, because Student could not meet his burden of persuasion that Parents were deprived of their right to participate in educational decision making. Parents were not deprived of their right to

participate, because in response to their October 25, 2011 letter, District provided a detailed letter notifying them of the basis of its decision not to assess, provided them with notice of procedural safeguards, and Parents were entitled to file for due process to compel District's assessment.

29. District's failure to meet its child find obligations, like its failure to assess upon parental request, as set forth in Issue Two, was a procedural violation, but did not rise to a substantive violation, as set forth in Legal Conclusions Seven, because Student failed to meet his burden that he was denied an educational benefit. Student provided insufficient evidence that he required special education and related services to access his kindergarten education during the 2010-2011 school year. Student provided evidence that Student did have challenges in kindergarten with his academics, and attention. Student's noted challenges supported a suspicion of a disability for assessment purposes, but they did not provide sufficient evidence that Student required special education and related services to access his kindergarten education. At hearing, Dr. Barron had difficulty supporting her opinion that Student required special education interventions at that early age, even assuming he had ADHD, especially where the evidence showed that he responded well to prompting and rewards, and made some progress. Likewise, Ms. Dickter offered that early LAS interventions were required to develop language and auditory skills so that Student could access his education when classroom instructions and other oral tasks become more complicated in later grades. Evidence that Student was challenged by oral instructions, or refused to respond to his teachers, was not sufficient to support special education modifications to his kindergarten educational program, or related services in kindergarten. Between April and June, 2012, the final reporting period, Student still had significant attention problems, and demonstrated that he benefitted from visual cues to instructions, but he received general education interventions, his grades improved, he became proficient in

his academic subjects, and he was promoted to first grade. As such, even without determining the relative appropriateness of the District and Dr. Barron's assessments, Student did not provide persuasive evidence that Student was deprived of a FAPE because he could not access his kindergarten curriculum without special education modifications to his general education program, or related services, due either to ADHD, a receptive or expressive language disorder, or any other disability, including an auditory processing disorder.

30. Student did not meet his burden of proof that he was denied an educational benefit because he did not provide sufficient evidence that Student was not prepared for first grade due to its failure to provide special education services in kindergarten. Despite Student's partially proficient grades in some areas in his first quarter of first grade, Student's early academic performance in first grade, based on Ms. Eckstrand's observation of Student during testing and her academic assessments, confirmed that Student did not require special education services in kindergarten to access his first grade curriculum. Ms. Mealey-Ures's observations, and Ms. Cruz's reports, and measures of Student's attention, including the CAS and ADHDT, persuasively diminished any doubts as to whether Student could control his attention, focus on school tasks and complete assignments. Further, although Student's auditory language deficits appeared significant, and his audiological functioning should have been assessed, based upon the results of several assessments, including the TAPS-3, Student failed to provide sufficient evidence that he could not access classroom instruction in kindergarten and was not adequately prepared for first grade.

31. Under these circumstances, the ALJ's equitable powers to provide relief in the form of repayment of Dr. Barron's assessment, or otherwise, was dependent on a determination that Student was deprived of a FAPE. As Parents failed to meet their burden of proof that their rights to participate were impeded, and Student failed to

meet his burden of proof that he was deprived of an educational benefit or FAPE in kindergarten as a result of District's failure to assess, no remedy is available. Student's request for reimbursement of Dr. Barron's assessment is denied. (Legal Conclusions One through 30, and Factual Findings One through 165.)

ISSUE TWO: WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY UPON PARENTS OCTOBER 25, 2011, REQUEST FOR ASSESSMENT.

32. Student contends that District was obligated to assess Student in all areas of suspected disability upon Parents' referral for assessment dated October 25, 2011, and that its failure to do so denied him an educational benefit. As a remedy, Student requests payment for Dr. Barron's independent assessment. District maintains that it was not obligated to assess Student just because Parents' requested a referral. District relies upon *Pasatiempo v. Alzawa* (9th Cir. 1996) 103 F.3d 796, 804, for the proposition that District does not have a duty to comply with a parental request where it has no reason to suspect a disability. District maintains that it satisfied its obligations when it reviewed Student's records, which did not include any documentation from Manhattan Head Start, interviewed Ms. Escobar, conducted a LAS screening, and provided Parents a timely response where it notified them of its decision and provided them with the procedural safeguards.

33. Legal Conclusions One, and Four through 30, are incorporated herein by this reference.

34. A referral for assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, service provider or foster parent. (Ed Code, § 56029.) As with District's child find obligations, set forth above, the threshold for suspecting that a child has a disability is relatively low, and does not require an inquiry as to whether the pupil qualifies for special education. (*Cari*

*Rae S., supra*, 158 F. Supp. 2d at p. 1194.) Screenings are not assessments, but are used to determine appropriate instructional strategies. (20 U.S. C. § 1414(a)(1)(E); 34 C.F.R. § 300.302.) In general, a pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) This section, however, is not intended to replace the assessment process discussed above. Rather, it refers to the type of educational methods to be used once a child has been determined to have exceptional needs.

#### Analysis of Issue Two.

35. Student did not meet his burden of proof that District was obligated to assess Student as a result of Parents' October 25, 2011, request for assessment. Given that the threshold for an assessment is low, there are few circumstances where Parents' referral does not require school district's to assess. Under the very limited circumstances here, District was not required to assess Student upon receipt of the Parents' October 25, 2011, assessment request, November 4, 2011. Student provided insufficient evidence that Parents' request for an initial assessment notified District of any suspected disability. District had no previous experience with Student, and no notice of any medical diagnosis or developmental delays. It did not have any records from Manhattan Head Start, and although it would generally be on notice of Student's educational history, or have easy access to records, where Student had attended its or another school district's programs, there was no evidence that Manhattan Head Start maintained any educational records, or that its records were readily available to District. Student began kindergarten less than two months before Parents' request. Parents notified District only of their concern with Student's academic performance. Parents' referral referenced Ms. Escobar's representations about Student's academic performance, and did not contain any independent information from Parent, including any information

about Student's speech and language delays, which they later repeated to every assessor. District was entitled to a short delay to conduct an investigation, which it did. It also conducted a LAS screening, which according to Legal Conclusions 34, was not a substitute for an assessment, but was an appropriate tool in the general education setting, considering that Parents' request for an LAS assessment was not supported by any information about his speech and language deficits. District checked with Ms. Escobar regarding her discussions with Parents to clarify their concerns, which Ms. Escobar confirmed were academic, particularly math. After it reviewed available records, which at that time would have consisted of the CELDT, class work, and Ms. Sebastian's screening, District reasonably and timely denied Parents' request. Based upon Parents' request for an OT assessment, District committed to an OT screening, which was not done until February 1, 2012, but Mother was provided with the results at the SST meeting. District's failure to conduct the screening did not deprive it of information about a suspected disability. Mother admitted to Ms. Rhee, when she later assessed Student that she was not concerned with Student's gross and fine motor skills, Ms. Rhee's later assessment confirmed that it was not an area of suspected disability, and Mother later had the opportunity to participate in the IEP team meeting where the OT assessment was reviewed. District responded without delay, within 15 days of Student's request, on November 4, 2011, and provided its detailed response to Parents' last known address, where it included a notice of Parents' procedural safeguards. Further, District notified Parents that it was forming an SST to address their concerns and explore general education interventions.

36. District did commit a procedural violation when it failed to timely start to assess Student in all areas of suspected disability by the time of the February 1, 2012, IEP team meeting. As set forth above regarding Issue One, District was on notice shortly after it sent the letter to Parents, that Ms. Escobar had concerns about Student's

attention and focus, concerns that went beyond academic performance, and his language deficits, which at that early part of kindergarten, without any additional information, could have been attributed to his ELL status. As set forth in Issue One, once it was on notice of Student's attention and focus challenges, it was obligated to start the assessments to fulfill its child find duties. As such, in addition to District's continuing child find obligations, District was required to assess Student in all areas of suspected disability, no later than about February 1, 2012, when Mother repeated her request for an assessment. If District had timely assessed Student, an IEP would have been held no later than April 2012.

37. For the same reasons stated in Issue One, Student persuasively identified numerous suspected areas of disability, which should have been assessed, including ADHD, an expressive and receptive language disorder, and an audiological processing disorder.

38. Student failed to prove by a preponderance of the evidence, that District's failure to assess Student in all areas of suspected disability earlier than it did impeded Parents' right to participate. As stated in Issue One above, Parents' right to participate in decisions regarding Student was not infringed, because, as their written request for assessment showed, they were aware of their right to request an assessment based upon their perception of Student's needs, had been provided notice of all IDEA procedural safeguards, including their right to file for due process, and participated in an IEP team meeting after the assessments were eventually completed.

39. Student did not meet his burden of persuasion that he was deprived of an educational benefit in kindergarten, or not prepared for first grade, as a result of its failure to timely assess Student in all areas of suspected disability. As stated in Issue One above, Student was provided interventions in kindergarten and his performance improved despite his continued attention and focusing challenges, and any other



suspected disabilities, and at the end of kindergarten he was prepared for first grade. As further stated in Issue One above, Student, at the start of first grade, did not demonstrate proficiency in all classroom areas, but he demonstrated academic competency on standardized measures, was able to attend and focus, and responded well to prompts and redirection. As such, Student provided insufficient evidence to meet his burden of persuasion that he required special education and related services to access his kindergarten or be prepared for first grade.

40. Under these circumstances, as in Issue One above, the ALJ's equitable powers to provide relief in the form of repayment of Dr. Barron's assessment, or otherwise, was dependent on a determination that Student was deprived of a FAPE. As Parents failed to meet their burden of proof that their rights to participate were impeded, and Student failed to meet his burden of proof that he was deprived of an educational benefit or FAPE in kindergarten as a result of District's failure to assess, no remedy is available. Student's request for reimbursement of Dr. Barron's assessment is denied. (Legal Conclusions One through 39, and Factual Findings one through 165.)

### ISSUE THREE: WHETHER DISTRICT'S LAS ASSESSMENT WAS APPROPRIATE SUCH THAT STUDENT IS NOT ENTITLED TO AN IEE AT PUBLIC EXPENSE

41. In response to Parents' request for an LAS IEE, District requests a determination that its assessment was appropriate, and that it does not have to fund an IEE at public expense. District argues that Ms. Sebastian's LAS assessment met all the criteria of an appropriate assessment, including her qualifications, and the range of formal and informal assessment tools administered. Student disagrees and maintains that he is entitled to an independent assessment due to deficiencies in Ms. Sebastian's assessment. In his closing brief, Student challenges Ms. Sebastian's repeat administration of the CASL, two months after Dr. Barron, her failure to include in her report a verbatim sample of Student's language that she used to determine Student's

ineligibility, and Ms. Sebastian's reliance on the older PLS-4, instead of PLS-5, which is normed for a bilingual population.

42. Legal Conclusions One, Four through 21, and 26, are incorporated herein by this reference.

43. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).) Following the assessment, an IEP team meeting shall be held within 60 days of receipt of parental consent. (Ed. Code, § 56329.)

44. 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. (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).)

45. When a parent disagrees with an assessment obtained by a school district, the parent is entitled to an IEE from qualified specialists at public expense unless the school district is able to demonstrate at a due process hearing that its assessment is appropriate. (Ed. Code, §§ 56329(b) & (c), 56506, subd. (c); 34 C.F.R. § 300.502.) In response the school district must, without unnecessary delay, either initiate a due process hearing to show that its evaluation was appropriate, or ensure that an IEE is provided at public expense, unless the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502, subd. (b)(2).) Except for requiring that an IEE at public expense meet agency criteria regarding assessments, the district may not impose conditions or timelines related to obtaining an IEE at public expense. (34 C.F.R. § 300.503.)

#### Analysis of Issue Three

46. As required by Legal Conclusions 15 and 43, District used a LAS pathologist to assess Student for a possible language disorder. Ms. Sebastian was well qualified to conduct the assessment. She was not a bilingual LAS pathologist, but no evidence was introduced that she was required to be bilingual to competently assess Student, or that the Spanish-language translator was required to have certain credentials which he or she did not. As required, Ms. Sebastian prepared a report and included in her report a wide range of informal and formal assessment measures, including interviews with Mother, Student, and Ms. Cruz and her observations during testing. Ms. Sebastian's report contained all the necessary elements specified in Legal Conclusions 44. Ms. Sebastian accurately transcribed the results of a range of formal assessments, and summarized her informal interviews and observations.

47. District did not meet its burden of persuasion that its LAS assessment was appropriate because not all formal assessment measures used were reliable. Although Ms. Sebastian was well qualified and used a variety of formal and informal assessment tools, Ms. Sebastian's selection of formal assessments was deficient. Ms. Sebastian admittedly was mistaken in her reliance on the CASL, which according to the publisher guidelines should not be administered within at least six months. Ms. Sebastian's CASL scores were inflated, and not as reliable as Dr. Barron's scores. Notable was Student's 12 point increase in syntax, from the first to the seventh percentile, an area which was also a common ELL challenge. However, Ms. Sebastian's conclusions regarding the CASL were contrary to the manual which reported Student's scores as consistent with clinically-delayed English-speaking pupils. Ms. Sebastian's assurance that she correctly considered formal measures, like the CASL, in context of her observations and interviews, was not sufficient to compensate for an unreliable score. Given the importance of distinguishing between Student's ELL status and a language disorder, it was critical that the standardized assessments used were independently reliable. Ms. Sebastian's selection of the PLS-4 instead of the PLS-5, which was normed for pupil's like Student, while not inappropriate, in and of itself, when taken together with an unreliable assessment, reduced the number of strong objective measures underlying Ms. Sebastian's opinion. Other formal assessment measures Ms. Sebastian selected were appropriate. She used bilingual measurements which more accurately depicted Student's strengths and weakness. Nevertheless, given the deluge of assessments, demonstrating Student's difficulty with syntax, sentence structure and comprehension, and overall auditory information that was not accompanied by visual stimulus, including the assessments administered by Ms. Dickter, her use of an important, but unreliable, formal assessment, like the CASL, did not advance District's burden of proof.

48. District did not meet its burden of persuasion that its speech and language assessment was appropriate because Ms. Sebastian relied upon incomplete assumptions about Student's primary language development and discounted audiological deficits which could account for language deficits that could not be attributed to his ELL status. As set forth in Legal Conclusions 17, where ELL pupils, like Student, are assessed, it is critical to distinguish between LAS disorders and characteristic ELL delays. As Ms. Dickter persuasively testified, (Factual Findings 148 through 165), the crux of Ms. Sebastian's opinion that Student did not have an expressive or receptive language disorder was not supported by Student's history, in particular, his lack of a functional primary language in Spanish, and continued deficits in the Spanish-language. Ms. Dickter's conclusion that Student did not have a functional primary language was supported by Ms. Velasquez's observation that Student was not proficient in Spanish for his age. Ms. Velasquez's and Ms. Sebastian's conclusions that he either did not learn enough Spanish, or lost his Spanish when he started learning English, were not reconciled with his developmental history. Understanding whether Student had developed a primary language and expected proficiency in it for his age was critical to assessing whether Student's language challenges, including his impaired score in syntax, were due to his ELD-one status, or signified a language disorder. It was particularly important to fully account for Student's primary language development in view of Ms. Sebastian's heavy reliance on informal measures and observations to form her opinion. Ms. Sebastian admitted that she discounted reports of Student's primary language delays, finding it more relevant to measure Student's speech today. Based upon her observations, she maintained that Student could speak one 8 word grammatically correct sentence in his primary language. Ms. Sebastian's report of Student's conversations sharply differed from Ms. Dickter's full language samples. Unlike Ms. Dickter, who set forth extensive verbatim spontaneous or "real life" unscripted conversations, Ms. Sebastian did not include an

exact transcription of Student's full language sample, or the questions she used to elicit his responses. Although, as set forth in Legal Conclusions 16, Ms. Sebastian was required only to report her findings from her transcript of conversations, given her assumptions about Student's primary language development, and his ELD-one status, her interpretation of Student's language sample, without an exact transcript was unreliable, and provided insufficient foundation for her opinion. District's burden of proof was also affected by equally nonspecific reports of her observations of Student on the play yard, and Ms. Cruz's reports of Student in the classroom. Further, as Ms. Dickter testified, low scores on standardized measures of Student's audiological processing, could account for Student's language delay and signify that Student had a disorder that was not explained by his ELD-one status. Student consistently performed low on audiological-related measures, including the PLS-4 measure of Auditory Comprehension Ms. Sebastian administered, and numerous other assessments, including assessments administered by Ms. Velazquez and Ms. Mealey-Ures, Dr. Barron and Ms. Dickter.

49. In sum, due to defects in Ms. Sebastian's use of the CASL, her failure to fully account for Student's primary language developmental delays, and possible auditory deficits, and reliance on incomplete language samples, District's LAS assessment was inappropriate. District shall make agency criteria available to Student within seven days of this decision, and fund an IEE at public expense. If the assessor requests to observe Student at his school and/or home, within three weeks of this decision, District shall provide access to Student's classroom, for no more than one 1 hour session, and school play yard, for no more than one, half-hour session, and Parents shall provide access to their home for no more than one 1 hour session. (Legal Conclusions 41 through 48, and Factual Findings One through 165.)

## ORDER

District shall fund an LAS IEE at public expense. District shall provide Student with agency criteria for the assessment within seven days of this decision. If the assessor requests the opportunity to observe Student at his school and/or home, within three weeks of this decision, District shall, provide access to Student's classroom, for no more than one 1 hour session, and to the school play yard, for no more than one, half-hour session, and Parents shall provide access to their home, for no more than one 1 hour session.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on Issue One and Issue Two, the two issues heard and decided in Student's due process hearing request, and Student prevailed on Issue Three, the sole issue heard and decided in District's due process hearing request.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: May 16, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings