

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL  
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2010100865

DECISION

Eileen M. Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on December 15 and 16, 2010, in Van Nuys, California.

Los Angeles Unified School District (District) was represented by Alyson Parker, Attorney at Law, of Pillsbury Winthrop Shaw Pittman LLP, and Patrick Balucan, Assistant General Counsel of the District's Office of General Counsel. Diana Massaria, Due Process Specialist, was present on behalf of District both hearing days.

Student was represented by Suzanne Snowden, Attorney at Law. Scott Bowman, assistant to Ms. Snowden, also attended the hearing. Student's mother (Mother) was present on both hearing days. Student's father was present the day he testified.

On October 19, 2010, District filed its Due Process Complaint (Complaint). On November 4, 2010, OAH granted a continuance of the hearing at the request of the parties.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file and serve closing briefs by no later than 5:00 p.m. on January 7, 2010. Upon the parties' timely filing of their closing briefs, the record was closed and the matter submitted.

## ISSUE

Whether the psychoeducational assessment conducted by District in March 2010 was appropriate, such that Student is not entitled to an independent educational evaluation (IEE) at public expense.

## FINDINGS OF FACT

### GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is an eight-year-old girl, who, at all relevant times, resided in the District. During the 2009-2010 school year, at the time of the assessment that is the subject of this action, Student was attending second grade at Castlebay Lane Elementary School (Castlebay) in the District.

### STUDENT STUDY TEAM (SST) MEETINGS

2. On June 3, 2009, during the 2008-2009 school year, when Student was in first grade, Castlebay convened its first SST to discuss concerns Mother and Student's teachers had about Student's academic progress.

3. The SST was concerned with Student's difficulty learning new concepts, spatial issues, inconsistent written expression (specifically, only 75% of her writing was clear), low comprehension scores, slow growth in fluency, inability to complete homework independently, and her failure to ask for help when she did not understand instruction. The SST was also concerned that she sometimes "tune[d] out the environment", and displayed "focusing issues." The SST team recommended modifications and an action plan. A classroom aide would provide Student one-on-one assistance. Mother stated that Student would be attending a summer program at California State University at Northridge (CSUN) and taking courses in reading, math and cheerleading. It was recommended that Parents read aloud to Student at home,

and that Parents and educators repeat back instructions to Student to ensure understanding.

4. During the 2010-2011 school year, the SST members implemented the recommendations of the June 2009 SST. On February 17, 2010, when Student was in second grade, the SST convened a follow-up SST meeting to discuss Student's progress and to consider additional interventions. Despite their efforts, Student still displayed the following learning deficits: failure to follow instructions and read directions for school work (even after she repeated back the instructions to teacher); difficulty with sequential order; and difficulty making predictions and inferences. The SST reported that Student, on reading comprehension tests accompanying the school's Open Court Reading (OCR) program, scored only two or three correct out of ten questions. The SST referred Student to a pullout intervention program to work on Student's reading and writing. In addition to the recommendations of the SST, Parents retained a certified District school teacher to assist Student with homework after school.

5. At the February 17, 2010 SST meeting, the SST referred Student for an initial special education assessment. Parents consented to the assessment.

#### DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT OF STUDENT

6. Beginning on March 19, 2010, as part of the initial assessment, special education teacher, Barbara Zafran, who attended the SST meetings, administered standardized tests of academic achievement to Student. Ms. Zafran, who testified at hearing, is a credentialed and experienced special education teacher trained to teach special education, and conduct standardized assessments and observations of pupils to assist in determining special education eligibility. Ms. Zafran possesses a severely handicapped credential, a learning handicapped credential, a multiple subject credential, and a resource specialist credential. She has been a special education and resource teacher at Castlebay for nine years.

7. Ms. Zafran administered the Woodcock-Johnson III Tests of Achievement, Third Edition (WJ-III), during three sessions, March 19, 2010, March 23, 2010 and March 24, 2010. Specifically, Ms. Zafran allotted 30 minutes on the first day of testing, 30 minutes on the second day of testing, and 20 minutes on the last day of testing. On the days allotted for 30 minutes, Student was able to complete 25 minutes of testing. Ms. Zafran explained that the WJ-III is a widely used, norm-referenced, standardized measure of academic achievement, which she administered to Student in accordance with tests instructions. The WJ-III, Form A, which included eleven discrete tests, measured Student's achievement within the following areas: reading; oral language; mathematics and written language. To measure Student's reading achievement, Ms. Zafran administered the letter-word identification test, the passage comprehension test and the reading fluency test, consistent with the test instruction manual. Letter-word identification measured Student's ability to identify letters and words without knowing the meaning of the words. Ms. Zafran concluded that Student had good phonemic awareness. Her standard score was within the average range and at grade level. The passage comprehension test measured Student's understanding of a written passage. Student was able to use context cues when she was unable to decipher a word. Student's standard score was within the average range and at grade level. The reading fluency test measured Student's ability to quickly read simple sentences, decide if the statement in the sentence was true, and circle a yes or no. Student read 30 sentences and correctly answered 28 questions. Student standard score was within the average range and at grade level.

8. Student obtained an average standard score in oral language, but her score was below grade level. One section of the oral language test required Student to recall information she heard from a total of eight separate passages, with increasing bits of information. Another section required her to point to items identified in the passage.

Student demonstrated that she could listen to details, follow one and two step directions, and then point them out in a picture. Student had trouble following three step directions or directions that were not straightforward.

9. To measure Student's mathematical achievement, Ms. Zafran administered the WJ-III calculation test, math fluency test, and applied problems test. The calculation test measured Student's ability to perform mathematical computations. Student obtained an average standard score and performed at grade level in mathematical computations. Math fluency measured Student's ability to solve simple addition and subtraction problems quickly. She obtained an average standard score and performed above grade level in math fluency. The applied problems test measured Student's ability to analyze and solve math problems read to her. Student had some difficulty with two step word problems. Overall, Student obtained an average standard score and performed at grade level in applied problems.

10. Student obtained standard scores in tests measuring her written language skills. Student correctly answered all spelling questions and scored above grade level in spelling. She scored above grade level on the writing fluency test. This test measured her ability to formulate and write simple sentences quickly by writing sentences in response to pictures within a seven-minute time limit. Student correctly wrote 13 simple, neat, and legible sentences using four to six words in the time allotted. Student scored above grade level on the writing samples test which measured her skill in writing sentences that described pictures and situations.

11. Ms. Zafran scored the WJ-III test results based upon norms for children seven to 10 years old. The results of the WJ-III were later incorporated in a psychoeducational assessment conducted by District psychologist, Karen Menzie.

12. In March 2010, Ms. Menzie performed a psychoeducational assessment of Student, and prepared a report. The report was dated March 23, 2010. Ms. Menzie,

who testified at hearing, received a bachelor of arts in latin american studies from the University of California at Los Angeles in 1982. She received a master's degree in science and school psychology from California State University, Los Angeles, in 1991. She holds a pupil personnel services certification. Her pupil personnel services certification allows her to work as a school psychologist. She also holds a teaching credential and a certification of competence in bilingual education. Ms. Menzie has been employed by the District for 22 years. At the time of the hearing, she had been a school psychologist for four years. As part of her responsibilities as a school psychologist, she assesses pupils for eligibility for special education. Ms. Menzie estimated that she conducted 175 psychoeducational assessments. As a school psychologist, Ms. Menzie also provides counseling services to pupils. At the time of Student's assessment, Ms. Menzie divided her time between three District schools, including Castlebay

13. In her report, Ms. Menzie explained that Student was referred for an initial comprehensive psychoeducational assessment after the second SST meeting, due to concerns about Student's limited progress in reading comprehension and writing. Ms. Menzie noted in her report that her assessment would provide guidance to the IEP team about instructional strategies and educational modifications, as well as assist the IEP team with its decision-making and program development.

14. In preparation for her assessment, Ms. Menzie reviewed Student's cumulative file, including all of Student's report cards, and SST meeting notes. She also reviewed Student's health and development background, relying on records obtained from District's nurse's report dated March 10, 2010. These records showed that Student was adopted at 14 months from China, and that her birth history was unknown. Student was first exposed to English at the time of adoption. Ms. Menzie reported that Student reached her developmental milestones for motor and speech within a normal range,

and, according to her February 2010 physical examination, was considered to be generally healthy. Ms. Menzie included Student's health and development background in her report.

15. Ms. Menzie also observed Student in her classroom on March 11, 2010, and included her observations in her report. At the time Ms. Menzie observed Student, the class was playing a spelling game called "Sparkle." Sparkle required the players to be attentive, and to employ strategies, such as counting the number of letters in a word, in order to project which letter would be required to complete the word. Pupils were lined up around the room and Student stood quietly between two peers awaiting her turn to spell. Ms. Menzie reported that Student demonstrated good sportsmanship when she was eliminated from the game, and after returning to her seat continued to observe the game and remained quiet. Ms. Menzie also interviewed Student's teacher, Randi Lieber, and learned that Student struggled with reading comprehension, math word problems and writing, and was "pulled out" by the intervention teacher for reading and writing instruction. Ms. Lieber stated that Student worked hard, strived to do her best and was very positive.

16. Ms. Menzie also reviewed Student's school records to ascertain her family background, and followed up this review with a telephone interview of Mother on March 16, 2010. Student's healthcare provider evaluated Student for attention deficit hyperactivity disorder (ADHD) when she was in kindergarten, and concluded that she did not meet the criteria at that time. Mother advised Ms. Menzie about Student's attendance at CSUN, which Ms. Menzie characterized in her report as "reading and math support." She noted that Student's parents and grandparents assisted Student with her homework, and understood that Student had an excellent social memory. She also acknowledged that Student received private therapy in the past for attachment issues, and currently receives therapy on an as-needed basis.

17. Ms. Menzie reviewed, and included in her report, Student's educational history from kindergarten through the first two trimesters of second grade, relying on information from Student's cumulative record and teachers' remarks on her report cards. These records showed that, in kindergarten, Student had some erratic peer relations, and needed to improve her listening, decoding, and word recognition skills. In addition, Student's first and second grade teachers expressed concern about Student's reading comprehension skills, and her application of math processes and facts. All of Student's teachers remarked that Student was a pleasure to have in class, her first grade teacher noting her interest in learning, her hard work, and her positive attitude, while her second grade teacher noted Student's ability to listen attentively, her hard work, and her consideration of others.

18. Ms. Menzie considered Student's current academic progress in second grade, and noted in her report that, based on Student's first trimester grades, Student was proficient in all academic subjects. Student also demonstrated consistent or strong effort in all areas pertaining to adult and student interactions.

19. Ms. Menzie noted the various general education interventions the District provided Student, and listed them in her report as follows: learning center support; in-school pullout intervention classes for reading and writing; twice weekly private tutoring funded by parents; praise; small group, individual, and modified instruction and expectations; extended time; preferential seating; repetition of directions; and breaking assignments into smaller components.

20. Ms. Menzie administered a variety of standardized and norm-referenced assessments to measure Student's processing abilities. Ms. Menzie administered the following standardized assessments: Cognitive Assessment System (CAS); Comprehensive Test of Phonological Processing (CTOPP); Test of Visual Perceptual Skills,



Third Edition (TVPS-3); and the Beery-Buktenica Development Test of Visual-Motor Integration (VMI).

21. Ms. Menzie memorialized her observations of Student during testing. She noted that during her administration of the standardized tests, Student hesitated during the first few testing tasks, but demonstrated more confidence and strategy use, such as scanning, verbalizing and rehearsals, as she became more comfortable with Ms. Menzie. Ms. Menzie reported that Student appeared confident and motivated throughout the assessment and tried her best at all times. She reported that the tests were administered without modifications and the test results were a valid reflection of Student's abilities and skills.

22. In her report, Ms. Menzie generally defined the composite areas included in the CAS, and included the specific scores in an appendix. The planning composite measured the mental process Student used to determine, select, apply and evaluate solutions to problems. Student achieved a standard score of 91, or average, in the planning composite. Student's scaled scores in the subtest of matching numbers was 4, or below average. Her scaled score for planned codes was 13, or high average.

23. The CAS attention composite measured Student's utilization of the mental process to focus thinking on particular stimulus, while ignoring other stimuli. Student obtained a standard score of 94, or average, on the attention composite. She obtained average scaled scores of 10 and 8, respectively, on the subtests of expressive attention and number detection.

24. The CAS simultaneous composite measured Student's mental process in relating separate pieces of information into a group, or seeing how parts related to a whole. This mental process was utilized in tasks involving spatial skills and included perceptions of whole items and patterns among items. Student obtained a high

average composite score of 115, an average scaled score of 9 on nonverbal matrices subtest, and a superior score of 16, on verbal-spatial relations.

25. The CAS successive composite measured Student's mental process in ordering or sequencing information. Student obtained an average composite score of 100, and an average scaled score of 10, on the subtests of word series or sentence repetition.

26. Based upon Student's broad average scores in the CAS assessment, Ms. Menzie reported that Student demonstrated strengths in the composites which comprised the assessment. Specifically, Ms. Menzie reported that Student achieved an average full-scale score of 100 on the CAS with broad average range performance in each area.

27. Ms. Menzie administered the TVPS-3 to measure Student's visual perceptual and processing abilities. In her report, Ms. Menzie described the TVPS-3 as a diagnostic and research tool for assessing an individual's perceptual abilities, which includes a number of components. The TVPS-3 includes three composite areas: Basic Visual Processes; Visual Sequencing Processes; and Complex Visual Processes. In total, TVPS-3 contains seven subtests spread between the composites, beginning with two non-scored examples, followed by sixteen test items, arranged in order of difficulty. The TVPS-3 utilized a total of 112 black and white designs. The subtests within the Basic Visual Processes composite included: visual discrimination, where Student was shown a design and required to point to the matching design; visual memory, where Student viewed for five seconds a design on one page, the page was turned, and the Student was required to choose the same design among choices on a second page; spatial relationships, where Student was shown a series of designs then had to select the design that is different; and form constancy, where Student had to select one design among a set of designs on the same page. The Visual Sequencing composite included

one subtest of sequential memory where Student was shown for five seconds a design sequence, the page was turned, and Student had to select the next sequence from choices on the following page. The Complex Visual Processes composite included two subtests: figure-ground, where Student had to select one design from many within a complex background; and visual closure, where Student was shown a completed design and had to match it to an incomplete design.

28. Student obtained an average score of 95 on the Basic Visual Processes composite of the TVPS-3. She obtained a below average scaled score of 5 on the form constancy subtest, a low average score of 7 on visual discrimination, and average scores of 7 and 11, respectively, on the visual memory, and spatial relations subtests. Student obtained a superior standard score of 130 on the sequencing composite, with a superior scaled score of 16 on the subtest of sequencing memory, the only subtest administered. Student obtained a below average standard score of 73 on Complex Visual Processes, with a low average score of 7 on figure ground, and a well-below average score of 2 on visual closure. Ms. Menzie's conclusion that Student had a visual processing deficit was principally based upon her below average score on visual closure.

29. Ms. Menzie administered the Berry-Buktenica Developmental Test of Visual-Motor Integration (VMI), to assess Student's ability to utilize her vision and motor skills together to reproduce shapes and figures. Student's fine motor (finger and hand) and visual-motor integration skills were measured by having Student copy geometric designs of increasing difficulty. Student obtained a standard score of 98, and a corresponding percentile rank of 45, both average scores. In the report, Ms. Menzie supported Student's average score with a description of Student's abilities to use a tripod grip, and to copy lines and simple geometric shapes. Ms. Menzie concluded that Student had average visual-motor integration abilities.

30. Ms. Menzie administered the Comprehensive Test of Phonological Processing (CTOPP) to assess Student's ability to process information heard through composite measurements of phonological awareness, phonological memory, and rapid naming. Ms. Menzie explained in her report that phonological processes support reading, effective mathematics calculations, listening comprehension, and reading comprehension. CTOPP included six subtests within the three composites: phonological awareness (elision and blending words); phonological memory (memory for digits and nonword phonological repetition); and rapid naming (rapid digit naming and rapid letter naming). Student obtained an average standard score on the phonological awareness composite of 97, with average scaled scores of 9 and 10, respectively, on elision and blending words. Student obtained an average standard score on phonological memory of 91, with a low average scaled score on memory for digits, and an average scaled score of 11 on nonword repetition. Student obtained a high average score of 112 in the rapid naming composite, with an average score of 11 in rapid digit naming, and a high average score of 13 in rapid letter naming.

31. Ms. Menzie also administered the Behavioral Assessment System for Children, Second Edition (BASC-2). BASC-2 is a standardized rating scale that measured Student's social and emotional status from the perspective of adults, who were in a position to observe Student (the raters). The extent to which Student externalized problems was measured by hyperactivity, aggression, and conduct scales. The extent to which Student internalized problems was measured by anxiety, depression, and somatization scales. The BASC-2 also provided clinical insight to attention and learning problems. Student's adaptive skills were measured by adaptability, social skills, and leadership scales. The raters provided responses to a detailed questionnaire. A "T-score" for each BASC-2 scale was generated after Ms. Menzie transcribed the raters' responses to the questionnaire into the BASC-2 computer program. "T-scores"

described the clinical significance of the raters' responses and range from very low (below a T-score of 31), low (T-scores between 31-40), average (T-scores of 41-59), at risk (60-69), and clinically significant (over 69). Ms. Menzie provided the BASC-2 questionnaire to Mother and to Student's second grade teacher, Ms. Lieber.

32. Ms. Lieber, who completed the BASC-2 rating scale, reported that Student became anxious about her performance, got nervous during tests, and worried about the opinions of other children. Ms. Lieber rated Student "at-risk" in the area of anxiety. Ms. Lieber rated Student "at-risk" in the area of learning problems. Ms. Lieber stated that Student often exhibited reading and math learning problems, often complained that the lessons moved too fast, and had difficulty keeping pace with the class. Ms. Menzie concluded that Ms. Lieber's responses to the learning problems scale were consistent with a visual processing deficit.

33. Mother advised at hearing that she never received the rating scale. However, she verbally provided Ms. Menzie her responses during a 25 minute cell phone conversation while she was shopping at a local department store, and Ms. Menzie filled in the rating scale for her. In her responses, Mother stated that Student often worried about what others thought of her, was too serious, and often tried too hard to please others. Mother also reported that Student acted atypically by doing strange things or acting out of touch with reality, and that Student often appeared lonely, sad, and sometimes stated that she hated herself. Under the functional communication scale, Mother stated that Student sometimes had difficulty expressing clear thoughts or getting needed information. Mother rated Student "at-risk" in the areas of anxiety, depression, atypicality, and functional communication. Given that Student followed classroom procedures, maintained respectful relations with others, and tried her best, Ms. Menzie concluded that many of Student's at-risk emotions could be attributed to her visual processing deficit, and her inability to meet grade level

expectations. She also concluded that many of the responses indicated that Student was highly sensitive.

34. Ms. Menzie used alternative measurements to assess Student's cognitive functioning, including her general ability and psychological processes. Ms. Menzie explained that psychological processes involved in learning include visual and auditory processing, perception, attention, memory, language and motor abilities. Ms. Menzie disclosed that she used a variety of alternative measures of Student's psychological processes, including observation, professional judgment, teacher reports, work samples, interviews, standardized measurements of achievement, non-verbal reasoning, and language and processing abilities. From these alternative measurements, Ms. Menzie concluded that Student's overall ability to learn, apply knowledge, generalize, utilize abstract concepts, and interpret information was in the average range.

35. In the area of attention, Ms. Menzie assessed Student's general ability and psychological processes. She described attention as the ability to sustain attention or concentrate for developmentally appropriate periods of time. Ms. Menzie relied on several factors, including her own observation of Student, where she found Student to be focused during exams.

36. Ms. Menzie addressed the psychological process of conceptualization in her discussion of Student's general ability and psychological processes. She defined conceptualization as the ability to use information in an increasingly complex and fluid manner beyond rote performance. She stated that the process of conceptualization is used in the OCR program and math applications. Based upon standardized test data, records reviews and observations, Ms. Menzie concluded that Student demonstrated an average ability to conceptualize information.

37. Ms. Menzie reported on Student's oral language skills and motor skills. Based on her observations, the rating scales, standardized assessments and her grades,

Ms. Menzie concluded that her language skills were average. Ms. Menzie acknowledged Student's immersion in the Chinese language through the time of her adoption at 14 months, but reported that Student had achieved proficient grades in speaking and listening, her articulation was clear and her eye contact and ability to take turns when engaged in conversation was average. From school records and interviews, Ms. Menzie reported that Student demonstrated average motor abilities for her age; she enjoyed cheerleading, drawing and coloring, and was able to print neatly.

38. In her report, Ms. Menzie included Student's academic achievement from her WJ-III scores from Ms. Zafran's assessment. Although Ms. Menzie's report was dated one day prior to Ms. Zafran's final day of testing, Ms. Menzie's report correctly copied the numerical results of Ms. Zafran's tests. Ms. Menzie reported that Student performed in the high average range in Broad Written, the average range in Broad Reading, and the average range in Broad Math. She acknowledged Student's difficulties in meeting grade level standards in reading comprehension and writing.

39. Ms. Menzie assessed Student's social-emotional status, specifically, her self-image, ability to form age appropriate relationships with others, to follow normal social and organizational rules, and to behave appropriately in a variety of settings. Culling from parent, teacher and student interviews, and school records, Ms. Menzie reported that Student was happy, sociable, witty, curious, resilient, a hard worker, and respectful. She reported that Student gets frustrated with difficult assignments. Ms. Menzie reported that Student enjoyed tetherball a lot, baseball, drawing and playing with friends. Ms. Menzie acknowledged reports of Student's past attachment issues and ongoing consultation with a private therapist on an as needed basis. Ms. Menzie also acknowledged Student's medical evaluation for ADHD as a kindergartner and the conclusion that she did not meet the criteria at that time.

40. Ms. Menzie utilized a non-standardized interview tool, utilized by District school psychologists, referred to as the Sentence Completion Task (SCT), to provide insight into Students internal thoughts, relationships and aspirations. Ms. Menzie included the results of the SCT in her report, and also summarized the results of the BASC-2 rating of Student's behavior. Based upon the foregoing assessment tools, Ms. Menzie concluded that Student's social and emotional needs could be met within the health curriculum in the general education setting.

41. In her report, Ms. Menzie summarized all of her findings and conclusions, and also attached an appendix of the standardized scores for the various assessments. Based upon the data from standardized tests, Ms. Menzie concluded that Student may qualify for special education due to a visual processing deficit, specifically in the area of complex visual processes. Ms. Menzie referred to portfolio items and classroom teachers' observations which demonstrated Student's consistent lack of ability to meet grade level standards in reading comprehension and writing. Based upon her consideration of the data, Ms. Menzie concluded that Student exhibited a severe discrepancy between her intellectual ability and academic achievement in the classroom in reading, writing, and mathematics applications. As such, Ms. Menzie concluded that Student met the criteria of a pupil with a specific learning disability.

42. In her report, Ms. Menzie made recommendations to the IEP team on methods of instruction. She recommended, among other things, providing Student with time to process information and multiple opportunities to rehearse and practice; examples and direct instruction; step-by-step directions; a personal notebook to write the main skill or concept from the worksheet to eliminate distraction of too much text on the worksheet; monitoring oral comprehension and repeating verbal instructions to check for understanding; praise; and extended time to complete written work.



43. Ms. Menzie recommended exercises to remediate Student's visual processing deficit, particularly her deficit in visual closure. She suggested exercises using pictures of familiar objects, removing part of the picture, and having Student identify or draw the missing part; exercises using highlighter to underline important words; and exercises which build up sight vocabulary.

44. Ms. Menzie closed her report with a description of the emotional and academic impact on Student resulting from her poorly developed visual form constancy. Ms. Menzie explained that pupils, like Student, with similar deficits, feel anxious about the general reliability of their visual world. Pupils with visual processing deficits also may experience learning difficulties because they may be unable to recognize a previously learned symbol or word when presented in a different manner. For example, a word learned in one form, color, or font may appear new when presented in a different form. As such, Ms. Menzie recommended decreased amount of text on the page for Student, as well as increased font size, and auditory cues.

45. At hearing, Ms. Menzie expanded on her report. She explained that she assessed Student in all areas of suspected disability, and as part of her assessment assessed Student's attention, executive functioning and comprehension.

46. Ms. Menzie explained at hearing that she administered the CAS because it was a valid measure of cognition, and tested a range of verbal and nonverbal abilities, including attention and executive functioning. According to the CAS administration guidelines, CAS is derived from the Planning, Attention, Simultaneous, and Success (PASS) theory and includes scales or composites for each area. CAS has two forms, a Basic Battery and a Standard Battery. Both the Basic Battery and the Standard Battery cover all PASS scales. The Basic Battery includes two subtests for each scale or composite area, 8 tests in total. The Standard Battery includes three subtests for each area, 12 tests in total. Ms. Menzie followed accepted practices by administering the

Basic Battery and did so because in her experience it provides a clear picture of cognitive processes without fatiguing the pupil. The Standard Battery is more appropriate where a pupil exhibits cognitive ability well below average, as with those pupils who have suffered traumatic brain injury. Ms. Menzie maintained that by using the PASS model of CAS, Student's executive functioning, which included her ability to plan, see patterns, internalize syntax and sustain attention for an age appropriate period of time, was adequately tested. Ms. Menzie did not consider Student's low score on the planning scale subtest of matching numbers reflective of executive dysfunction. The composite score was a more reliable indicator of Student's planning ability and included Student's above average on the other subtest, planned codes, which comprised the composite.

47. At hearing, Ms. Menzie was dismissive of the concerns of the SST with Student's attention, and considered the earlier rejection of an ADHD diagnosis by Student's physicians significant, despite Mother's precautionary warning that the physicians stated that the diagnosis could change with age. Ms. Menzie stated that aside from her observations and school records, in forming her opinion about Student's attention, she also relied on her administration of CAS, particularly the subtests on word series, sentence completion and expressive attention. She also relied upon the BASC-2 rating scales obtained from Mother and Ms. Lieber for information regarding Student's behaviors to rule out social and emotional issues that affect school performance, but the BASC-2 also addresses attention as a behavior. Ms. Menzie did not send the rating scales to Father; however, there was no evidence that Father's responses would offer new information not already known from Student's records, including SST notes, Mother or Ms. Lieber. Based on these measures, she did not find that Student had attention deficits, including ADHD. Ms. Menzie explained that students with processing deficits often exhibit attention difficulties when performing tasks that are difficult for them.

Attention problems stemming from their processing deficits do not mean that they also have attention deficits. Ms. Menzie explained that when Student appeared to be unfocused or inattentive, she was suffering from cognitive fatigue. Ms. Menzie advised that had she found clinically significant indications of attention issues from the BASC-2 rating scales, or from her observations, she would have administered further tests specific to ADHD.

48. At hearing, Ms. Menzie explained her administration of the CAS according to instructions. The CAS instruction manual contained guidelines, including administering the timed tests exactly and precisely according to the time limits; presenting the stimuli at the prescribed rate; following the scoring rules exactly; providing the child with the proper materials (for example, a red pencil); and administering the subtests in the prescribed order. There was no evidence that Ms. Menzie failed to administer the assessment according to these enumerated guidelines.

49. Before administering the CAS subtests, Ms. Menzie utilized the sample and demonstration items to clarify the requirements of the test. The specific instructions for the demonstration of the matching numbers subtest provided for the assessor to show the Student how to underline the correct numbers in the demonstration question. Although the instruction for the demonstration did not provide for crossing out a wrong answer, Ms. Menzie demonstrated for Student how to cross out a wrong answer.

50. Planned codes required the Student to translate letters into specific codes by correctly marking the code system of Xs and Os under boxes marked with the letters A, B, C, and D (e.g., A=OX, B=XX). The specific instructions for planned codes required the assessor to write the OX under the heading A and the Student to write the XX under the heading B. It also provided for the assessor to correct any errors immediately and provide further explanation if necessary. In the planned codes demonstration, Ms. Menzie demonstrated how Student could affix an O and X, as required in the sample.

She also placed the XX under the heading B. Student placed the correct letters under the C and D heading.

51. Ms. Menzie read the instructions for Student as required. Student was anxious and concerned about what to do if she made a mistake. Ms. Menzie demonstrated for Student how to cross out the wrong answer. In Ms. Menzie's experience pupils typically get stymied when it comes to changing their answer, and it is important to make sure that they are comfortable with crossing out the wrong answer before the test begins so that their performance isn't affected by their anxiety. Based upon her experience administering the CAS, Ms. Menzie's demonstration did not affect the validity of the assessment.

52. At hearing, Ms. Menzie further elaborated on her observation of Student and her assessment of Student's reading comprehension and writing. Ms. Menzie intended to observe Student during a language arts lesson that involved reading. Instead of observing Student's reading comprehension she observed Student's attention and behavior. She did not attempt to reschedule the observation for another time. The purpose of conducting an observation was to confirm the accuracy of Student's formal assessments by reviewing Student's performance in class. Ms. Menzie was satisfied that she did not need to conduct an additional observation of Student during a reading comprehension or writing lesson because she had enough information from Student's records, including portfolio samples, that Student performed inconsistently in reading comprehension and writing.

53. In view of Student's scores in reading comprehension on the WJ-III, Ms. Menzie attributed Student's reading comprehension challenges to her deficits in complex visual processes, particularly visual closure, which made it difficult for her to visualize a complete written image, e.g., a geometric shape or a vase. As a result of her visual processing deficit, Student became confused with written text. Ms. Menzie

emphasized that Student's confusion with the visual presentation of material in the class impacted her learning. She explained that Student's visual processing deficits also impacted her ability to understand or retain auditory instructions because absent visual cues, the auditory instructions were more difficult to understand.

54. Ms. Menzie provided straight forward testimony about her assessment. Based upon Mother's testimony, it appears that she did not recall filling in the BASC-2 rating survey for Mother during a telephone interview. As set forth below, Ms. Menzie's report was not perfect. However, Ms. Menzie's testimony was honest and she capably explained the foundation for her opinion. When weighed against Student's criticisms, Ms. Menzie's report and testimony were given more weight, due to her direct observation of Student, her reliance upon extensive school records, and her demonstrated ability to apply her experience and make a reasoned judgment as to the source of Student's deficits.

55. District provided Mother with a copy of Ms. Menzie's report prior to the upcoming IEP meeting. Shortly after delivery, but prior to the IEP meeting, Ms. Menzie made a minor revision to one sentence of the report with information from Student's second quarter classroom progress report. Specifically, the report initially stated that Student's first trimester grades were proficient in all academic subjects. Ms. Menzie amended the report with Student's second trimester grade information, which stated that Student earned grades of partially proficient in all academic subjects, and not meeting grade level standards. Mother did not become aware of the amendment until the parties exchanged exhibits in connection with this matter. District uses an on-line computer program, known as Welligent, to memorialize IEP team meetings. District scans and attaches assessments and other IEP documents to the Welligent-generated IEP. District IEP team members can access the draft IEP and attached assessments on the computer and generally do so prior to the IEP. This updated version, not the signed

version provided to Mother, was made part of District's permanent IEP records and scanned into the computer as an on-line attachment to the IEP. Ms. Menzie's modification did not otherwise alter her signed report, including, Student's test scores, her analysis of those scores, or her conclusions. The on-line modification did not include any information that was not known at the time of the April 29, 2010, IEP team meeting.

56. On April 21, 2010, after Ms. Menzie completed her report, Ms. Zafran observed Student during an OCR lesson. Student turned the page at the appropriate time, but often looked around, and became concerned that another child was not on the right page, and turned the page for that child. Student did not appear to be reading the OCR lesson and eventually put her head down on the book.

57. On April 23, 2010, Ms. Zafran also prepared a report outlining the results of the WJ-III she conducted in March 2010, which also included a summary of Student's educational and developmental history, as well as teacher and parent concerns. Ms. Zafran reviewed Student's records, her OCR tests, her scores on classroom math tests, and work samples. Ms. Zafran compared Student's results in the WJ-III with her classroom performance. In her review of the Student's OCR test results, Ms. Zafran discovered that Student's second grade comprehension scores recorded in the February 17, 2010 SST meeting notes were significantly lower than the latest OCR reading comprehension scores she reviewed. She believed a mistake had been made by the SST in recording the scores. The February 17, 2010 SST recorded Student's OCR reading comprehension score as 3 of 10; in her review of Student's OCR records, Ms. Zafran's record review discovered OCR scores of 6 of 10.

58. In her report, Ms. Zafran memorialized the concerns of Student's teachers and parents. Among her second grade teacher's concerns were her attention span and concentration, loss of focus during individual work, difficulty acknowledging multi-step

directions, and comprehension. Her teacher described Student's performance as inconsistent. Parents were concerned about Student's reading and writing, inconsistent work performance, need for repetition, and individual teaching.

59. As a result of her formal and informal assessment, Ms. Zafran concluded that Student had "some" difficulty with oral processing of information, reading comprehension, organizing her writing in a paragraph, and multiple-step word problems.

60. The IEP team met on April 29, 2010. All required members of the IEP team were present including Mother, Ms. Zafran, Ms. Menzie, and Student's second grade general education teacher. The IEP team reviewed Ms. Zafran and Ms. Menzie's assessments. The IEP team considered two possible areas of suspected disability: attention deficit disorder and specific learning disability. The IEP team determined that Student was eligible for special education as a pupil with a specific learning disability due to deficits in oral and visual processing.

61. At the close of the IEP team meeting, Ms. Menzie provided all the testing materials to the IEP coordinator for inclusion in the Student's school records, including Student's response book which contained Student's responses to the CAS subtests. She also completed the record form of CAS, and provided the form to the District IEP coordinator to be included in the Student's file.

62. On September 27, 2010, another IEP team meeting was held with all required IEP team members. Mother registered her disagreement with the psychoeducational assessment report District initially provided her, contending the results of the visual processing assessment were inconclusive. Immediately thereafter, Mother served District with a written request for an IEE.

63. District declined Mother's request for an IEE and instead, on October 19, 2010, filed a due process hearing request seeking a determination that Ms. Menzie's psychoeducational assessment was appropriate.

64. Student subpoenaed her assessment file, and found that District failed to maintain Student's complete testing and assessment records. Specifically, Student's assessment file did not include the CAS response book containing the raw data for some of the subtests administered, matching numbers, planned codes, and number detection. Student's file did not contain the CAS record form where Ms. Menzie was required to record her observations of Student's test-taking strategies. Also missing from Student's file was the answer book containing the raw data for the VMI assessment and the teacher's handwritten BASC-2 rating scale. All other testing records were included in Student's file.

#### STUDENT'S CRITIQUE OF DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT

65. Mother retained the services of Dr. Nancy Blum, a clinical neuropsychologist, to review and provide expert commentary on Ms. Menzie's assessment. Dr. Blum reviewed Ms. Menzie's report, and Student's IEP, but never met, observed, or assessed Student. On October 27, 2010, Dr. Blum wrote a letter to District outlining the basis for her determination that Ms. Menzie's assessment was inappropriate. While Dr. Blum agreed that Student had visual processing deficits, she maintained that Ms. Menzie underestimated the depth of Student's visual processing deficits. Further, given Student's CTOPP scores indicating adequate phonological processing and auditory memory, Ms. Blum concluded that Student's visual processing deficits could not account for her problems with reading comprehension and written expression particularly comprehension involving multi-step directions, and math word problems. Based upon Student's performance on the CAS and the CTOPP, Dr. Blum questioned whether Student's attention and executive function could be contributing to



her low performance in reading, written expression, and math word problems. Dr. Blum maintained that Ms. Menzie did not correctly interpret test results or sufficiently analyze Student's attention and executive functioning.

66. Dr. Blum criticized Ms. Menzie's interpretation and analysis of her test results, contending that Ms. Menzie under-reported Student's attention and or executive functioning deficits, as reflected in the subtests of the CAS, the TVPS-3, and the CTOPP. Dr. Blum stated that Ms. Menzie inaccurately relied upon composite scores, which were average, and ignored subtests which revealed discrepancies in Student's performance. By analyzing the composite score, Dr. Blum maintained that Ms. Menzie gave the erroneous impression that Student performed adequately, when in fact she did not. Dr. Blum maintained that contrary to Ms. Menzie's report of the CAS results, Student did not demonstrate strengths in Planning, Attention, Simultaneous, and Success (PASS). Specifically, Student's low score on the matching numbers subtest reflected considerable executive dysfunction. As for the TVPS-3, Dr. Blum disagreed with Ms. Menzie's finding that Student's composite score of Basic Visual Processes was average, given the below average subtest score of visual processes, as well as the low score on form constancy. She stated that Ms. Menzie minimized Student's deficiencies in visual processing when Ms. Menzie reported Student's Complex Visual Process score as below average, given Student's very low score on visual closure. Although Dr. Blum accepted that Student did not have an auditory processing disorder, she criticized Ms. Menzie's finding that the CTOPP composite of phonological memory was average, because Student scored below average on the subtest of memory for digits. Dr. Blum concluded that Student's low score reflected a weakness in passive attention span and phonological memory.

67. Dr. Blum also criticized Ms. Menzie's assessment for failing to sufficiently test Student in the area of attention. Specifically, Dr. Blum contended that Ms. Menzie

administered almost no standardized tests of Student's attention functioning, despite concerns about Student's ability to attend and focus. Dr. Blum believed that Ms. Menzie could not rely on the CAS expressive attention and number detection subtests in reaching this conclusion, as these subtests only measured selective attention and shifting attention. Given Student's history of attention challenges, Dr. Blum recommended additional standardized assessments which she maintained entailed thorough testing of sustained attention or divided attention

68. Dr. Blum also criticized the use of the WJ-III as a measure of assessing Student's academic proficiency, given Student's struggles with grade level standards in reading, writing, and mathematics. Dr. Blum explained that the Gray Oral Reading Test-IV (GORT-IV) was more appropriate for Student's known deficits because, unlike the WJ-III, it requires a pupil to read longer passages, assessed reading rate and accuracy, and measured reading comprehension with multiple choice questions. In addition, Dr. Blum contended Student should have been administered a reading decoding test, as well as assessments which involved writing a story or essay. Dr. Blum advised that the WJ-III is too simplistic and neither provides sufficient information concerning a pupil's writing ability, nor requires pupils to organize their thoughts.

69. Dr. Blum, who testified at hearing, obtained a doctorate in clinical psychology and participated in an American Psychological Association (APA)-approved postdoctoral fellowship at the University of California, Los Angeles, in child clinical and pediatric psychology. Since 1995, as part of her private practice, she has conducted psychological and neuropsychological evaluations of children, adolescents, and adults, including neuropsychological evaluations for children with IEPs. She has also conducted developmental evaluations for the California regional centers and supervised psychology interns in psychological and neuropsychological assessments of children at a private nonpublic school. Since 2001, she has been a lecturer in psychology at

California State University, Northridge, where she has taught, among other subjects, an introductory course in psychological assessments.

70. At hearing, Dr. Blum focused her criticism on Ms. Menzie's interpretation and analysis of the CAS results pertaining to Student's attention. While contradicting her letter, and conceding that the CAS composite scores were considered more reliable than the CAS subtest scores, Dr. Blum maintained that given Student's history of attention challenges, the low scores on the CAS matching numbers subtest of the planning scale should have caused Ms. Menzie to perform further assessments of Student's attention. Student's historical attention challenges should have been more apparent to Ms. Menzie than she reported. Given Student's history of attention challenges, Ms. Menzie should have administered the CAS standard battery, which is comprised of three subtests for each PASS scale, and a total of 12 twelve subtests.

71. Dr. Blum further criticized Ms. Menzie's overall reliance on CAS as a measure of attention, opining that CAS provided only a superficial and incomplete measure of attention. Dr. Blum has never administered a CAS assessment, but derived her opinions from her research. According to Dr. Blum's research of CAS, it does not do a good job of assessing distinct areas of attention, and attaches too much emphasis on speed which does not test attention. Dr. Blum further opined that CAS does not do a good job of testing executive functioning. Executive functioning involves the highest levels of neurocognitive processing and governs a pupil's ability to organize, multi-task, and shift attention from one task to another. Deficits in executive functioning could result in problems in recording assignments, completing paperwork, or transferring paperwork from school to home.

72. Dr. Blum also disapproved of Ms. Menzie's handling of CAS test instruction protocols, by physically demonstrating to Student where she should place her answers. Dr. Blum explained that the CAS instructions specify the words and the physical motions

the assessor should use in explaining the instructions, and caution the test administrator to follow the instructions “exactly as prescribed in the Administration and Scoring Manual.” The rationale provided for following standardized instructions with the exact wording provided is to provide the same experimental conditions for all pupils taking the tests so that accurate comparisons can be made. According to the CAS manual, “Any alteration of the instructions, materials, or time limits will affect the performance of the child and compromise the comparison of the child’s raw score to normative values.” The CAS general instructions did not expressly authorize the assessor to physically demonstrate how to respond to questions by marking the answer box. The CAS instructions authorize the examiner to explain in “whatever terms are necessary” to be certain that the child understands the tasks, as set forth in the CAS manual:

[t]his additional instruction can be in any form (gesturing or verbal instruction in any language.) The intent of this instruction is to provide latitude to the examiner so that he or she can be sure the child was adequately informed about what do to. This instruction is not intended to teach the child how to do the test.

However, Dr. Blum contended that this additional instruction disallowed Ms. Menzie’s use of physical instructions, and limited instruction to gestures or verbal instruction. Dr. Blum’s testimony did not address the CAS instructions specific to each subtest.

73. At hearing, Dr. Blum also questioned the validity of the CAS based upon District’s failure to produce the complete CAS raw response data and record forms. Dr. Blum maintained that given Ms. Menzie’s misinterpretation of Student’s test scores in her report, and her “sloppiness” in following CAS test protocols, it was important to have the raw data to confirm the accuracy of Ms. Menzie’s test results.

74. At hearing, Dr. Blum also challenged Ms. Menzie's reliance on the TVPS-3 to assess Student's visual processing. Dr. Blum never administered the TVPS-3, but after reviewing the Buros Mental Measurement Yearbook (the "yearbook"), a reference book used by clinical psychologists to confirm the validity and reliability of assessments, found that the TVPS-3 was a research tool, and not a reliable assessment tool.

75. Dr. Blum also criticized Ms. Menzie for failing to administer the BASC-2 appropriately, by choosing to give the rating scale only to Mother, and not one to Father or to Student's grandmother, who were also Student's caregivers. Dr. Blum explained that, according to the manual for the BASC-2, the parent rating scale was designed to be completed by the child's parent, guardian, foster parent or custodial caregiver. The manual emphasized that it was desirable to obtain ratings from both parents, if possible, to provide more information and to reveal areas of disagreement that may be important in diagnosis. However, it did not require ratings from both parents.

76. Dr. Blum criticized Ms. Menzie for failing to provide the teacher rating scales to other school personnel that were directly involved with Student, including Student's classroom assistant, or the pull-out resource teacher who had been working with Student for at least a month prior to Ms. Menzie's report. The BASC-2 manual states a preference for providing teacher rating scales to multiple teachers who supervised pupil in fairly organized class settings in order to ascertain how the pupil responds to varied teaching styles, academic demands and discipline. According to Dr. Blum, BASC-2 provides that the rater must have one month of daily contact, or six to eight weeks of several-days-a-week observation.

77. Dr. Blum criticized Ms. Menzie for failing to administer the BASC-2 parent rating scale to Mother according to test instructions. The BASC-2 rating instructions stated a preference for a controlled setting such as the clinician's office to avoid

distractions. The instructions also stated, however, that it is preferable to obtain the parent rating scale under uncontrolled conditions, than not to obtain it at all.

78. Dr. Blum criticized Ms. Menzie's failure to observe Student in her classroom during class instruction involving reading comprehension. Ms. Menzie observed Student playing the game "Sparkle," which required Student's to pay attention and focus when recalling vocabulary words, and not on reading comprehension

79. Mother added testimony to support Dr. Blum's characterization of Ms. Menzie's assessment as sloppy. Among other things, she remarked that Ms. Menzie mistated: her report of Student's ADHD diagnosis as a final diagnosis, as opposed to one that could change with Student's age; Student's development as normal, when she did not sit up until 17 months; Student's summer program as an intervention program; her report that Student does "funny" things as "strange" things; and Student's interest in baseball. Although Mother was sincere, her examples were not material to Ms. Menzie's report.

80. Overall, Dr. Blum's analysis, despite certain weaknesses in Ms. Menzie's administration of formal assessments, and her failure to observe Student in a reading comprehension class, did not contradict Ms. Menzie's assessment results. Ms. Menzie determined that Student had a visual processing deficit based not only on formal assessments, but on Student records, her observations of Student during testing, and her professional judgment. Dr. Blum had never met or observed Student. She had not administered the CAS or the TVPS-3. Her objections to Ms. Menzie's assessment were not restricted to Ms. Menzie's selection and administration of formal tests, but differences in their respective professional judgment as to the conclusions reached from test data, records, and classroom observations. Despite her apparent competence and candor, Dr. Blum's expert testimony was not persuasive.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. As the petitioning party, District has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-58, [126 S. Ct. 528].)

2. District contends that its psychoeducational assessment complied with the IDEA and State law. Specifically, District asserts that Ms. Menzie was qualified to conduct the assessment; assessed Student in all areas of suspected disability; used a variety of assessment tools and strategies; and administered the assessment in a nondiscriminatory and appropriate manner with valid and reliable instruments. Student disagrees, and contends that District failed to assess Student in all areas of suspected disability, and failed to adequately assess Student in the areas it did assess. Specifically, Student maintains that Student was not adequately assessed in the area of attention, visual processing, and reading comprehension. Further, Student contends that District failed to administer the assessments according to the assessment protocols. Finally, Student contends that District's failure to maintain and produce all the assessment data, further supports a finding that District failed to meet its burden of proof that its assessment was appropriate. For the following reasons, District has met its burden of proof.

3. In order to determine whether an assessment has been properly conducted, it must conform to the requirements of the law. Education Code § 56320, subdivisions (a) through (e), provides that assessments must be conducted in accordance with the following pertinent requirements:

that testing and assessment materials and procedures be selected and administered so as not to be racially, culturally, or sexually discriminatory;

that the materials and procedures be provided and administered in the student's primary language or other mode of communication, unless unfeasible to do so;

that the assessment materials be validated for the purpose for which they are used;

that the tests be administered by trained personnel in conformance with test instructions;

that tests of intellectual or emotional functioning be administered by a credentialed school psychologist;

that the tests and other assessment materials be tailored to assess specific areas of educational need, and not merely those that are designed to provide a single general intelligence quotient;

that no single measure be used as the sole criterion for determining eligibility or an appropriate educational program for the student.

4. Assessments must be conducted by qualified persons who are knowledgeable of the student's disability, who are competent to perform the assessments, as determined by the local educational agency, and who give special attention to the student's unique educational needs, including, but not limited to, the need for specialized services, materials, and equipment. (Ed. Code, §§ 56320, subd. (g) & 56322.) Psychological assessments must be performed by school psychologists. (Ed. Code, § 56324.) Personnel who assess the pupil must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56327 & 56329.) The report shall include, but not be limited to, the following: (1) whether the student may need special education and related services, (2) the basis for making the determination, (3) the relevant behavior noted during the 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 and development, and medical findings, if any, and (6) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate. (Ed. Code, § 56327.)

5. The student must be assessed in all areas related to his or her suspected disability including, where appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, social and emotional status. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306 (2006).)

6. The disability categories under which a child may be found eligible for special education and related services includes specific learning disability (SLD). (Cal. Code Regs., tit. 5, § 3030, subds. (c), (f), (i), & (j).) SLD is a result of a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell or do mathematical calculations. (Cal. Code Regs., tit. 5, § 3030, subd. (j).) "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j))

7. A student is eligible for special education under the category of "specific learning disability" based on: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the pupil's present teacher; 4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test

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

8. An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i) (2006).) A parent has the right to request an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1) (2006); Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must, "without unnecessary delay," either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. § 300.502(b)(4); Ed. Code, § 56329, subd. (c).)<sup>1</sup> If the public agency files a due process complaint notice to request a hearing, and the final decision is that the agency's evaluation was appropriate, the parent still has the right to an IEE, but not at public expense. (34 C.F.R. § 300.502(b)(3)(2006).)

9. Here, District met its burden of proof on many aspects of its legal obligation to conduct an appropriate assessment because its evidence was uncontradicted. The evidence showed that, as a credentialed school psychologist, Ms. Menzie was qualified and properly assigned the responsibility to conduct an initial psychoeducational assessment of Student. Ms. Menzie was knowledgeable about Student's suspected disabilities, given her expertise, her review of Student's records, family and background information, teacher's comments, SST notes, and through her own personal observation of Student. There was no evidence that the assessment and the procedures used were racially, culturally or sexually discriminatory. Consistent with

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<sup>1</sup> "Unnecessary delay" was not at issue in this case.

her obligations, Ms. Menzie prepared a comprehensive written report setting forth her findings and conclusions.

10. District established by the preponderance of the evidence that it assessed Student in all areas of suspected disability by using a variety of assessment measurements. Significantly, as set forth in Legal Conclusions 6 and 7 above, the evidence established that as part of its initial assessment of Student, District assessed all the components of a suspected specific learning disability using a broad range of measurements. District's extensive tracking of Student's progress through OCR testing, portfolio samples, and the SST meetings, provided strong support for Ms. Menzie's opinion. Although Ms. Zafran's report of her classroom observations and interviews with teacher and parents post-dated Ms. Menzie's report, Ms. Zafran's observations and reflections of parent and teacher concerns, were generally consistent with Student's records and did not raise suspicions of additional disabilities not accounted for in Ms. Menzie's initial psychoeducational assessment. It was noteworthy from Ms. Zafran's investigation that Student's OCR scores were significantly higher than previously reported by the SST. While all IEP team members agreed that Student had problems with multi-step directions, Ms. Zafran's opinion that her visual processing disorders could account for what appeared to be comprehension and attention difficulties was reasonable. Dr. Blum's contention that Student's CAS subtest scores gave rise to a suspicion of disabilities for which District was obligated to assess was contradicted by her concession that the CAS composite scores are a more reliable indicia of Student's processing abilities.

11. District established by a preponderance of the evidence that it assessed Student in the area of attention. The evidence showed that Ms. Menzie administered standardized assessments of Student's attention by administering the CAS and the BASC-2. Dr. Blum's criticism that the CAS, as a whole, was an inadequate test of

attention, as well as her criticism that Ms. Menzie should have administered more tests, particularly in the area of sustained or divided attention as part of Student's initial assessment, was not persuasive. Contrary to Dr. Blum's assertion that the CAS is inadequate, the evidence established that the CAS remains a valid and reliable norm-based assessment of cognitive processes under the PASS theory. Further, Ms. Menzie did not solely rely upon CAS to measure Student's attention. Ms. Menzie's classroom and testing observations provided evidence of Student's ability to sustain attention. In addition to performing the CAS basic battery, Ms. Menzie had the opportunity to observe Student during her administration of other standardized measurements, her informal interview, and in her classroom during the game of Sparkle. Ms. Menzie did not observe attention issues during her classroom observation. Student was able to maintain her focus during the game of Sparkle as a participant and when she returned to her seat.

12. Further, Student argues that Ms. Zafran's observations that Student lost attention after 25 minutes was probative of Student's difficulty with sustained attention and should have led to a more thorough assessment of Student's possible attention deficits. This contention is without sufficient foundation, as Ms. Zafran tested Student for approximately thirty minutes, and Student sustained her attention during most of the test. There was no testimony as to the attention span of a typical seven year old. Further, although Ms. Menzie was dismissive of the significance of school reports of Student's attentional challenges, in addition to her own observations, she did not find sufficient support for further assessment of Student's attention, including ADHD, from her review of either teacher or Mother's responses to the BASC-2 rating scales. Ms. Menzie's understanding of Mother's relative lack of concern with Student's attentional challenges is corroborated by Mother's comments about her report closer in time to the IEP team meeting. Months after receiving the report, Mother noted only her concerns

with Ms. Menzie's assesment of Student's visual processing deficits, not her attention. Given these factors, District demonstrated that it assessed Student in the area of attention.

13. Student's contention that District failed to adequately assess her for executive functioning deficits is not persuasive. The evidence established that Ms. Menzie, did, in fact, assess, albeit superficially, for executive functioning by using the CAS assessment, particularly the planning scale. The CAS composite score, the more accurate measure, did not give rise to an obligation to conduct further assessments of Student's executive functioning as part of District's initial psychoeducational assessment. Ms. Menzie satisfactorily explained that the one subtest score of matching numbers, although low, did not raise a suspicion that Student had executive functioning deficits worthy of additional assessment as part of the initial assessment. Although it was true that Student had difficulty organizing her writing, there was no evidence from school records, teacher observations, or Ms. Menzie's testing observations, that Student suffered from poor executive functioning, such as the examples identified by Dr. Blum of forgetting to write down her assignments or bringing home homework.

14. District established that it assessed Student for visual processing deficits. Ms. Menzie administered the TVPS-3. Student argued that Ms. Menzie underestimated her visual processing deficits. Significantly, Student's expert agreed that she had visual processing deficits. However, as clearly demonstrated in her report and testimony, Ms. Menzie determined that Student had a visual processing disorder that qualified her for special education. Although Student claimed that Ms. Menzie inappropriately relied upon the TVPS-3 because it has been reported to be unreliable as a measurement, Ms. Menzie established through her observations of Student during testing, as well as through Student's testing results, that Student demonstrated significant deficits in complex visual processes. The TVPS-3 required Ms. Menzie to closely observe Student's

ability to work with a variety of images on the page. There was no evidence that Ms. Menzie failed to accurately administer or report Student's performance on the TVPS-3. Accordingly, based upon her close observation of Student during the administration of TVPS-3, Ms. Menzie obtained reliable test results. Given these factors, District demonstrated that it appropriately assessed Student in the area of visual processing.

15. District met its burden of proof that it had appropriately assessed Student's reading comprehension. Although Dr. Blum may have thought that the WJ-III did not assess Student's ability to understand more complex passages, or write more involved paragraphs, the evidence established the WJ-III to be a well-recognized normed test. In addition, there was no showing that Ms. Zafran failed to administer the WJ-III according to test protocols. While it is true Ms. Menzie did not observe Student during a reading comprehension class lesson, Student's difficulties with longer passages, involving multi-step directions, were well documented by the SST, her teachers, and confirmed by the results of the WJ-III. Ms. Menzie reconciled the results of the WJ-III with Student's educational records and teacher's concerns. In her analysis of Student's records and teacher reports, Ms. Menzie reconciled the results of the TVPS-3 with teacher's at-risk responses to Student's behaviors in class, her frustration with lessons moving too fast and her difficulties with reading comprehension. Although Dr. Blum maintained that reading comprehension challenges were distinct from visual processing problems, Ms. Menzie explained that Student's difficulty with complex visual processes, made it difficult for her to track information on a page.

16. District also proved by a preponderance of the evidence that Ms. Menzie administered the assessments according to test protocols. Student did not challenge Ms. Menzie's administration of the CTOPP and the VMI assessments. Student's expert isolated two places where Ms. Menzie marked the demonstration or sample page in the CAS (i.e., matching numbers, and planned code), and concluded that Ms. Menzie did not

follow instruction protocols. However, in the matching numbers subtest, the test manual allowed the assessor to mark the demonstration with the correct answers, but did not tell the assessor to place an X over a wrong answer. For the planned code subset, the test manual allowed the assessor to correct the wrong answer. In both examples, contrary to Dr. Blum's analysis, the assessor was allowed to mark the page, not just point or gesture. Most significantly, Ms. Menzie testified that she was sensitive to Student's history of anxiety and wanted to make sure she created a comfortable testing environment for her. Given that the assessor can physically demonstrate how to answer the question, or can correct the answer, Ms. Menzie's administration of the demonstration and sample portions of these subtests, were not inconsistent with the instructions and did not undermine the validity of the assessment.

17. Further, there was no evidence that Ms. Menzie marked Student's answers for her in the body of the text, or didn't follow any of the other protocols. In addition, there is no evidence that Ms. Menzie failed to administer the CAS tests according to the test manual by administering the tests in the proper order, using the precise time limits for each test, scoring the tests exactly, and providing the child with the proper materials. Given the above factors, District demonstrated that it used proper testing protocols when assessing Student.

18. District met its burden of proof that it administered the BASC-2 according to test protocols. Although the BASC-2 states a preference for multiple parent and teacher ratings, and a controlled interview environment, Ms. Menzie's administration of the BASC-2 was appropriate. She selected a teacher with a long term relationship with Student, and one involved Parent. The evidence established that the parent rating scales correctly reflected Mother's concerns.

19. Finally, Student argues that District's loss of certain assessment documents should weigh against a determination that District met its burden of proof. Student

cites *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 876, 16 Cal. Rptr. 2d 787, which held that where evidence was willfully suppressed the trier of fact can draw inferences that lost evidence was damaging. In contrast to *Bihun*, the evidence in this case established that District did not intentionally withhold documents from Student's file. District did not carefully maintain Student's assessment records. However, there was no evidence that Student's records were destroyed or modified. Most of Student's records were maintained in the file and produced. The documents produced did reveal minor departures from the administration of the CAS demonstration and sample protocols; however, the documents produced did not reveal that Ms. Menzie materially departed from test protocols, or tampered with Student's scores.

20. Based on the foregoing, District has demonstrated that its psychoeducational assessment of Student was appropriate. As such, Student is not entitled to an IEE at public expense. (Findings of Fact one through 80; Legal Conclusions one through 19.)

## ORDER

1. District's March 2010 psychoeducational assessment was properly conducted.
2. Student is not entitled to a psychoeducational IEE at public expense.

## PREVAILING PARTY

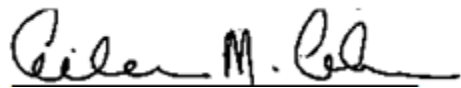
Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on the only issue that was heard and decided in this case.



## 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: February 3, 2011

A handwritten signature in black ink, appearing to read "Eileen M. Cohn", written over a horizontal line.

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings