

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

COMPTON UNIFIED SCHOOL DISTRICT;  
ABC UNIFIED SCHOOL DISTRICT; AND  
MID-CITIES SELPA,

Respondents.

OAH CASE NO. N 2006011030

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on June 19-23, 2006 and on July 20, 2006, at the offices of the Compton Unified School District, 417 West Alondra Boulevard, Compton, California.

Petitioner-Student (Student) was represented by his attorney, David M. Grey, Esq. Student's mother (Mother) was present during the hearing on Student's behalf. Student and his father were only briefly present at the hearing.

Respondent Compton Unified School District (Compton) was represented by Daniel L. Gonzalez, Esq. and Patrick Peng Wang, Esq., of Littler Mendelson. Respondent ABC Unified School District (ABC) was represented by Brian R. Sciacca, Esq., of Atkinson, Andelson, Loya, Ruud & Romo. Sheila Levy-Craven, ABC's Director of Pupil Support Services, and Terri Villa-McDowell, ABC's SELPA Facilitator, were also present on ABC's behalf.

On June 16, 2006, respondent Mid-Cities SELPA moved to be dismissed from the action on the grounds that it is not a public education agency for purposes of special education due process hearings pursuant to Education Code section 65601, subdivision (a). The motion was heard at the commencement of the due process hearing. Ray Guillaume, Mid-Cities SELPA Director, appeared at the commencement of the hearing in support of the motion to dismiss. At that time, Student voluntarily dismissed Mid-Cities SELPA, without prejudice. Also at that time, ABC renewed its previously-denied motion to bifurcate the hearing of the issues against ABC. The motion was denied. Sworn testimony and documentary evidence were then received at the hearing.

Student's second amended due process complaint was filed on March 20, 2006. At the conclusion of the hearing on July 20, 2006, a continuance was granted until August 14, 2006, for the parties to file closing briefs. All parties filed closing briefs on that date. Student's closing brief has been designated in the record as Petitioner's Exhibit 12. Compton's closing brief has been designated in the record as Respondent Compton USD's Exhibit Y. ABC's closing brief has been designated in the record as Respondent ABC USD's Exhibit Z.

## ISSUES

### I. ABC SCHOOL DISTRICT

1. Did ABC deny Student a free, appropriate, public education (FAPE) by reason of one or more of the following:

- A. Failing to assess Student in all areas of suspected disability during May and June 2004?
- B. Failing to assess Student using the appropriate assessments in May and June 2004?

C. Failing to create and implement an Individualized Education Program (IEP) containing meaningful and measurable goals that addressed Student's unique needs from June 2004 through approximately March 24, 2005?

2. Is Student entitled to payment by ABC for compensatory education, or for any other services, including contribution to funding of placement in a non-public school (NPS)?

## II. COMPTON SCHOOL DISTRICT

1. Did Compton deny Student a FAPE from April 2005 through May 31, 2005, by failing to implement the June 16, 2004 IEP formulated by ABC, as later modified, and/or by failing to hold a 30-day interim IEP as required by Education Code section 56325, subdivision (a), in effect at that time?

2. Did Compton's assessment in May 2005 fail to assess Student in all areas of suspected disability, so as to deny Student a FAPE?

3. Did Compton deny Student a FAPE from April 2005 through January 30, 2006, by failing to formulate and implement an IEP which contained meaningful and measurable goals that addressed his unique needs?

4. Is Student entitled to placement in an NPS and/or compensatory education and/or other services, at Compton's expense?

## CONTENTIONS OF THE PARTIES

Student contends that ABC and Compton (collectively referred to as the Districts), failed to assess him in all areas of suspected disability, so as to address his alleged deficiencies in memory, processing speed, auditory processing, and speech and language processing, as well as his visual perceptual disorders, dyslexia, and his symptoms of attention deficit hyperactivity disorder (ADHD). Student also contends that ABC failed to assess him appropriately, in that it assessed him with tests that were outdated or were not

intended for use on pupils of his age. Further, he contends that the Districts failed to provide him a FAPE, in that their IEPs failed to contain appropriate goals that addressed his unique needs. Student also contends Compton violated Education Code section 56325, subdivision (a), by failing to implement the June 16, 2004 IEP, as modified by the February 2005 ABC addendum IEP and/or by failing to timely hold an interim IEP meeting. Student seeks compensatory education, educational therapy, placement at an NPS, and additional services at the expense of either or both of the Districts.

The Districts deny these contentions, and further contend that Student's own conduct was the cause of any failure by Student to progress. ABC also contends that Student's Mother consented to the ABC IEPs, and therefore his objections should be barred.

## FACTUAL FINDINGS

### GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student was born on March 30, 1991. He is 15 years old and has resided in the Compton Unified School District since February 2003.
2. At the time of the due process hearing, Student was being home-schooled. Immediately prior to commencing home-schooling, from approximately April 7, 2005 through approximately October 27, 2005, Student was enrolled at Willowbrook Middle School (Willowbrook), located in Student's home school district of Compton.

### STUDENT'S EDUCATIONAL BACKGROUND

3. Student attended elementary school in the Long Beach Unified School District (Long Beach). Long Beach retained him in second grade. Long Beach provided him special education services from December 1998 through April 17, 2003, when Student was in the fifth grade. His eligibility category at that time was specific learning disability, in the area of reading comprehension. The IEP team at Student's elementary

school in Long Beach met on April 17, 2003, at Mother's request. At that meeting, the IEP team exited Student from special education, also at Mother's request. Mother sought to transfer Student to ABC by means of an interdistrict permit, and she believed that the permit would not be issued if Student were receiving special education services. Therefore, Mother arranged for Student to be exited from special education in Long Beach, and she successfully enrolled him in ABC.

#### ABC UNIFIED SCHOOL DISTRICT

A. ABC Unified School District Assessments

B. ABC Unified School District Assessments

4. As is discussed in Legal Conclusions 9 and 10, a school district must conduct appropriate assessments and assess in all areas of suspected disability. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be provided and administered in the student's primary language or other mode of communication, unless this is clearly not feasible. As is further discussed in Legal Conclusions 4 and 10, if a school district fails to assess a student properly, and the failure results in a loss of educational opportunity to the student, or seriously infringes on the parents' opportunity to participate in the IEP process, the failure constitutes a denial of a FAPE.

1. Student's Areas of Suspected Disability

5. In April 2003, when Student was 12 years old, Student enrolled in the fifth grade in a general education program at Carver Elementary School (Carver) in ABC. There was no evidence as to his academic performance at Carver during fifth grade. Student struggled in sixth grade at Carver, during the 2003-2004 school year. His teacher attempted to help Student by providing him with peer tutoring and note-taking support,

and by helping student occasionally after school. Additionally, Carver placed Student in a "Title 1 reading class," which is a small, pull-out class for students who require extra academic help. Placement in a "Title 1 reading class" is based upon a student's standardized test scores. The class met 1-3/4 hours per day, five days per week. Student attended the "Title 1 reading class" from the beginning of the school year until approximately December, 2004. He was so embarrassed about attending the class that he became emotionally upset, and therefore his Mother and the District agreed to withdraw him from the class.

6. Student's sixth grade report card showed that, by the end of the year, he only met grade level standard in some areas of math, and in science. He approached grade level standard in reading skills and in most writing skills, and in nearly half of the math skills. In other academic skills, the report card showed that his academic performance was below grade level standard. Student had difficulty spelling words at grade level.

7. Student's suspected areas of academic disability during his sixth grade school year of 2003-2004 were reading, mathematics, and written language.

## 2. Appropriateness of ABC's Psychoeducational Assessment

8. While Student was in sixth grade, during the 2003-2004 school year, a Student Study Team determined that Student's academic performance warranted a referral for a psychoeducational assessment.<sup>1</sup> An ABC transdisciplinary evaluation team performed the assessment. The team included ABC psychologist Hazel Zigner, Psy.D., Alyssa Rose, a credentialed RSP teacher at Carver, and a nurse. The team assessed Student in May and

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<sup>1</sup> No party presented any evidence regarding the formulation or existence of an assessment plan.

June 2004. Dr. Zigner wrote a report dated June 16, 2004, describing the assessments administered to Student and their results.

9. The report included a behavioral assessment, and the results of a health screening that had been performed by the nurse. The nurse noted Student's asthma and allergies. The report also described the assessments that Dr. Zigner performed. Dr. Zigner, a 26-year employee of ABC, was qualified to assess Student. She had experience performing assessments, and assisted in teaching a course in intelligence assessments for many years at California State University, Long Beach. Dr. Zigner assessed Student's cognitive and academic skills using the following instruments:

Matrix Analogies Test-Expanded Form (MAT) Wechsler  
Intelligence Scale III (WISC-III) Comprehensive Test of  
Nonverbal Intelligence (CTONI) Bender-Gestalt Test of Auditory  
Analysis Skills (TAAS)

10. Alissa Rose, a credentialed RSP teacher at Carver with 16 years of experience, administered the Woodcock-Johnson III (WJ-III) examination to Student as part of the psychoeducational assessment. She has been trained to administer the WJ-III, and was qualified to administer the assessment.

11. The psychoeducational report concluded that Student "was presently functioning within the average range of nonverbal intelligence." Based upon Student's scores on the Bender Gestalt (which were not contained in the report), and the CTONI Geometrical NonVerbal IQ (104), the report noted that "[D]elays in sensory motor processing appear to be associated with a severe discrepancy" between Student's nonverbal ability and academic achievement in reading, mathematics, and written language. The report noted that Student's learning disability had been determined through standardized testing, classroom observations, work samples, review of records, and assessment of functional and developmental information. The report also noted that

Student's WJ-III Academic Knowledge test score of 102, with a grade equivalent of 8.1, might also have been used to determine eligibility for special education, since it was similar to the CTONI score that was used.

12. The WISC-III revealed that Student was functioning within the average range in verbal areas, within the borderline range in performance skills, and was functioning within the low average range of overall intelligence. It showed that he had "relative weaknesses" on the Processing Speed and the Freedom from Distractibility Factors, weaknesses in auditory concentration and attention for verbally presented math problems, and "difficulty with visual alertness to missing details and organization of puzzle parts to wholes." Dr. Zigner noted that Student may learn more efficiently through language processing channels and have more difficulty learning through visual-manipulative channels.

13. The report stated that Student is age-appropriate in his overall verbal skills, and that he is very verbal. The report states that Student's speech and language skills appear to be age-appropriate, and that he is able to define words and do verbal problem solving tasks equivalent to this age expectancies. The report states that Student does not demonstrate an auditory sequential processing disorder, yet also refers to "Student's problems in auditory sequential analysis. . . ." The report noted that Student's strengths were in science, humanities, social studies, and reading comprehension, and that he had difficulty in writing, spelling, and math fluency.

14. The report concluded that Student was eligible for special education services under the category of specific learning disability. The report recommended that consideration be given to placing Student in a Resource Specialist Program (RSP). The RSP setting is a small group setting, which provides Students more individualized attention than is available in the general education setting. The report recommended a variety of methods to address Student's difficulties with attention, task completion, math speed, writing and vocabulary skills, self-confidence, and social skills. The report

recommended that new material and concepts be presented vocally, verbally, and sequentially, and that more time should be given to Student when new concepts are taught. The report also recommended that instruction should utilize repetition, concrete examples, visual aids, and manipulative materials. Dr. Zigner suggested that Student should try to work against a stop watch or timer to improve his speed in math. In addition to direct phonics instruction, Dr. Zigner recommended whole-word and whole-language approaches in reading and writing.

15. Student's expert, Claudia McCulloch, Ph.D., criticized Dr. Zigner's methodology and her analysis. Dr. McCulloch, who is a California licensed educational psychologist and a former school psychologist for the Los Angeles and Torrance Unified School Districts, conducted an independent assessment of Student and generated her own report in approximately August 2005, which is further discussed below.<sup>2</sup> From a methodology standpoint, Dr. McCulloch criticized Dr. Zigner for administering and scoring the TAAS without reporting her reasons for doing so. Dr. McCulloch testified that, since the TAAS had a ceiling at the third grade level, it was not an appropriate assessment on its face, and therefore its administration warranted explanation. Dr. McCulloch also criticized Dr. Zigner for not calculating Student's processing speed using the WJ-III Academic Fluency subtests. Had she done so, she would have realized that Student's processing speed was "ultra, ultra, low." Dr. McCulloch not only considered it an error for Dr. Zigner to fail to fully appreciate Student's processing difficulties in and of itself, but this failure also highlighted Dr. Zigner's error in using the WISC-III instead of the WISC-IV. Dr. McCulloch opined that not only was the WISC-IV a more recent test, but it also more appropriately assessed a student who has slow processing speed. Also, Dr. McCulloch observed that had Dr. Zigner calculated Student's slow processing speed, she would not have recommended

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<sup>2</sup> There was no evidence that Dr. McCulloch's report was sent to ABC at any time prior to the time that Student filed his due process complaint.

that he perform math problems against a timer, since slow processing speed is “hard-wired” and cannot be corrected by performing timed exercises. Dr. McCulloch also criticized Dr. Zigner for failing to evaluate Student’s global memory skills, and therefore she was not aware that he had “massive, massive memory issues” that seemed to coincide with his slow processing speed.

16. Dr. McCulloch also criticized Dr. Zigner’s analysis of the assessment results, in that Dr. Zigner did not interpret the social/adaptive information, and in that she recommended that Student be placed in the RSP, when he needed “extensive support” in the “most intensive program possible.” Dr. McCulloch also noted the apparent discrepancy in Dr. Zigner’s report as to whether Student has auditory processing difficulties.

17. Dr. McCulloch criticized Dr. Zigner for not finding the specific disorders that Dr. McCulloch herself found, or for not appreciating their severity: symptoms related to ADHD, dyslexia, and visual perceptual disorders, as well as very slow processing speed, auditory and speech and language processing disorders, and severe memory deficits.

18. Dr. McCulloch’s criticisms do not detract from the appropriateness of the assessments, primarily because Student did not offer sufficient evidence that any of Dr. Zigner’s alleged errors impacted Student’s education at ABC. Dr. James Morrison, an ABC District psychologist, testified that WISC-III scores strongly correlate to WISC-IV scores.<sup>3</sup>

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<sup>3</sup> Student objected to Dr. Morrison rendering expert opinions, on the grounds that ABC had listed him as a witness in ABC’s prehearing conference statement, but that he was not listed as an expert witness. Student further objected to Dr. Morrison rendering opinions with respect to Dr. McCulloch’s report, on the grounds that the prehearing conference statement did not state that Dr. Morrison would address Dr. McCulloch’s report. Student’s objections were taken under submission, and Dr. Morrison was permitted to testify subject to the objections. Having considered the arguments and the evidence, the objections are overruled. ABC’s failure to specifically designate Dr. Morrison as an

He also noted that Dr. Zigner did not use the WISC-III to evaluate Student's eligibility for special education. Dr. Morrison acknowledged that the TAAS test had a ceiling at the third grade level. However, no evidence was presented as to why the TAAS was

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expert witness in the prehearing conference statement is excusable and did not cause prejudice to Student. Customarily, parties only specifically designate retained witnesses as "expert" witnesses in these matters, although many employees of the school districts, such as Dr. Morrison, regularly offer expert opinions during their testimony. Further, the areas of testimony to which a witness will testify are customarily described in general, amorphous, and ambiguous terms in prehearing conference statements, without objection. It would be draconian to penalize ABC for following these customs, especially when, as noted on the record at the hearing, Student himself did not comply with all of the prehearing procedures. Student was on notice of Dr. Morrison's capacity, and that he would testify regarding assessments, and should not have been surprised that Dr. Morrison would be asked about Dr. McCulloch's opinions. ABC designated Dr. Morrison as a witness in the prehearing conference statement and in its witness list, stating that he would testify about "ABC's initial assessment of Petitioner and prior assessments of Petitioner," as well as several other designated topics. During the hearing, and well before the time that Dr. Morrison testified, the parties stipulated that Dr. Morrison had not had any contact with Student, and counsel for ABC repeatedly stated that Dr. Morrison would testify. ABC produced Dr. Morrison's curriculum vitae on June 30, 2006, nearly three weeks before July 20, 2006, the day that Dr. Morrison testified. ABC's prehearing conference statement could have been clearer regarding both the expectation that Dr. Morrison would render expert opinions and the areas of his testimony, but these errors are not deemed to be significant enough to strike Dr. Morrison's testimony. Student could have attempted to clarify the areas to which Dr. Morrison would testify in advance of Dr. Morrison's testimony; he did not.

administered, or for what purpose the test was used. Therefore, there is no evidence to support that Dr. Zigner violated the precept that tests are to be validated for the purpose for which they are used by administering the WISC-III or the TAAS. Dr. Morrison also agreed that Dr. Zigner did not use the best assessment for measuring Student's processing skills. Yet, the report recognizes that Student has sensory motor processing deficits. Dr. Morrison was not asked to, and did not explain, the discrepancies noted between Dr. Zigner's finding that one of Student's strengths was in auditory sequential processing and her subsequent reference in the report to Student's "problems in auditory sequential analysis." No evidence was presented as to the significance of this apparent inconsistency in the context of Student's education, especially since the report contains recommendations to address Student's problems in auditory sequential processing. Nor was any evidence presented as to the impact of Dr. Zigner's failure to analyze social/adaptive information. No evidence was presented as to the impact on Student's education at ABC of Dr. Zigner's failure to report the Bender-Gestalt score. With respect to Dr. Zigner's recommendation of RSP placement, Dr. Morrison testified that such a recommendation was typical for an individual such as Student.

19. Significantly, although Dr. Zigner did not find the deficiencies that Dr. McCulloch discovered, they both concluded that Student had deficits in the same academic areas: reading, mathematics, and written language. Dr. Zigner's recommendations were similar to those of Dr. McCulloch, and addressed many of the same concerns. Both psychologists acknowledged Student's weaknesses in memory, processing skills, organization, and abstract reasoning, and proposed similar classroom accommodations to address these issues, such as using multi-modal forms of instruction, note-taking assistance, repetition, allowing additional time to complete tasks, explaining new concepts, and helping Student keep track of assignments and homework. Their recommendations also differed somewhat. For example, Dr. Zigner recommended that the

teacher use concrete examples, while Dr. McCulloch recommended that the teacher use metaphors. Dr. McCulloch criticized Dr. Zigner's recommendation that Student practice math skills while working against a clock, but Dr. Morrison supported Dr. Zigner's suggestion, because, in the real world, one's work nearly always has time restrictions. Such differences in opinion, especially when there was no evidence that any teacher actually subjected Student to these particular techniques, are not sufficient to demonstrate that any harm befell Student by reason of Dr. Zigner's recommendations.

17. Dr. McCulloch found that Student had "severe symptoms of the Dysphonetic type of dyslexia" and "milder symptoms of the Dyseidetic type of dyslexia" and possible ADHD, along with very significant visual processing problems, severe language processing problems, "ultra, ultra low" processing speed, auditory processing problems, and severe memory deficits. No evidence was presented, however, that ABC suspected, or reasonably should have suspected, the existence of these particular disabilities. Student's teachers at ABC were favorably impressed with Student's verbal abilities. Student's "Title 1" class teacher testified that Student had a good vocabulary, participated in class, remembered the stories he read in her class, and that Student remembered and used vocabulary words weeks after he had learned them in class. Student's sixth grade teacher testified that Student was not good at spelling, but no evidence was presented that Student had a problem in school with "reversals" or any other symptoms of dyslexia. Student's grade equivalent score of 8.1 and standard score of 102 on the Academic Knowledge subtest of the WJ-III demonstrated that Student had good long-term memory, and was able to absorb and remember a large amount of information across a variety of academic areas. Finally, Dr. McCulloch did not observe Student at ABC, nor interview his teachers there. She did not review any school work that Student performed while he was attending school in ABC. Under these circumstances, her criticisms of Dr. Zigner and ABC are based more on theory than in fact. Her opinions are, therefore, given less weight than the testimony of ABC's

witnesses, including Student's general education and special education teachers.

18. ABC assessed Student in all areas of suspected disability, and used the appropriate assessments to determine those suspected disabilities. ABC's conduct in assessing Student did not rise to the level of a denial of a FAPE.

B. ABC Unified School District IEPs

19. As is stated in Legal Conclusions 4, 7, and 8, IEPs must contain measurable annual goals and objectives that correspond to the Student's identified unique needs. A school district denies a FAPE if the IEP does not address a Student's unique needs. Furthermore, the adequacy of an IEP is determined from the perspective of the IEP team at the time of the IEP, and not in hindsight.

20. ABC's assessment identified Student as having a specific learning disability, with unique needs in the areas of reading, mathematics, and written language. After Dr. Zigner completed the psychoeducational assessment report, ABC convened an IEP meeting on June 16, 2004, the day following Student's last day of sixth grade. The IEP team consisted of Mother, a District Administrator, Student's general education teacher, Ms. Rose, and Dr. Zigner. The team found Student eligible for special education under the category of specific learning disability, in the areas of reading, mathematics, and written language. The team agreed that Student's preferred learning style was multimodal, so that material should be presented to him in a variety of ways.

21. The IEP team recommended that Student be placed in a General Education/RSP program, with RSP services in reading, writing, and math to be provided for two periods, five times per week. The team recommended the following instructional modifications: "Note taking support," "Modified presentation," and "Peer tutor." The team recommended the following testing and classroom accommodations, to be used in the areas of reading, written expression, spelling, and mathematics:

(1) Test will be administered in shorter segments, over an extended time period

- (2) Student will be given additional time to complete the test
- (3) Test will be taken in a small group or individual setting
- (4) Portions of the test (excluding the reading section) will be read to the student.

22. The IEP team reported Student's present levels of functioning, incorporating the observations of Student's classroom teacher, and the results of the psychoeducational assessment, especially the WJ-III scores. The IEP team also used Student's scores on the ABC Unified Reading and Writing Survey in the area of reading, and the Wide Range Achievement Test III, both of which were administered by Ms. Rose, in formulating the present levels of functioning. The IEP team set measurable goals and objectives in the areas of reading, math, and written language, based upon Student's classroom teacher's observations and the assessment data. These goals included, for reading:

When given one page of a 7th grade text, [Student] will state the main ideas of the text and identify at least two statements (evidence) within the text that support the main idea with 100% accuracy in at least 3 out of 4 trials.

The team also recommended that reading comprehension strategies be used to improve Student's reading.

23. The team, noting that Student had not yet mastered work with fractions, set the following math goal: "[Student] will correctly calculate at least 7 out of 10 problems involving multiplying and dividing of simple fractions in at least 3 out of 4 trials."

24. The team set the following writing goal: "After completing a first draft, [Student] will edit and revise his text to produce an edited version scoring at least 3 on the writing rubric in 2 out of 3 trials."

The IEP team recommended that Student improve his writing by editing his drafts and adding greater details.

25. The team drafted no goal in the area of fine and gross motor skills. The IEP contains a typed sentence that Student's "fine and gross motor skills appear to be age appropriate at this time, but a handwritten comment adds "Bender Gestalt indicates sensory motor processing disorder." The IEP contains no explanation of these notes. Dr. McCulloch, Student's expert, noted the apparent contradiction between the handwritten notation and the typed sentence. No evidence was offered or elicited regarding the identity of the person who wrote the comment regarding the Bender Gestalt, or its significance.

26. The IEP also states "Speech and language abilities appear to be age appropriate at this time." No pre-vocational/career goals were set, but the team recommended that Student write down all of his assignments and that parents check that all work was completed.

27. Mother initialed and signed the IEP, consenting to the program and services indicated in it. Mother was given the opportunity to participate in the development of the IEP.

28. The IEP was to be implemented at Fedde Middle School (Fedde), also in ABC. Student commenced seventh grade at Fedde at the beginning of the 2004-2005 school year.

29. The IEP was implemented at Fedde. Student was in the RSP class for one class hour (the second class of the day, commencing at 9:00 a.m.) and for two hours after school, five days per week. Many modifications and accommodations were tried in the RSP class, such as the use of Alpha Smart, small group and one-to-one instruction, test modifications, Student re-taking tests, reading test to him, and after-school interventions. At the end of the fall semester in seventh grade, Student's grades were "Ds" and "Fs" in Algebra, English, and Science, and he had a "C-" in History/Social Sciences.

30. On January 24, 2005, Mother and Student met with Student's RSP specialist and the assistant principal to discuss Student's scores on the WJ-III that ABC had

administered on January 11, 2005, and Student's progress. The scores reflected that student had strong recall skills but was weak on reading fluency and word attack skills. The RSP teacher and assistant principal recommended that Student attend a Special Day Class (SDC), where he could receive more one-to-one and small group instruction than he was receiving in the RSP class. At the meeting, Mother requested additional accommodations for Student. ABC offered additional accommodations in the form of extended test time, smaller group setting during tests, and support with all content subjects in the resource specialist classroom and after school in the Guided Study Program. Mother observed two SDC classes after the meeting.

31. The District convened a follow-up IEP meeting on February 2, 2005, which was attended by Mother, the District's special education supervisor, the school principal, Student's RSP teachers, the SDC teacher, and Student's science and history teachers. Student joined the team towards the end of the meeting. Mother expressed concern about Student's low grades. The teachers reported that Student was not completing homework and was very disorganized. The RSP and history teachers reported that Student had difficulty in language arts. The team did not change the goals and objectives from the initial IEP. However, the team agreed to change Student's placement from RSP to SDC effective February 7, 2005, for Math, English, and Science. The team agreed that Student would remain in general education for History. After the meeting, both Mother and Student signed the addendum IEP, which was implemented.

32. During seventh grade, from September 2004 through March 24, 2005, Student had 17 days of unexcused absences and he was absent one day due to illness. He was tardy nine days, to the extent that he missed the beginning of his 9:00 a.m. RSP class on those days. Occasionally, he would defiantly refuse to do his assignments.

33. Student's last day at Fedde was approximately March 24, 2005. In April 2005, Student transferred from Fedde to Willowbrook, which is located in his home district of Compton.

34. ABC provided a FAPE in that the goals and objectives as set forth in the June 16, 2004 IEP (which were incorporated into the February 2005 addendum IEP) were designed to meet Student's unique needs. Dr. Zigner's and Dr. McCulloch's assessments demonstrated that Student required special education services in the areas of reading, math, and written language. Student's IEPs at ABC provided goals and objectives in each of those areas. Dr. McCulloch criticized the goals and objectives as too ambitious for Student, but she neither observed Student in class nor contacted his teachers at ABC. In contrast, Student's teacher at Carver, who assisted in drafting the goals and objectives based upon his personal experience with Student in the classroom, did not consider the goals to be too ambitious. Ms. Rose, the RSP specialist who performed several of the assessments upon which the IEP was based, did not consider the goals to be too ambitious. She testified that the reading goals were appropriate in view of Student's sixth grade level reading score on the ABC Reading and Writing Survey. Student's RSP teacher at Fedde, who was responsible for implementing portions of the IEP, also agreed with the goals and objectives of the Math and Written Language portions of Student's IEP of June 16, 2004. (Since he was not Student's reading teacher, he was unable to comment on the appropriateness of that goal.) The testimony of Student's teachers in this regard, which is based upon their personal experience with Student's performance in the classroom, outweighs the more theoretical opinion of Dr. McCulloch on this issue.

35. Moreover, the opinions of the ABC witnesses who formulated the goals and objectives at the IEP meeting are entitled to more weight than Dr. McCulloch's opinions on this topic. Dr. McCulloch's opinions are, of necessity, infused with hindsight. The goals and objectives in the IEP, however, must be evaluated as of the perspective of the IEP team at the time they were written. (Legal Conclusion 7) Student presented no persuasive evidence that the goals and objectives in the IEP were unreasonable or otherwise inappropriate from the point of view of the IEP team in June 2004, when the IEP was initially formulated, or in February 2005, when the IEP was

modified to change Student's placement.

36. No evidence was presented that directly addressed whether, or to what extent, Student met the goals in the IEP while at Fedde. The parties apparently did not dispute that Student did not progress well at Fedde. Student's lack of progress does not necessarily implicate the conduct of ABC or the goals in the IEP. Student's attendance record at Fedde was not optimal, in that he had numerous absences and tardies. Student's SDC teacher testified, without contradiction, that Student's attendance record probably adversely impacted his education. Student willfully refused to perform assignments. Student did not present evidence discounting the effect of these other factors on his progress at Fedde. Also, by the time ABC placed Student in special education, he had been without special education services for nearly a year, since Mother enrolled him in ABC as a general education student. This circumstance adversely impacted his progress. Finally, Student voluntarily transferred from Fedde several months before the end of the school year, and only a few weeks after having been placed in the SDC class. It is therefore unknown how well he might have progressed in the SDC at Fedde.

37. Student's relatively short tenure in special education at ABC actually illustrates that ABC generally acted appropriately in identifying Student as a candidate for special education services and placing him in special education. ABC monitored Student's progress, and, when less formal interventions were not successful, ABC assessed him. Upon determining that he was eligible for special education services, ABC provided an RSP placement to Student. After several months, ABC determined that the RSP placement was not appropriate and shifted Student from the RSP placement to the more restrictive SDC placement. In sum, ABC identified Student as in need of special education services, and it provided the services, in the least restrictive environment, in a relatively timely fashion. In view of ABC's efforts, it is troubling that Student contends that ABC inadequately assessed and provided for his learning disabilities, when Mother represented to ABC that he had

none. Additionally, Mother's previous acquiescence in the ABC IEPs adversely reflects upon her credibility in criticizing them now.

#### COMPTON UNIFIED SCHOOL DISTRICT

##### A. Compliance with Education Code Section 56325, Subdivision (a)

38. As is explained in Legal Conclusion 11, a school district which enrolls a student from a special education program in another district is required to follow certain procedures in placing the transfer student in the school district's own special education program. When Student transferred from ABC, Compton was required either to formulate and implement a new IEP, or to implement ABC's IEP of June 16, 2004, as modified by the February 2005 addendum, as an interim placement. Then, within 30 days of enrolling Student, Compton was to convene an IEP team meeting to decide upon a final placement for Student. As is explained in Legal Conclusion 4, Compton's failure to comply with these procedures could constitute a denial of a FAPE if they denied Student an educational benefit or substantially interfered with his parents' ability to participate in the IEP process.

39. Student commenced attending Willowbrook on April 7, 2005. He was placed in the SDC, which was team-taught by Mr. Jones and another special education teacher, assisted by two aides. Mr. Jones is a certified special education teacher who has taught special education in Compton for 10 years. Mr. Jones holds a Master of Arts degree in Special Education Instruction, Curriculum, and Development, along with three other Master of Arts degrees in various educational areas. Mr. Jones taught the SDC class using multiple modalities for all subjects. He used modified texts, and previewed lessons with students prior to teaching the material. He used a variety of reading programs, and provided individualized instruction. When Student commenced attending Willowbrook, Student's educational program was governed by the June 16, 2004 IEP from ABC, and by the February 2005, addendum IEP.

40. On May 2, 2005, Jacqueline Stewart, the school psychologist, conducted a psychoeducational assessment of Student, in preparation for the IEP. She wrote a report dated May 4, 2005.

41. On May 31, 2005, Compton convened an IEP. Mother, Student's grandmother, two advocates for Student, Willowbrook's social worker Mr. Jones, and other Compton representatives attended the meeting. Ms. Stewart did not attend the meeting. At the meeting, Mother presented a list of concerns and requests, which was attached to the IEP. The list expressed her concern about safety at Willowbrook. The list included a request for independent speech and language, audiological, vision therapy, assistive technology, and occupational therapy assessments. Mother requested that Student participate in the Lindamood-Bell Program and the Fast ForWord Program during the summer. The list also outlined a variety of accommodations, and requested that Student be listed as eligible for special education service under both "learning disabled" and "other health impaired." Mother's list concluded: "Due to the poor academic and safety record of the school, [Student] will require a non-public school placement by the fall semester."

42. The team noted that Student had a severe discrepancy between intellectual ability and achievement, and determined he qualified for special education services under the category of Other Health Impaired, based upon his asthma and allergies. The IEP included a record of Student's present levels of functioning in the areas of Academic Achievement, Social-Emotional Status, Psycho-Motor Development, Pre-Vocational/Vocational Skills, Self-help Skills/Adaptive Behavior, Communication Status, Intellectual Development and Medical Health Information/Physical Condition. The team noted that Student did not know his current address, city, and zip code. The team also noted that Student did not wear his eyeglasses regularly, which impeded his writing skills. The team realized that the assessment done by Ms. Stewart was inadequate. In view of this, and Mother's concerns, the IEP team decided not to proceed with the IEP. Rather, the

IEP team signed a partial IEP document that did not include any goals and objectives, but that included these comments:

IEPT determined that due to limited information provided about [Student], another IEP meeting will be held to address the students [sic] concerns. CUSD Program Coordinator and the Special Needs Office will communicate with the parent and education personnel about other services.

(ESY) Student is recommended to participate in Extended School Year program, as due to the nature and severity of the student's disability, regression of skills is likely to occur if the student is out of program for an extended period of time.

Progress report will be communicated to parent bi-weekly and quarterly.

Mother did not agree or disagree with the partial IEP document. Compton maintained Student's placement in the SDC, with his educational program governed by the ABC IEP of June 16, 2004, and by the February 2005 addendum IEP, pending further assessments and the convening of another IEP meeting.

43. Compton substantially complied with Education Code section 56325, subdivision (a). Compton complied with the portion of Education Code section 56325, subdivision (a), requiring that it implement, to the extent possible, the ABC IEP and the addendum IEP. It did not comply with the letter of section 56325, subdivision (a), in that it did not hold an IEP team meeting until 50 days of Student's enrollment in the District, instead of the 30 days required by the statute. There was no evidence that the brief delay in holding the IEP team meeting denied Student an educational benefit, or prevented

Mother from participating in the development of the IEP, so as to rise to the level of denial of FAPE.

B. Compton Unified School District's Psychoeducational Assessment

44. The legal standards regarding assessments are set forth in Findings of Fact 4, *supra*. In summary, Compton is obligated to assess a student in all areas related to his suspected disability, using appropriate assessments performed by a qualified assessor. The assessments themselves must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must, to the extent possible, be provided and administered in the student's primary language or other mode of communication. The failure to properly assess a student can constitute a procedural violation of FAPE. (Legal Conclusions 4, 9, and 10.)

45. On May 2, 2005, Ms. Stewart administered the following assessments to Student:

Test of Auditory Perceptual Skills-R (TAPS-R) Test of Visual  
Perceptual Skills-R (TVPS-R) Beery-Buktenica Developmental  
Test of Visual-Motor Integration (VMI) Kaufman Test of  
Educational Achievement (KTEA) Matrix Analogies Test (MAT)<sup>4</sup>

Ms. Stewart concluded that Student was functioning in the low-average range of cognitive ability. She noted his psychological processing strength in visual motor integration, and that his psychological weaknesses were in visual and auditory perceptual

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<sup>4</sup> No party presented any evidence regarding the formulation or existence of an assessment plan.

skills. His academic achievement was below his age and grade level. The report concluded that he appeared to have a learning disability which was "affecting the area of spelling."

The report contained two recommendations: (1) Student "may be considered for RSP services" and (2) Student's "educational program should be integrated into the regular educational program as much as possible."

46. Ms. Stewart's assessment was deficient in various respects. She only identified spelling as an area of disability. She did not interpret several of the assessments, such as the KTEA, the TAPS-R, and the TVPS-R. In view of Student's educational history from ABC, Ms. Stewart should have more fully interpreted and analyzed Student's reading, math, and language skills, and more specifically identified Student's disabilities in these areas. Her report mistakenly noted that it was a triennial assessment. She did not appear to recognize that the severe discrepancy in the subtest scores on the TAPS-R and the TVPS-R rendered the quotients for those tests inaccurate. She did not explain her recommendation that Student be considered for RSP services, in view of Student's SDC placement at ABC. However, the weight of the evidence demonstrated that Compton did not rely upon Ms. Stewart's assessments and report. Rather, at the IEP team meeting of May 31, 2005, the team rejected Ms. Stewart's work, decided to obtain further assessments, and decided to maintain the ABC IEP of June 16, 2004, as modified by the addendum IEP of February 2005. Therefore, Ms. Stewart's assessments did not impact Student's education. Compton's psychoeducational assessment of May 2005 was flawed, but Compton did not thereby deny Student a FAPE.

#### C. Compton Unified School District's IEPs

47. As is stated, *supra*, and in Legal Conclusions 7 and 8, IEPs must contain measurable annual goals and objectives that correspond to the Student's identified unique needs. A school district denies a FAPE if the IEP does not address a Student's unique

needs. Furthermore, the adequacy of an IEP is determined from the perspective of the IEP team at the time of the IEP, and not in hindsight.

1. IEP MEETING OF MAY 31, 2005

48. The IEP meeting of May 31, 2005, resulted in an IEP which contained meaningful and measurable goals that addressed Student's unique needs. At the meeting, the IEP team agreed that the ABC IEP of June 16, 2004 and the addendum of February 2005 would govern Student's educational program pending the performance of additional assessments. As was discussed above, the ABC IEP and its addendum were appropriate, and provided a FAPE. In view of the inadequacy of Ms. Stewart's assessment, and the relatively short amount of time that Student had been at Compton so as to be observed, the IEP team's plan to continue to implement the ABC IEP and its modification was not objectively unreasonable at the time of the May 31, 2005 IEP meeting.

2. EVENTS PRIOR TO IEP MEETING OF OCTOBER 26, 2005

49. Subsequent to the May 31, 2005 IEP meeting, Compton agreed to Mother's request that it obtain and pay for an independent assessment by Claudia McCulloch, Ph.D., a California licensed educational psychologist. Dr. McCulloch performed a neurodevelopmental assessment, which focuses on how a student's functioning impacts his learning and school performance. The assessment was performed during eight sessions between June 21, 2005 and August 26, 2005; each session lasted no more than 90 minutes. Dr. McCulloch produced a 125-page report, which she commenced writing on August 20, 2005. The report incorporated the results of the final testing session on August 26, 2005.

50. Dr. McCulloch observed Student's behavior during the testing sessions. Dr. McCulloch was unable to observe Student in the classroom, since the assessment occurred during the summer. She was unable to contact Mr. Jones, Student's SDC teacher at Compton, to obtain his impressions of Student.

51. In her report, Dr. McCulloch diagnosed Student as having the following disabilities:

Reading Disorder  
Mathematical Disorder  
Disorder of Written Expression  
Developmental Coordination Disorder  
Attention-Deficit/Hyperactivity Disorder  
Not Otherwise Specified (NOS)  
Learning Disorder NOS:

Speed of Processing Deficits  
Memory Deficits

Additionally, the report states that Student "does not 'fit neatly' into any singular category of dyslexia, but he most closely aligns with severe symptoms of the Dysphonetic [sic] type of dyslexia and with milder symptoms of the Dyseidetic [sic] type of dyslexia."

The report also mentioned that the following conditions should be ruled out: receptive-expressive language disorder, and central auditory processing disorder. The report also noted that attention deficit hyperactivity disorder, predominantly inattentive type, should be ruled out once Student was in an appropriate educational placement.

52. Dr. McCulloch's report recommended the following assessments/evaluations: speech and language (including phonological awareness and processing, as well as a screening for central auditory processing disorder), Lindamood-Bell, audiological, occupational therapy, assistive technology, and visual perception (in addition to visual acuity). Among the classroom settings and accommodations she recommended were: individualized instruction, extra time to complete tasks, study guides for tests, allowing Student to write on tests instead of using an answer sheet, instruction in multiple modalities, no timed activities, testing on portions of chapters, do not downgrade Student for handwriting or for technical errors in his writing, assistance in organizing his backpack and checking his homework assignment books, books on tape for pleasure reading and the Kurzewil program for academic reading, teaching by metaphor, and

evaluating his mastery of concepts several months after they have been taught. Dr. McCulloch recommended that Student's academic placement include a small student-teacher ratio, with a special education-credentialed teacher and a college-educated aide; modified textbooks, and opportunities for extensive repetition; access to assistive technology, including voice recognition technology; speech and language therapy, occupational therapy, social skills training; and psychological support with trained therapists on site. She recommended that Lindamood-Bell and FastForward be available and their concepts should be integrated into the curriculum.

53. Dr. McCulloch's report was transmitted to Compton on August 29, 2005, and Compton received it shortly thereafter. Also at the end of August 2005, Student commenced eighth grade in Mr. Jones's SDC class. He had not attended ESY during summer 2005.

54. In May 2005, Compton attempted to obtain a speech and language screening/observation of Student by Kathryn George, a licensed California speech and language pathologist employed by Mid-Cities SELPA. Ms. George unsuccessfully attempted on several occasions during June 2005 to contact Mother to schedule the screening/observation. At some point, the goal was broadened to perform an assessment, not merely a screening. In September 2005, Ms. George attempted not only to schedule the assessment, but also to obtain Mother's consent to observe and assess Student. Mother did not entirely cooperate with Ms. George's attempts to arrange the observation and assessment and to obtain her consent, but Mother eventually consented. The observation and assessment was scheduled for, and occurred on, October 11, 2005.

55. Ms. George and Gayle Adkins, the speech therapist at Willowbrook, performed the assessment, and Ms. George wrote the report. Ms. George's credentials include a B.S. degree in Communicative Disorders, an M.S. in Speech Pathology and Audiology, and an M.A. in Educational Administration. She has worked as a speech and language pathologist since approximately 1981. Prior to her employment with Mid-Cities

SELPA, she had been employed for approximately ten years by the Diagnostic Center of Southern California, where she had attained the position of Assistant Director. Ms. George has taken many classes regarding administering and interpreting tests in her field, and has held a Certificate of Clinical Competence from the American Speech-Language-Hearing Association continuously since 1982. She was qualified to perform the assessments.

56. Ms. George and Ms. Adkins performed the assessment for several hours at Willowbrook on a school day morning. The assessment process included a review of the assessment reports of Dr. Zigner, Ms. Stewart, and Dr. McCulloch. Ms. George noted in her report that both Ms. Stewart's report and Dr. Zigner's reports stated that Student had no problems related to the areas of speech and language. She noted Dr. Zigner's finding that Student performed better on verbal tasks/subtests than he did on non-verbal ones. Furthermore, she noted Dr. Zigner's conclusion that Student is age-appropriate in his overall verbal skills and able to do verbal problem solving tasks to age expectancies. Additionally, Ms. George noted in her report that neither Student's classroom teacher nor Mother had concerns related to Student's speech and language skills.

57. Ms. George and Ms. Adkins assessed Student in the areas of auditory processing, semantics, syntax/morphology, pragmatics, articulation, fluency, and voice. The examiners observed Student's behavior during the evaluation process, and Ms. Adkins observed Student in the classroom. Ms. George and Ms. Adkins asked Student problem-solving situation questions, and they administered the following standard assessments:

Comprehensive Receptive and Expressive Vocabulary Test,  
Second Edition (CREVT-2)  
Goldman Fristoe 2 Test of Articulation  
Oral and Written Language Scales (OWLS)

58. Ms. George and Ms. Adkins concluded that Student did not need or qualify for speech and language services, as his "results on all assessments tasks, both formal and informal, were within the average range." According to the examiners' report, Student displayed no auditory processing, discrimination, sequencing, or memory deficits, receptive and expressive communication skills were all within the average range for age and ability, and communication skills were within normal limits across domains. Student was cooperative and conversational during the assessment, and he performed at a higher level than the average for students in the District. With respect to the possibility that Student had a Central Auditory Processing Disorder, Ms. George testified that such a diagnosis was controversial, and that, in her opinion, there were no appropriate tests for such a disorder.

### 3. IEP MEETING OF OCTOBER 26, 2005

59. The District convened an IEP meeting to consider Dr. McCulloch's and Ms. George's reports. The meeting was set for October 13, 2005, but, due to Mother's unavailability on that date, it was not held until October 26, 2005.<sup>5</sup>

60. The meeting was attended by Mother and Student's advocate, and Willowbrook's principal, counselor, social worker, and nurse. Mr. Jones, Ms. George, and the District's Special Needs Program Coordinator also attended the meeting.

61. The IEP team recorded that Student was eligible for special education under the category of specific learning disability. The team recommended the SDC class setting, with mainstreaming services in the areas of history and science. The team also recommended ESY services. The team noted that "Further evaluations will be needed to

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<sup>5</sup> Since Mr. Jones commenced preparing for the meeting when it was set for October 13, 2005, some of the forms relating to the IEP meeting bear the typed date of October 13, 2005.

determine if assistive technology and other special needs services are needed.” The team also noted that Student exhibited certain symptoms of ADD/ADHD, which must be diagnosed by a physician. The team stated that “Student will be recommended for diploma track for high school graduation.” The team noted Student’s allergies and asthma and recommended that Student consistently carry his asthma medication.

62. The team recorded Student’s present levels of functioning in a variety of areas based upon Dr. McCulloch’s report and Mr. Jones’ observations. The team set measurable, quantifiable, goals in the areas of Pre-Academic/Academic-Reading, Academic Reading- Vocabulary Skills, Academic: Reading, Academic: Writing Skills; Pre-Academic/Academic Writing; Academic: Math Skills; Transition and Vocational Skills (which noted, in a teacher observation, that Student was continuing to work on learning his address, phone, and emergency information, with the assistance of his parents, and included a goal for spelling), Social Skills Development, Pre-Academic/Academic—Reading Fluency, and Adaptive Behaviors—Attendance, which addressed Student’s numerous tardies and absences. The academic goals were less ambitious than were the goals in the ABC modified IEP, in that they attempted to correspond to the grade level scores Student attained in Dr. McCulloch’s assessments for a particular skill. Thus, for example, Student’s grade equivalent scores in phonological awareness were at the kindergarten/first grade level. The goals for phonetically decoding words in the Reading goal contemplated Student decoding words at the first and second grade levels. The goals also contained notes referring to student’s need for assistance in organizational skills. The IEP team did not record any findings as to whether the goals in the ABC modified IEP had been met.

63. The IEP also included a Behavioral Plan, as Student had been involved in several altercations at school and was occasionally defiant. The team also formulated accommodations and modifications for use during testing, in the classroom, and for behavioral management. The modifications comported with many of Dr. McCulloch’s recommendations, to the extent that those recommendations could be implemented in

a public school setting. The IEP team also noted that Student failed to wear his eyeglasses consistently. The IEP modifications provided that Student must wear his eyeglass for tests, and that he be monitored to ensure that he consistently wears them.

64. Ms. George orally presented her report to the team. Mother refused to sign the IEP, and left the meeting abruptly.<sup>6</sup> She later submitted a written document requesting that Student be placed in Summit View NPS because she was concerned about Student's safety and Compton's failure to provide FAPE. Mr. Jones sent her the IEP for signature on October 28, 2006. She did not sign the IEP.

65. On October 27, 2006, Student ceased attending Willowbrook. Mother, dissatisfied with the IEP, safety issues at Compton, and Student's lack of progress at Compton, commenced home-schooling Student. She requested information regarding home- schooling and independent study from Compton, and Compton provided her with some information. Compton also provided a teacher for Student who had had some training in the Lindamood-Bell method. The teacher instructed him, and his brother, at their home using Lindamood-Bell techniques in reading and math. Since Mother did not formally withdraw Student from school, Compton commenced truancy proceedings.

66. The IEP of October 26, 2005, constituted an offer of a FAPE, pending the further assessments that were mentioned therein. The IEP addressed many of Mother's concerns, as expressed in the list that she presented at the previous IEP meeting. Additionally, the IEP was largely based on the Dr. McCulloch's independent assessments and report, which were requested by Mother. Compton did not incorporate all of Dr. McCulloch's recommendations in the IEP, but that does not detract from the finding that the IEP offers a FAPE, for an assortment of reasons. First, Dr. McCulloch report and testimony were rendered from the perspective of maximizing Student's potential. As is

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<sup>6</sup> There was conflicting evidence as to whether Mother left the meeting while it was still in progress. It is not necessary to resolve that conflict in this Decision.

stated in Legal Conclusion 5, the law requires only that Compton provide Student “a basic floor of opportunity.” Secondly, Dr. McCulloch’s assessment methods and interpretations had a tendency to maximize Student’s academic potential while minimizing his academic achievements. Thus, she characterizes him as performing more poorly than he actually does. Additionally, Dr. McCulloch recommended that Student have speech and language therapy, occupational therapy, and various assistive technology devices. At the same time, she recommended that Student be assessed in these areas. Until the assessments are completed, reason suggests that it is an open question as to whether Student actually requires the therapy and devices that Dr. McCulloch recommended.

67. The IEP proposed an educational program that contained measurable and meaningful goals and objectives that addressed Student’s unique needs, as identified by teacher observations and by Dr. McCulloch’s report. The goals were designed to help Student acquire the skills he needs to progress. The IEP was reasonably calculated to provide Student with an educational benefit. The weight of the evidence demonstrated that Compton was able to implement the IEP.

## LEGAL CONCLUSIONS

### A. APPLICABLE LAW

1. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code § 56000.)<sup>7</sup> FAPE consists of special

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<sup>7</sup> The ABC IEP was drafted prior to the reauthorization of the IDEA, which became effective July 1, 2005. Thus, this case straddles both versions of the IDEA. To the extent that provisions of the former version of the IDEA differ from the reauthorized version, and

education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).)

"Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402 (29).)

2. Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code § 56363, subd. (a).)

3. The United States Supreme Court recently ruled that the student in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) \_\_\_U.S. \_\_\_ [126 S.Ct. 528].)

4. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist.*, (9th Cir. 1002) 960 F.2d 1479 at 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural

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such differences are relevant to the determination of any issue in this Decision, they will be specifically noted. In most, if not all instances, however, the provisions of the former IDEA that are relevant to this Decision were not amended by the reauthorized IDEA.

flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Target Range, supra*, 960 F.2d 1479 at 1484.)

5. In *Rowley, supra*, 458 U.S. 176, The United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* At p. 201.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

6. Important, but not necessarily determinative factors in determining educational benefit are the student's grades and whether the student is advancing from grade to grade. (*Rowley*, 458 U.S. 176 at 203, and fn. 25.) Another factor is progress on standardized tests. (*Target Range, supra*, 960 F.2d 1479.) Another factor is whether the student makes progress toward the goals set forth in the IEP. (*County of San Diego v. Cal. Special Ed. Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458.)

7. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's

proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999), 195 F.3d 1141.)

8. IEPs must contain annual goals and objectives. (20 USC 1414(d)(1)(A)(ii) and 20 USC 1414(d)(1)(A)(viii)(I). For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. The annual goals are then divided into short-term objectives, which are measurable, intermediate steps between the present levels of educational performance and the annual goals. The objectives are developed based on a logical breakdown of the major components of the annual goals, and they can serve as milestones for measuring progress toward meeting the goals. (34 CFR § 300, Appen. A)<sup>8</sup>

9. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be conducted. (Ed. Code § 56320.) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the student's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code § 56381.) The student must be assessed in all areas related to his or her suspected disability,

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<sup>8</sup> Proposed amendments to the CFR to correlate to the reauthorized IDEA have recently been published. This citation is to the version of the CFR that was in effect when the ABC IEP and ABC modified IEP were drafted.

and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (a),(b).) The personnel who assess the student must prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code § 56327.)

10. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2),(3); Ed. Code § 56320, subd. (a),(b).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) (444 F3d 1149 at 1154-1155).)

11. In spring 2005, Education Code section 56325, subdivision (a), provided that whenever a student transfers into a school district from a school district not operating programs under the same local plan in which he or she was last enrolled in a special education program, the administrator of a local program shall ensure that the student is immediately provided an interim placement for a period not to exceed 30 days. The interim placement must be in conformity with an IEP, unless the parent agrees otherwise. The IEP implemented during the interim placement may be either the student's existing

IEP, implemented to the extent possible within existing resources, and which may be implemented without complying with section 56321 subdivision (a), or a new IEP, developed pursuant to Education Code section 56321. Prior to the end of this 30-day interim period, the IEP team must review the interim placement and make a final recommendation on the appropriate placement. (Ed. Code § 56325, subd. (b).)

12. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Id.* at p. 1497.) To obtain relief in the form of compensatory education, the student must present specific evidence as to how the compensatory education should be calculated. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516 at 524.)

## B. DETERMINATION OF ISSUES

### 1. ABC School District

13. Issue 1: Did ABC deny Student a free, appropriate, public education (FAPE) by reason of one or more of the following:

- A. Failing to assess Student in all areas of suspected disability during May and June 2004?
- B. Failing to assess Student using the appropriate assessments in May and June 2004?
- C. Failing to create and implement an IEP containing meaningful and measurable goals that addressed Student’s unique needs from June 2004 through approximately March 24, 2005?

14. Based on Factual Findings 5 through 18, and Legal Conclusions 4, 9, and 10, ABC appropriately assessed Student in all areas of suspected disability. To the extent that

Dr. Zigner's assessment contained errors or omissions, there was no evidence that any such errors or omissions deprived Student of an educational benefit, or prevented his parents from participating in the IEP process. ABC's assessment process did not deny Student a FAPE.

15. Based on Factual Findings 19 through 37, and Legal Conclusions 1 through 8, ABC's IEP of June 16, 2004 and the addendum IEP of February 2005, contained meaningful and measurable goals that addressed Student's unique needs. ABC's IEPs did not deny Student a FAPE.

16. Issue 2: Is Student entitled to payment by ABC for compensatory education, or for any other services, including contribution to funding of placement in an NPS?

In view of the determination of Issues I A, I B, and I C, there is no basis upon which to find ABC liable for any services.

## II. COMPTON SCHOOL DISTRICT

17. Issue 1: Did Compton deny Student a FAPE from April 2005 through May 31, 2005, by failing to implement the June 16, 2006 IEP formulated by ABC, as later modified, and/or by failing to hold a 30-day interim IEP as required by Education Code section 56325, subdivision (a), in effect at that time?

18. Based on Factual Findings 38 through 43, and Legal Conclusion 11, Compton's conduct did not rise to the level of a denial of a FAPE. Compton substantially complied with Education Code section 56325, subdivision (a). Compton's brief delay in holding its initial IEP meeting did not deprive Student of an educational opportunity or seriously infringe upon his parents' rights to participate in the IEP process.

19. Issue 2: Did Compton's assessment in May 2005 fail to assess Student in all areas of suspected disability, so as to deny Student a FAPE?

20. Based on Factual Findings 44 through 46, and 49 through 58, and Legal Conclusions 4, 9, and 10, Compton did not deny Student a FAPE by failing to properly assess Student in all areas of suspected disability. However, its assessment process was flawed. Compton properly disregarded the inadequate assessment of Ms. Stewart, and relied instead on the assessments of Dr. McCulloch, Ms. George, and Ms. Adkins. These assessors assessed Student in the areas of disability that they suspected, and for which they were qualified to assess Student. However, Dr. McCulloch's assessment also revealed additional areas of disability that she recommended be assessed, and Compton did not perform those assessments. Nevertheless, Student was not denied an educational opportunity by reason of Ms. Stewart's assessment, nor did the assessment significantly infringe upon his parents' rights to participate in the IEP process. Nor was there evidence that Compton's failure to perform the additional assessments recommended by Dr. McCulloch denied Student an educational opportunity, or seriously infringed upon his parents' rights to participate in the IEP process. Therefore, Compton's conduct did not rise to the level of a denial of a FAPE.

21. Issue 3: Did Compton deny Student a FAPE from April 2005 through January 30, 2006, by failing to formulate and implement an IEP which contained meaningful and measurable goals that addressed his unique needs?

22. Based on Factual Findings 59 through 67, and Legal Conclusions 1 through 8, Compton did not deny Student a FAPE from April 2005 through January 30, 2006, by failing to formulate and implement an IEP which contained meaningful and measurable goals that addressed his unique needs. Until October 2005, Compton implemented the ABC IEP of June 16, 2004, and the modified ABC IEP of February 2005, which contained appropriate goals that addressed Student's needs in reading, math, and written language. The IEP that was formulated at the meeting of October 26, 2005, was based largely on Dr. McCulloch's report, and contained appropriate and measurable goals. It proposed an

educational program that contained measurable and meaningful goals, that addressed Student's unique needs, as identified by Student's classroom teacher and by Dr. McCulloch, and it was reasonably calculated to provide Student with an educational benefit pending the further assessments that were mentioned therein, and the assessments that are ordered in this Decision. The weight of the evidence demonstrated that Compton was able to implement the IEP.

23. Issue 4: Is Student entitled to placement in an NPS and/or compensatory education and/or other services, at Compton's expense?

24. Based upon Factual Findings 52, 57, and 58, and Legal Conclusions 9 and 10, the conclusion that Compton did not deny a FAPE does not end the analysis. Student, by challenging the completeness of Compton's psychoeducational assessment of May 2005 and the goals and objectives in Compton's IEPs, has necessarily raised the issue as to whether Student requires further assessments. Dr. McCulloch, upon whose report the IEP of October 26, 2005, is based, identified certain of Student's disabilities, but raised questions about the existence of additional disabilities and recommended various additional assessments that should be performed to evaluate those disabilities. The IEP of October 26, 2005, also mentioned that Student requires further assessments. Compton has already performed a speech and language assessment, but there was no evidence that Compton's assessment covered Student's phonological awareness and processing, which Dr. McCulloch testified should be fully assessed.

25. Ms. George, the speech and language pathologist, testified that Student had no speech and language disabilities, and that no further assessments were required. Dr. McCulloch suspected that Student has difficulties with phonological awareness and processing, and recommended assessing those areas. If such difficulties exist but remain undetected, Student may lose an educational opportunity or benefit. The same reasoning

applies to the occupational therapy and assistive technology assessments, which Dr. Morrison testified were unnecessary, but which Dr. McCulloch recommends.

26. Mr. Jones testified that Student did not always appear to be able to hear in the classroom, which, along with Dr. McCulloch's testimony and report, supports an audiological assessment for both acuity and processing. This assessment need not include an assessment for central auditory processing disorder, as recommended by Dr. McCulloch, since there is controversy as to the existence of the disorder. No evidence was presented as to the types of tests that could detect such a disorder, and no authority was presented that the legal obligation to assess in all areas of suspected disability extends to assessments for an alleged central auditory processing disorder.

27. To fully meet its obligations to assess Student in all areas of suspected disability, and based on the recommendations of Dr. McCulloch and the IEP team's acknowledgment that further assessments are necessary, Compton should assess Student in the following areas: auditory acuity and processing, as well as phonological awareness and processing, and visual perception and acuity. Furthermore, pursuant to Dr. McCulloch's recommendations, Compton should also perform occupational therapy and assistive technology assessments.

## ORDER

1. Within 15 days of this Decision, Compton shall immediately initiate the following assessments of Student:

- (a) Phonological awareness and processing assessment
- (b) Auditory processing assessment
- (c) Auditory acuity assessment
- (d) Visual acuity and perception assessment
- (e) Occupational therapy assessment
- (f) Assistive technology assessment.

When the assessments are completed and the assessment reports generated, Compton will confer with Student regarding a meeting date and time and will convene and complete an IEP team meeting. The purpose of the meeting will be to review the assessments, and to develop appropriate educational services based upon the assessments. The meeting will be convened by no later than December 15, 2006.

2. All other relief sought by Student is denied.

## PREVAILING PARTY

Education Code section 56507, subd. (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that respondent ABC prevailed on all issues pertaining to it. (ABC Issues 1A through 1C and Issue 2). Student prevailed on Compton Issue 4. Compton prevailed against Student on Compton Issues 1 through 3.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: September 20, 2006



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ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division