

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011030273

DECISION

The due process hearing in this matter was held on April 25, 26, 27, 28, 2011, and May 2, and 9, 2011, in Los Angeles, California, before Administrative Law Judge (ALJ) Clifford H. Woosley, Office of Administrative Hearings (OAH). Attorneys Jill C. Rowland and Sam J. Paneno of The Alliance for Children's Rights (ACR) appeared on behalf of Student.<sup>1</sup> Student's legal guardian (Guardian) was present on the first day of the hearing. Diane M. Willis of Sansom Willis LaFoe LLP appeared on behalf of Los Angeles Unified School District (District). District Due Process Specialists Dr. Jeanique Wells and Sue Talesnick attended the hearing for District.

On March 1, 2011, Student filed a Request for Due Process Hearing (complaint). On March 30, 2011, OAH granted, for good cause, a continuance of the due process hearing, pursuant to the parties' joint request. On May 9, 2011, at the close of hearing,

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<sup>1</sup> ACR Legal Director, Laura Streimer, observed the first three days of hearing, while ACR paralegal Cindy Rodas observed the fourth day of hearing.

the parties were granted permission to file written closing arguments by May 27, 2011. Upon receipt of the written closing arguments, the record was closed, and the matter submitted.

## ISSUES<sup>2</sup>

1. Whether District denied Student a free appropriate public education (FAPE) for the 2009-2010 school year, beginning October 30, 2009, by failing to:
  - a. Conduct a visual processing assessment for vision therapy by a licensed optometrist, as requested by Student;
  - b. Assess Student in a known area of disability due to the District's predetermined policy regarding visual information processing and vision therapy;
  - c. Provide Student with a timely written refusal to assess for vision therapy services;
  - d. Hold a timely IEP meeting within sixty (60) days of a signed assessment plan, causing a denial of vision therapy services;
  - e. Provide an educational program that was reasonably calculated to provide some academic benefit in the areas of reading because of District's refusal to assess and offer visual information processing and vision therapy;
  - f. Provide vision therapy services despite Student's regression in reading comprehension and reading fluency skills, as well as Student's failure to make adequate progress in handwriting (i.e. the form of writing including letter alignment, spacing between letters and words, letter formation and sizing) and

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<sup>2</sup> At hearing, Student's motion to withdraw some issues was granted.

- g. Provide vision therapy services due to the District's predetermined policy regarding visual information processing and vision therapy.
- 2. Whether District denied Student a FAPE for the 2010-2011 school year, by failing to:
  - a. Conduct a visual processing assessment for vision therapy by a licensed optometrist, as requested by Student;
  - b. Assess Student in a known area of disability due to the District's predetermined policy regarding visual information processing and vision therapy;
  - c. Provide an educational program that was reasonably calculated to provide some academic benefit in the areas of reading because of District's refusal to assess and offer visual information processing and vision therapy;
  - d. Provide vision therapy services despite Student's regression in reading comprehension and reading fluency skills, as well as Student's failure to make adequate progress in handwriting; and
  - e. Provide vision therapy services due to the District's predetermined policy regarding visual information processing and vision therapy.

## FACTUAL FINDINGS

- 1. Student is a 10-year-old, third grade student at Purche Avenue Elementary School (Purche), in a general education classroom. She is eligible for special education and related services under the category of other health impaired (OHI) based on her attention deficit hyperactivity disorder (ADHD). Student also has visual processing deficits which affect her ability to access her general education curriculum.
- 2. Student's legal guardian (Guardian) testified at the hearing. She was appointed Student's sole legal guardian in July 2010 and had since held Student's

educational rights. Student has lived with Guardian, as a foster parent, for three years. Before the legal guardian appointment, Student's biological mother (Mother) held Student's educational rights. Although Guardian did not possess any educational rights before July 2010, she was actively involved in Student's daily educational matters, including speaking to teachers, and attending school meetings, including the Student's individualized education program (IEP) meetings.

3. Student attended first grade in 2007-2008 at Purche. Guardian believed that Student was not learning and was behaving poorly in class. She requested a Student Success Team (SST) meeting, which took place on June 12, 2008. Guardian believed that Student required additional assistance and a special education evaluation due to Student's academic and behavioral issues. Student had been receiving therapy for her ADHD and difficult behavior, which included throwing tantrums. The SST Committee discussed the concerns, including the possibility of retention. Although Guardian thought Student should be retained and repeat first grade, Mother was opposed. The team decided to delay any decision about retention and monitor Student's progress in the second grade.

4. During the 2008-2009 second grade school year, Guardian continued to express concerns regarding Student's class behavior, including temper tantrums, and poor academic performance in reading and writing. Guardian requested a Section 504 plan.<sup>3</sup> Student's teacher completed a Section 504 evaluation form, noting that Student

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<sup>3</sup> Section 504 of the Rehabilitation Act of 1973 ensures that a qualified child with a disability has equal access to education. The child may receive appropriate accommodations and modifications tailored to the child's individual needs.

was irritable, distractible, moody, quarrelsome, aggressive, and disruptive. Purche assembled a Section 504 team and held an evaluation meeting on April 1, 2009. The team addressed Student's escalating classroom behaviors, which had caused the teacher to call the Guardian two or three times a week. Guardian testified that Student exhibited similar escalating behaviors at home, especially when asked to do her homework. The team developed a Section 504 plan and a Section 504 behavioral support plan. The team noted that Student's ADHD called for accommodations in the classroom and school nurse support for Student's medication.

5. A representative of Five Acres Therapeutic Behavioral Services (Five Acres), where Student had been receiving counseling services, attended the April 1, 2009 Section 504 meeting. On the same day, Five Acres and District entered into a Memorandum of Understanding (MOU), agreeing to various strategies of mutual cooperation and assistance to target behaviors and provide intensive interventions, including allowing a Five Acres' behavioral aide to accompany Student to class a few days a week.

6. Guardian concluded that Student continued to perform poorly during the 2008-2009 school year, especially in reading. Student scored "far below basic" on the Spring 2009 California Standard Test in English Language. Student received a "not proficient" score in reading for the last progress report of the 2008-2009 second grade school year. The teacher noted in her comments that Student had difficulty meeting standards and needed to improve reading fluency. The teacher concluded that Student's poor performance was due, in part, to Student's negative behaviors, including lack of self-control, failure to complete assignments and tasks, failure to participate in class discussions, lack of self confidence and difficulty in paying attention.

7. At the conclusion of the 2008-2009 second grade school year, Purche, Mother and Guardian discussed retention to have Student repeat second grade. Mother

wanted to retain Student. Mother possessed the educational rights at the time and, accordingly, Student was retained and repeated second grade in the 2009-2010 school year.

8. By letter dated September 9, 2009, Attorney Jill C. Rowland of the Alliance for Children's Rights (ACR) informed the principal of Purche that ACR had been appointed by the Los Angeles Superior Court to represent the educational interests of Student. ACR noted that it was working with Mother (then holder of educational rights), Guardian (then foster parent), and Student's court appointed special advocate (CASA) Beth Wells. In addition, the ACR advised in its letter that the current Section 504 plan was inadequate and that Student's known or diagnosed academic and behavioral disorder met special education law criteria of "suspected disability." As such, ACR concluded that Student warranted a special education assessment, and requested a comprehensive psychoeducational assessment of Student.

9. ACR's September 9, 2009 letter also advised that, in addition to ADHD, Student had also been diagnosed with oppositional defiant disorder (ODD) and post-traumatic stress disorder (PTSD). Guardian testified that Student was abused<sup>4</sup> before going into foster care. This was the first time that the District was informed of Student's ODD and PTSD diagnoses.

10. District timely prepared a special education assessment plan, to which Mother consented on September 25, 2009. On October 1, 2, 7 and 9, 2009, the District's school psychologist, Dr. Linda Lerner Simon, conducted an assessment of Student, and completed a Confidential Psychoeducational Report for the initial IEP. Dr. Simon testified at hearing.

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<sup>4</sup> No evidence indicated, and no implication should be taken, that Mother was the cause.

## OCTOBER 2009 PSYCHOEDUCATIONAL ASSESSMENTS

11. Dr. Simon earned her bachelor of science as a primary care nurse practitioner in 1977 from Lehman College of the City University of New York, a master of science as a clinical specialist in mental health in 1981 from Hunter College of the City University of New York, a juris doctor law degree in 1990 from Benjamin N. Cardozo School of Law, a master of science in school psychology in 1996 with a pupil personnel services credential from National University, post graduate certification in school neuropsychology in 2003 from Texas Woman's University, an Administrative Tier I credential in 2005 from National University, and a Ph.D. in psychology in 2008 from Capella University, Minneapolis, Minnesota. Dr. Simon possesses Professional Clear Credentials in California Administrative Grades K-12, Pupil Personnel Services, School Psychology, and School Nursing. She is a licensed educational psychologist and is a Diplomat of the American Board of School Neuropsychologists. She is a certified clinical specialist in mental health and a registered professional nurse, as well as admitted to the United States Supreme Court and New York State Bars.

12. Before coming to the District in 1993, Dr. Simon was the hospital specialist for liaison psychiatry at Queens-Nassau Mental Health Center for eight years, performing psychiatric consultations and supervising or providing direct treatment. Her duties included being a clinical instructor and a lecturer for medical staff. She also supervised residents, interns, and medical students. Previously, she had been a field nurse clinician, a hospital administrator (Baptist Medical Center), and a staff nurse and team leader (Veterans Administration Hospitals, New York City). She was also an adjunct professor at Alliant University, Los Angeles, in the doctoral and master's degree programs for school psychology. She also taught graduate courses in teacher credentials, school psychology and school counseling at National University, Los

Angeles. In addition, she was an adjunct assistant professor and clinical instructor from 1983 to 1988 at the College of Staten Island of the City University of New York.

13. She had been a school psychologist with the District for 11 years. Previously, she was a school nurse in District elementary, middle and secondary schools for seven years. Dr. Simon's District duties include conducting psychoeducational evaluations, consulting with staff and parents, attending IEPs, and providing counseling to students, primarily at Purche. She also conducts gifted and preschool testing, working with students through continuation high school.

14. Dr. Simon had conducted more than 1000 visual processing tests and evaluations, which are part of every psychoeducational assessment. Her experience, credentials and education qualified her as an expert in school psychology and in the administration and interpretation of visual processing tests and psychoeducational assessments.

15. Dr. Simon's assessment of Student included health and developmental history, background and family history, educational history, review of records, review of Student's work product, interviews of Mother and Guardian, and observations of the Student in the classroom, on the playground, and during assessment. Assessment tools also included: Cognitive Assessment System (CAS); Test of Visual Perceptual Skills – 3rd Edition (TVPS-3); Test of Auditory Processing Skills – 3rd Edition (TAPS-3); Wide Range Achievement Test – 4th Edition (WRAT-4); Burks' Behavior Rating Scale – 2nd Edition (BBRS-2) completed by Student's classroom teacher; Behavior Assessment System for Children – 2nd Edition (BASC-2) completed by Student's classroom teacher; Conners' Rating Scales – 3rd Edition (Conners-3) completed by Student's classroom teacher; and the Woodcock-Johnson Tests of Academic Achievement III (WJ-III) administered by a Resource Specialist.



16. After reviewing Student's history and records, Dr. Simon noted that Student had been medically diagnosed with ADHD, for which she took Strattera (Atomoxetine) twice a day, as well as Respidal in the evening, which was for Student's anxiety and PTSD. Dr. Simon also learned that Student was living with Guardian while her brother was in foster care with Guardian's mother, and that Student had been retained, pursuant to Mother's request, in second grade for the 2009-2010 school year. Student's teacher for the 2008-2009 school year reported that Student was below grade level in math (basic facts) and reading comprehension, and had disorganized writing. Her 2008-2009 report cards had scores of "1s" (not proficient) and "2s" (partially proficient), with some "3s" (proficient) in non-academic areas. The California Standards Testing (CST) for spring 2009 were "far below basic" in English language arts and "below basic" in math. However, at the time of Dr. Simon's assessment, Student's current teacher reported that Student was able to read and write at grade level. The teachers also advised Dr. Simon that Student was capable, but lacked respect for authority figures and had a short attention span.

17. Dr. Simon observed Student in the classroom during an average lesson, where Student would often be distracted, not following the lesson or paying attention. Student was constantly playing with crayons and, when taken away, would become disruptive and disrespectful until she got her crayons returned. Student had a behavioral therapist from Five Acres in the classroom to address issues related to her trauma victimization.<sup>5</sup>

18. Student came for assessment willingly and was cooperative, but she was constantly physically active and demonstrated excessive impulsivity and distractibility,

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<sup>5</sup> In order to properly preserve Student's legal right to confidentiality, the details of the trauma victimization were not included in any report.

even though she had taken her medications before coming for testing. Student worked for praise and tangible incentives (gold tickets, prizes) as long as the work was not too challenging. Student's work effort was observed to be inconsistent, though she generally put forth a good effort. She used avoidance behaviors when tasks became "too hard." Student was easily distracted by auditory and visual environmental stimuli. Student was generally in a good mood. During the approximately two hours of testing, Dr. Simon provided frequent breaks and tested in a quiet, well-lit, well-ventilated room to minimize Student's distractibility.

### COGNITIVE ABILITY

19. Dr. Simon administered the CAS, which measures cognitive ability in the areas of planning, attention, simultaneous process, and successive processing. Student obtained an overall CAS standard score of 97 which indicated solid average cognitive skills. Dr. Simon said that some of Student's low average scores on some CAS subtests may have been affected by Student's poor attention abilities. Though cooperative, Student sometimes impulsively jumped into tasks without waiting for instructions, which penalized her performance. Student's receptive and expressive verbal language skills appeared at or about commensurate with her ability and experience. Student could write independently but, per teacher, the writing was "not organized," which Dr. Simon stated was a function of ADHD. On the WJ-III, Student's writing fluency was in the solid average range (Standard Score (SS) 100); but her writing samples were low average (SS 86). Though there were some deficits in conceptualization and association, Student's expressive ability was at or about age and grade level.

20. Dr. Simon determined that Student struggled with attention and concentration (i.e., the ability to stay focused and on task). This included self-monitoring, self-control, generation of strategies and their use, and sustained effort. On Burks' Scale,

Student's concentration and attention were "mildly elevated," on the BASC-2, Student's attention and concentration were in the average range. On the Conner-3, Student was also in the "mildly elevated" range for hyperactivity/impulsivity, but in the "elevated" range for inattention. Student was constantly in motion, sitting, repositioning herself, grabbing pencils from the cup on the table, leaning across the table to see what the examiner was doing, wagging her feet and legs. Student's overall planning appeared to be inefficient on informal testing, but when tested formally by the CAS Planning subtests, Student scored in the high average range. However, these subtests were very novel and interesting for children and held children's attention well. Based on the above, Dr. Simon concluded that Student had significant traits of ADHD in school that appeared to be impacting Student's learning.

21. These same traits affected Student's short and long term memory. Student demonstrated low average short term and long term memory on informal tests. She scored in the below average range in visual memory on the TVPS-3, slightly below average in auditory memory on the TAPS-3, but average memory for story recall, immediate and delayed, on the WJ-III. Dr. Simon's report noted that attention and concentration are such elemental aspects of efficient memory, any deficit in attentional mechanisms would affect memory performance. Dr. Simon stated that Student did not appear to have memory deficits which could not be explained by the diagnosed ADHD.

#### VISUAL PROCESSING

22. Dr. Simon testified that the psychoeducational evaluation's visual processing assessment employed more than one type of test. Best practices dictated the use of various instruments to assess visual processing. All the visual processing tests and subtests, along with the classroom and clinical observations, must be considered in evaluating the existence and significance of visual processing deficits.

23. Dr. Simon defined “visual processing” as the ability of the brain to take in information through the visual channel, store, and efficiently recall the learned material when required. Visual processing tests become increasingly complex as they progress.

24. In evaluating Student’s vision processing, Dr. Simon utilized the TVPS and the subtests of CAS with visual processing and handwriting components. The CAS subtests involved visual processing speed, scanning, visual perception, and visual memory. Dr. Simon noted that the CAS manual addresses visual processing and that the subtests, by their very nature, involved visual processing. Dr Simon reported that Student scored above average for Matching Numbers, above average for Planned Connections, high average for Planned Codes, above average for Number Detection, and average on Receptive Attention. Student scored below average in Figure Memory. Dr. Simon testified that, in her opinion, the score was slightly deflated. The nature of the figure memory test required Student to maintain constant focus on objects for about five seconds, something Student had difficulty doing because of her ADHD and distractibility. Dr. Simon concluded that, overall, Student performed extremely well on CAS subtests that involved visual processing.

25. Student also took the TVPS-3 standardized test which was a more difficult and tiring test than the CAS, as it requires greater attention. The test has many opportunities to produce fatigue, causing students to shut down and rush to complete the test, creating error. Dr. Simon, therefore, assured that Student was well rested and administered the TVPS on October 2, 2010, which was a different day than the CAS.

26. The TVPS-3 included seven subtests: (1) Visual discrimination, which is the ability to detect similarities and/or differences in materials which are presented visually; (2) Visual memory, which is recollected information about what one has seen, tested by having the student look at an object, which is taken away, and then having the student choose the object from a page of objects; (3) Spatial relationship, which is the ability to

perceive the location of objects in relationship to other objects; (4) Form constancy, which is the ability to recognize forms as they change size, shape, or orientation; (5) Sequential memory, which is the ability to remember forms or characters in correct order, tested by having a student see a string of forms and, thereafter, choose that same string from other strings; (6) Figure ground, which is the ability to perceive and locate a form or object within a busy field without getting confused by the background or surrounding images, tested by having the student see a form and then try and find the form when it is camouflaged or hidden; and (7) Visual closure, which is the ability to visualize a complete whole when given incomplete information or a partial picture. Dr. Simon described each subtest, noting the demands upon the Student and the meaning of the results for the Student's visual processing.

27. Student's TVPS scores had four composite indexes. Student received a standard score of 77 in basic processing, which was low. She received a very low score of 55 on the sequencing index; but this index was based solely on the sequential memory subtest, which Student did not complete, because she refused to continue as the test became more difficult. Therefore, this score was not an accurate measure. For the complex processes and overall processing indexes, Student scored 73, which was extremely low.

28. Student's TVPS scores were very low when compared to her performance on the visual processing CAS subtests, where Student's scores were generally in the above average to high average range. Dr. Simon stated that one would expect the scores to be comparable and, consequently, she carefully looked at Student's conduct within the context of the testing. Dr. Simon noted that the CAS subtests were very novel, interesting and engaging, keeping Student involved and working until she reached her performance ceiling, which proved to be very high. On the TVPS, Student simply did not try as hard, was unfocused, and did not remain engaged. TVPS was strictly timed and,

once Student became disengaged, standardization did not allow sufficient time for Student to meaningfully reengage.

29. Dr. Simon's observation of Student in the classroom also provided information related to evaluating Student's visual processing. Certain behaviors like squinting, difficulty copying from the board to paper, copying from book to paper, accuracy, body language, tilting of head, must be evaluated within the context of the class and the pupil's suspected deficits. Dr. Simon did not see behavior indicative of visual processing deficits substantively affecting Student's classroom performance.

30. Dr. Simon's informal testing of Student's visual processing included responding to questions after reading common words and observing objects. During the academic WRAT-4 testing, Dr. Simon carefully observed the Student as she performed spelling and reading tasks. Dr. Simon reviewed handwriting samples and noted that Student's handwriting was immature for her age, but insignificantly so. Student's writing had proper spacing between letters and words, with no transposing of letters or words. Student could copy from a model with accuracy. The handwriting was legible, which was the primary criteria. These observations provided qualitative information regarding possible visual processing deficits.

31. Dr. Simon emphasized that, when there is a visual processing deficit, the type of remediation depends upon the area impacted. If the pupil bunches letters, or cannot keep the letters of a word on one line, indicating a lack of visual planning, Dr. Simon would look to an occupational therapist to screen and, if necessary, assess. If the pupil cannot pull a word out of a sentence or whole page, then special education teaching techniques by the resource specialist would remediate the visual processing deficit. Dr. Simon stated that the purpose of visual processing related services was to bolster areas of weakness, remediate if possible and, if not, teach compensatory skills.

For example, related services strengthen auditory and kinesthetic learning as compensatory mechanisms for visual processing deficits.

32. Dr. Simon stated that a school psychologist was trained and educated to assess visual processing because it is part of the psychological processing domains. Dr. Simon's professional opinion was that school psychologists are better suited than optometrists to interpret visual processing test results for purposes of determining related services and school support to address a student's needs in the educational setting.

#### ACADEMIC ACHIEVEMENT AND SCHOOL READINESS

33. Dr. Simon also evaluated Student's academic achievement, which measured acquired knowledge and determined what level the Student had developed age-appropriate knowledge that relied on exposure and long-term memory and retrieval skills. Student's teacher reported that her alphabet and number recognition were at grade level. Student's spelling, word recognition, and language arts were at or about grade level.

34. Dr. Simon used two standardized instruments in evaluating Student's academic achievement and school readiness: the WJ-III and the WRAT-4. Resource teacher Martine Garcia administered the WJ-III over three days, beginning October 13, 2009. Ms. Garcia holds a special education credential for mild to moderate disabilities and has been a resource teacher for five years. Ms. Garcia testified at the hearing and was qualified to administer the WJ-III test to Student. Ms. Garcia tested Student over three 45-minute sessions. Like Dr. Simon, Ms. Garcia noted that Student was fidgety and required frequent redirection. She gave Student breaks between the subtests, but not during the testing. Ms. Garcia adhered to testing protocols for the WJ-III.

35. According to the WJ-III standardized scores, Student's academic skills were average compared to others her age, except for oral language, which was below average. The average range of standard scores (SS) was 85 to 115. In reading, Student's skills were all average. Specifically, Student's SS in Broad Reading was 90; in Basic Reading Skills was 95; in Letter Word Identification was 92; in Reading Fluency was 97; in Story Recall was 92; in Passage Comprehension was 85; and in Story Recall was 108. In written language, Student's skills were all average with a Spelling SS equaling 89 and a Writing Fluency score of 100. Student's writing samples were slightly below average with an SS of 86.

36. Dr. Simon administered the WRAT-4 on October 7, 2009. On the WRAT-4, Student's academic skills were all in the average range, except for math computation, where Student had a SS of 79. Student had a SS of 88 in Word Reading, 89 in Sentence Comprehension, 94 in Spelling, and 87 in Reading Composite.

37. Dr. Simon also conducted informal academic testing measuring Student's knowledge regarding common sight words, coins and currency, telling time, geometric shapes, alphabet, calendar, colors, body parts, and directionality. Student's recall of history and current events was slightly below her second grade peers at Purche.

#### SOCIAL/EMOTIONAL

38. Dr. Simon also evaluated Student's social and emotional status. Student's second grade teacher for the 2009-2010 school year, Ginny Lin,<sup>6</sup> completed

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<sup>6</sup> Ms Lin obtained her bachelor of arts in human development from the University of California, San Diego, followed by her teaching credential from California State University, Long Beach. In 2009, she earned master of arts in education administration from California State University, Dominguez Hills. She has a full, clear teaching credential as well as a Cross-cultural Language and Academic Development (CLAD) certificate,



standardized scales in social-emotional and behavioral areas using the BBRS-2, Conners-3, and BASC-2. The BBRS-2 indicated that Student had elevated poor anger control, moderate rebelliousness, elevated attention deficits, elevated withdraw, moderate cognitive deficits and moderately poor self-esteem. The BASC-2 results indicated that Student's scores for externalizing problems, internalizing problems and school problems were within normal limits. However, Student was in the "at risk" category for the behavioral symptoms index and all areas of adaptive skills (social skills, leadership, and functional communication). The Connors-3 results indicated that Student scored in the very elevated range for inattention, aggression, and peer relations. Student was in the elevated range for learning problems and executive functioning. Dr. Simon stated that the standardized scale scores supported the medical diagnosis of ADHD.

39. Ms. Lin reported that Student could work independently and completed work, even though it could be sloppy and with mistakes. Student worked better alone because she was easily distracted by "social chatter" in small groups, even though Student liked to work with other girls in a small group session. Student's homework was always complete and turned in on time and Student was able to complete most class assignments in the time allowed. Although Student scored in the average range on the CAS Planning subtests, Student's approach to initial planning was generally poor. Ms. Lin reported that Student had made excellent academic progress since the previous year, noting improvement even in the first two months of that school year.

40. During the assessment, Dr. Simon easily established a rapport with Student, as she was cooperative and was in a good mood, and had a good general

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which qualified her to teach English language learners. She had been a teacher with the District for eight years and was, at time of the hearing, teaching third grade at Purche. The previous year, she taught a second/third grade combination class.

demeanor. Ms. Lin reported that Student tended to stay to herself but she got along well with her peers, especially when assigned to work groups. There had been no playground issues and her attitude toward adults was good as long as she was getting what she wanted. She could be disrespectful when she did not get her way, although Student was never disrespectful during the assessment process. Student reported watching a lot of television each day and admitted not to reading daily, though this was a class requirement. Within 18 months before the assessment, Student had undergone a significant psycho-emotional trauma with which she had had difficulty dealing. She had been seen for therapy in a structured trauma-related program. This trauma had directly impacted Student's behavior at school and at home. The behavioral aide was assigned to more directly address Student's behavior.

41. Dr. Simon said that Student's psycho-emotional trauma, separation from her sibling and mother, and Student's placement in the foster care system were factors that negatively impacted Student's ability to successfully access the general education curriculum. In spite of this, Student had made great improvement since the previous year in terms of her ability to interact appropriately with peers, teachers and staff. Student appeared happier. The counseling had been effective and Dr. Simon recommended its continuance. While there was an emotional component to Student's attitude and occasional disruptive and disrespectful behaviors, Dr. Simon concluded that they appeared to be a "normal" reaction to her abnormal circumstances. In addition, Student's medically diagnosed ADHD, with its concomitant impairment in executive functioning, further impacted Student.

42. Dr. Simon found that Student's intellectual ability could not be assessed with certainty because of Student's unusual circumstances, her medically diagnosed ADHD, her medication for her ADHD, and her medication for anxiety and PTSD. However, based on the alternative assessment, standardized instruments, observations,

teacher input, and parent/foster parent interviews, Dr. Simon concluded that Student was functioning within Student's average range of potential at that time. Student demonstrated weakness in conceptualization and association; however, her oral and written expression were commensurate with her age, ability, and educational/social experiences.

#### DR. SIMON'S CONCLUSIONS AND RECOMMENDATIONS

43. Though Student's short-term and long-term memory were generally intact, especially for experiential events, Student's inability to attend made it difficult for her to deposit material information into her working and short-term memory, and then into her long-term memory. Dr. Simon concluded that any demonstrated deficits in memory (short or long-term) were attributable to the ADHD. Though there were some minor deficits in auditory memory, Student's auditory processing was grossly within normal limits and was actually a learning strength. The minor deficits in auditory memory were more likely related to ADHD. In fact, Student's strength was in her phonological processing ability.

44. Dr. Simon emphasized that Student's attention and concentration were well below average. Despite medication for the diagnosed ADHD, Student was still very easily distractible, was in constant physical motion, displayed very poor impulse control, and had difficulty focusing at age level. These significant deficits in attention impacted Student's ability to successfully access the general education curriculum.

45. Dr. Simon's report stated that Student's visual processing was well below average in basic, sequential, and complex processes. Student demonstrated significant strength in spatial relations, but in other areas, especially static and sequential visual memory, Student was below average. Dr. Simon opined that Student appeared to have a visual processing disorder.

46. Dr. Simon found Student's motor skills, both fine and gross, to be well within the normal range and did not impact her ability to learn. Speech language was another area of strength for Student, who was able to articulate her needs, wants and ideas. Her receptive and expressive language skills were commensurate with her education and experience levels.

47. Academically, Student was inconsistent in her school work. Student completed homework, turned it in on time, and did her class assignments. Generally, Student liked school. On standardized tests, Student functioned within the average range in all areas, except in the area of understanding directions. This area of significant weakness for Student was likely related to the ADHD because Student did not "catch" everything told to her by her teacher or parent. Student's strengths were in reading, decoding, writing, and oral comprehension. She did not know her math facts by heart, which impacted her ability to keep up with her class during lessons. Overall, Dr. Simon found that there was no discrepancy between Student's cognitive ability and her academic achievement.

48. Student's ADHD was confirmed by the classroom observations and Student's scores on the three behavioral scale instruments.

49. Student was generally respectful to adults, but would become disrespectful if she did not get her way. She got along well with peers. Overall, Student had a sense of right and wrong and was generally socially appropriate in school. However, Student had a significant social-emotional history and at times acted out at school. Although Student had made significant improvement in her ability to interact with peers and adults, and in managing her temper, she continued to need therapy. Because Student's reactions to the upheaval in her young life appeared to be "normal" responses, Dr. Simon concluded that Student did not qualify for special education services under the eligibility of Emotional Disturbance (ED).

50. Based on the standardized and informal test results, Dr. Simon concluded that Student's cognitive ability and learning potential were in the average range. Dr. Simon determined that Student did not qualify as Specific Learning Disabled (SLD) because there was no discrepancy between her ability and achievement, even though she had psychological processing domain deficits. In fact, Student's strengths included reading, writing, and phonological processing ability. Her weaknesses were in math, attention/concentration, and visual processing skills.

51. Dr. Simon determined that Student met the eligibility criteria for OHI as a result of her medically diagnosed ADHD, the severity of which impacted her ability to successfully access the general education curriculum without additional supports. On this basis, Dr. Simon recommended that the IEP team find Student eligible for special education placement and related services.

#### ACR'S REQUEST FOR ADDITIONAL ASSESSMENTS

52. On October 29, 2009, District received a letter from Student's attorney that requested the following: 1) an occupational therapy assessment by a licensed or registered occupational therapist to cover the area of fine motor functioning; and 2) "visual processing assessment for vision therapy by a licensed optometrist, as outlined in Title 5 of the California Code of Regulations section 3051.75."<sup>7</sup>

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<sup>7</sup> The witness testimony indicated that "vision therapy" includes a broad group of techniques aimed at correcting and improving visual disorders, including visual processing disorders or deficits.

## THE NOVEMBER 12, 2009, INITIAL IEP

53. On November 12, 2009, District convened Student's initial IEP team meeting. Attending were: Mother, Guardian, Purche assistant principal Rose Amah, special education resource teacher Ms. Garcia, Student's second grade general education teacher Ms. Lin, Dr. Simon, attorney Ms. Rowland, CASA advocate Ms. Wells, ACR legal intern Minh-Van Do, and Marriage and Family Therapist (MFT) intern Brina Cooper from Starview Counseling (Starview), which was providing Student with mental health and other services.<sup>8</sup>

54. Dr. Simon presented her Psychoeducational Report. The IEP team found that Student met the criteria for Special Education services under the OHI eligibility based on her ADHD. Student's present levels of performance (PLOP) were discussed.

55. The PLOP for reading was based on the WJ-III and the 2009 CST in language arts. Student's needs were in the area of comprehension. In particular, Student struggled with decoding multi-syllable words, irregularly spelled words, and third grade vocabulary. Suggested accommodations included enrichment in the RSP program to provide Student with more opportunity to practice strategies to assist her in reading comprehension.

56. The PLOP for writing was based on the WJ-III and the 2009 CST. Student scored in the average range for her age level on the Writing Fluency Test. Though Student demonstrated the ability to write complete sentences, they were light in content and missing standard conventions such as capitalization and punctuation. In addition, her writing was illegible and she had some difficulty with spelling. Like reading, RSP

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<sup>8</sup> Agencies, other than the District, were providing these mental health services to Student.

program enrichment would provide Student an opportunity to practice writing strategies and conventions.

57. The Math PLOP was based on the WJ-III and 2009 CST. Student was about one year behind her age and grade level in her ability to perform mathematical computations. She was lower than average in Applied Problems, which tested the ability to solve word problems. She did better when the problem was read to her. The suggested accommodation was small group support to improve Student's number sense, calculation and analytical math skills.

58. The school nurse submitted the PLOP for Student's Health, which was based upon parent interview and review of records and health assessment. Student was in general good health except for her medically diagnosed ADHD for which she took medications. She passed her vision screening and hearing test. Her areas of need were related to her medications, which could cause side effects. For this, Student would be allowed to drink water when needed, have bathroom privileges, and a rest period.

59. Ms. Garcia also drafted proposed Annual Goals/Objectives in Reading, Math, and Writing. She proposed two Behavioral Support goals. The IEP team agreed to all goals and placed Student in the general education classroom at Purche, for the remainder of the 2009-2010 school year and the 2010-2011 school year until the next annual IEP meeting in November 2010. The IEP provided services from the Resource Specialist Program (RSP), taught by a highly qualified resource specialist teacher (RST) and supported by a highly qualified resource specialist program assistant (RSPA). RSP services were provided one to five times per week for 150 weekly minutes to address deficits in reading/writing, utilizing a pull-out/inclusion model. RSP services were also provided one to five times per week for 60 weekly minutes to address deficits in math, also in a pull-out/inclusion model. The IEP team developed a Behavior Support Plan

(BSP) for the classroom teacher, to be collaboratively monitored by the RST and informally supervised by the school psychologist, Dr. Simon.

60. The IEP also offered accommodations and supports, which included: pre-teach/re-teach, writing scaffolds (story maps and writing organizers), small group/one-on-one instruction, preferred seating next to board/teacher, extended time, peer mentor, word bank at desk, math manipulatives as it related to solving word problems, breaks as needed to address ADHD needs, and teacher to check for understanding by asking Student to summarize task. For the English Language Arts (ELA) and Math CST, Student would test in a small group setting, have extra time on a test within the testing day, and could have supervised breaks within a section of the test.

61. The Starview mental health services would provide continued Therapeutic Behavior Service (TBS) and a support counselor who would liaise with the school, pursuant to a memorandum of understanding with the District.

62. Parent signed and approved the IEP, with a notation repeating the request for OT and vision therapy assessments.

#### NOVEMBER 18, 2009 ASSESSMENT PLAN

63. The District prepared an assessment plan for vision therapy by an optometrist and an OT assessment. Mother signed her consent to the plan on November 18, 2009, and it was returned to District.

64. District employee James Astle processed the assessment plan by selecting assessors from a District list based on proximity to Student's home. Mr. Astle then prepared the correspondence needed to complete the assessments. Mr. Astle did not review assessments or provide any input to the selection of assessors, and was not qualified to do so. Mr. Astle generally performed assistive technology assessments for District and had been given the part-time clerical assignment of processing assessment



plans. The only criteria he used to select assessors was the District list and proximity to a student's home.

65. By letter dated December 12, 2009, Mr. Astle informed Student's Mother and Guardian that the District had arranged to have David G. Kirschen, O.D., Ph.D. of the Doris Stein Eye Research Center at UCLA conduct the vision therapy assessment. The letter stated that the Mother or Guardian needed to contact Dr. Kirschen to make an appointment. The letter included all necessary contact information. The letter concluded by stating that, upon the assessment's completion and receipt of the report, an IEP meeting would be held to review the assessment results. Mr. Astle also contacted Dr. Kirschen to confirm the referral.

66. Student's Mother and Guardian did not schedule an appointment with Dr. Kirschen in response to Mr. Astle's letter. Instead, attorney Ms. Rowland faxed a letter to Mr. Astle on January 19, 2010, stating that ACR had been appointed by the Los Angeles County Dependency Court to represent the Student's interests. Ms. Rowland objected to Dr. Kirschen's assessment of Student stating that he

"does not provide evaluations of developmental vision processing, nor does he provide vision therapy to address deficits in developmental vision processing. He does provide assessments and therapy, but only for ocular motor deficits, such as strabismus. [Student] is not suspected of having ocular motor deficits, rather she has shown visual processing deficits, and thus an assessment of developmental vision processing is appropriate."

67. Ms. Rowland then requested that Student be referred to an optometrist who “can provide an assessment for vision therapy to address deficits in developmental vision processing.”<sup>9</sup>

68. Mr. Astle responded to Ms. Rowland’s letter in two similar e-mails to ACR, dated January 20 and 21, 2010. Mr. Astle offered to refer Student to the Center for the Partially Sighted. However, he noted that its optometrists would not test “for visual processing because vision therapy [did] not treat visual processing deficits.” When Mr. Astle used the term “visual processing,” he was referring to “visual information processing.” Mr. Astle further stated that visual processing tests were administered by school psychologists and deficits were treated through accommodations and other activities in the classroom as part of a special education intervention program. He stated:

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<sup>9</sup> At the hearing, the parties agreed that there are two broad components to the visual processing system, which would be referred to as follows:

- The first part of visual processing is the visual system’s ability to efficiently and accurately acquire visual information, which is transferred to the brain. This comprises the basic visual physiological processes and is the “front end” of visual processing or “visual efficiency.”
- The second part of visual processing is how the brain processes the information received from the front end of the visual system. This involves higher brain functions and is referred to as the “back end” of visual processing or “visual information processing.”

The term “developmental vision processing” means visual information processing or the back end of visual processing.

"We do not feel that optometrists are qualified to give and interpret educational tests dealing with processing issues. Vision therapy deals with the eyes in the intake of information. Processing issues have to do with the brain and how it processes the information. Vision therapy does not [address] these areas."

69. According to Mr. Astle, Dr. Kirschen had conducted visual processing assessments that resulted in a recommendation for visual therapy, which the District then provided. Optometrists at the Center for the Partially Sighted had similarly done so. The vision therapy to which Mr. Astle referred was for visual efficiency and not visual information processing in the brain.

#### JANUARY 2010 OT ASSESSMENT AND FEBRUARY 2010 AMENDMENT IEP

70. Occupational therapist Joy Huynh conducted an OT evaluation of Student, and issued a report on January 29, 2010. Ms. Huynh obtained a bachelor of science in OT from University of Missouri and possessed a California OT license. She is a member of the National Board of Occupational Therapy (NBOT) and has been an OT for 11 years, all as a District employee.

71. Ms. Huynh's duties involved OT therapy and assessments, which included visual processing. She would observe functioning in a clinic and in the classroom to determine if a child scanned data appropriately, and visually discriminated foreground from background, as well as visually spaced out materials. She would look at work samples, talk to the teacher, watch a child's eyes as they visually tracked, and have the child copy shapes. She utilized standardized tests, such as the TVPS or a test of visual motor integration (VMI), as well as other tests that have visual components.

72. Ms. Huynh interviewed the teacher, Ms. Lin, observed Student clinically and in the classroom, reviewed Student work samples, and reviewed all other available records, such as the initial IEP and the psychoeducational assessment. Ms. Huynh reviewed the TVPS and visual component test results in Dr. Simon's October 2009 report, noting that Student scored poorly on most subtests. Student's performance for spatial relations was better than the other visual processing scores. Because Dr. Simon conducted visual processing testing just a few months before, Ms. Huynh determined that further standardized tests in this area were not needed for her OT assessment. Ms. Huynh noted that Student had ADHD, for which she took medication.

73. Ms. Huynh observed Student in her second grade general education classroom and school campus (outdoor cafeteria, courtyard, steps, and playground). The Student was required to perform second-grade academic skills according to California general education standards. Ms. Huynh's clinical and classroom observations indicated that Student's postural stability for sitting, maintaining and changing positions, and manipulation with movement were adequate to perform educational tasks, such as maintaining upright seated posture, retrieving fallen items on the floor, maintaining a good balance, raising her hand to answer questions and reaching for various objects.

74. Ms. Huynh evaluated Student's fine motor skills, which involved precise movement by the small muscles of the hand, which are the foundation to more complex skills such as writing and cutting. Student showed adequate muscle control in her hands which allowed her to maintain a functional dynamic tripod grasp on her pencil. Ms. Huynh noted that Student's pencil pressure was very light, which was consistent with the teacher's report, review of writing work samples, and Student's tendency to rush when printing. However, there was no muscle weakness in Student's hands. Student showed strength in her ability to utilize a variety of school tools such as glue sticks, manual pencil sharpener, scissors, and hole punch. She properly performed bilateral hand skills.

In the classroom, Ms. Huynh suggested that Student could improve her fine motor and motor planning skills by receiving extra time to practice, such as when opening containers, using rulers and other tools.

75. In evaluating Student's visual processing for performance of academic tasks, Ms. Huynh said Student showed significant weakness in the areas of visual perception and visual motor integration for performance of written communication tasks. The writing sample showed highly illegible printing with difficulties in visual spatial organization, including improperly formed letters and numbers, poor spacing between letters and words, improper adherence to margin boundaries, and poor letter placement within designated lines. Student did not reverse letters. Ms. Huynh suggested that using raised lined paper would help Student form letters more legibly because the raised lines helped her to feel order correctly place letters on the writing line and that graph paper or lined paper turned in a vertical position would also assist Student in aligning columns correctly when completing math calculations.

76. Student maintained appropriate body awareness in moving about the educational environment, without bumping into obstacles and by appropriately reacting to unexpected and loud sounds. However, Ms. Huynh observed that Student was very distractible, consistent with the ADHD. Ms. Huynh suggested a number of strategies to improve Student's on-task behaviors, such as preferential seating, breaks, and appropriate fidget tools. As for behavior, Ms. Huynh observed that Student organized her materials in and around her desk, and demonstrated the ability to quickly locate desired items on the desk and in the classroom cupboards. Ms Huynh noted that Student's history included instances of emotional outbursts at school when encountering frustration or peer conflict (e.g., losing a game).

77. In summary, Ms. Huynh found that Student could fully participate and perform general education activities, including functional visual processing skills in the

classroom. However, Student presented a need in visual processing in copying sentences from near and far points accurately. Ms. Huynh suggested classroom accommodations such as adapted writing paper, graph paper, and appropriate fidget tools for improved focus during teacher lectures and when performing independent writing. She also recommended occupational therapy to assist Student in benefiting from her specially designed instruction.

78. An IEP team meeting was held on February 4, 2010 to review the OT assessment. In addition to Ms. Huynh, the team consisted of Mother, assistant principal Ms. Amah, Ms. Garcia, second grade general education teacher Ms. Lin, and ACR attorney Ms. Rowland. The team agreed to provide OT to Student, one to five times per week, for a total of 60 monthly minutes. Ms. Huynh drafted a Motor OT goal with two incremental objectives to address Student's handwriting. Mother consented to amend the IEP to include the OT goal and services.

79. Ms. Huynh provided OT services to Student from February through June 2010. During this time, Student wrote better when she was motivated. When she was not motivated, her handwriting deteriorated. Student's handwriting steadily improved. Ms. Huynh did not provide OT to Student in 2010-2011 school year, however, she credibly testified that after reviewing writing samples from that year, Student continued to improve in this area.

#### 2009-2010 SECOND GRADE SCHOOL YEAR

80. Student repeated second grade in the 2009-2010 school year with Ms. Lin as her general education teacher. Ms. Garcia was Student's RSP teacher. Both testified at the hearing.

81. Ms. Lin credibly testified that Student made significant academic progress in her class. For example, in spring 2009, Student scored far below basic on the ELA CST,

and below basic on the Math CST. One year later, in the spring of 2010, Student scored proficient on the ELA CST and proficient on the Math CST. Student's progress was substantial, jumping two full levels on the CST, which was very rare. Ms. Lin attributed Student's significant progress to Student's hard work, the IEP related services, the school's support team, receipt of psychological and counseling support, and stabilization of Student's home life. Ms. Lin was very proud of Student, who did a lot of learning that year as confirmed by her improved performance. Ms. Lin considered Student a great success.

82. Ms. Lin's second grade class used the Open Court Reading (OCR) program, which systematically teaches decoding, comprehension, inquiry and investigation, and writing in a logical progression. District mandated periodic OCR testing every few months. Ms. Lin tested Student when she first started in September 2009.

83. For the first of three grade reporting periods, Ms. Lin gave Student "not proficient" achievement score in reading, far below fellow students in fluency and comprehension. However, as Ms. Lin and the RSP teacher Ms. Garcia worked with Student throughout the year, Student made significant improvement in both fluency and comprehension, receiving a "partially proficient" in reading the following reporting period, with increased scores for Student's effort. Ms. Lin used strategies such as phonics, blending, fluency and sight-word recognition in a small group setting. Peer tutors partnered and read with Student. Ms. Lin employed various methods to increase comprehension, by asking questions, having Student ask questions, having Student summarize stories, and having Student practice the comprehension strategies taught in the OCR system. Student did not have a problem reading out loud. She would stumble when unsure of a word or had difficulty with phonics, but this type of stumbling was not unusual with second graders. Student did not skip lines or change word order. With OCR, the pupils were given a passage each week, which they read and studied. At the

end of each week, Ms. Lin administered OCR tests to determine passage comprehension. Therefore, Ms. Lin was able to measure and track Student's comprehension progress. The OCR tests showed that Student's comprehension steadily improved with each of the five units over the school year, starting with a score of four and achieving a benchmark score of eight by the end of the year.

84. In Spelling, Student's year end score was slightly below grade level. Vocabulary was inconsistent, with most scores below proficient or close to basic. Writing Conventions and Strategies scores were slightly below grade level. In Writing Applications, she improved from slightly below to benchmark; then, inexplicably, Student scored poorly on the next unit. This was inconsistent with Student's prior performance and may have merely been an unusually bad day for Student. Student did the OCR tests independently, with no assistance.

85. Ms. Lin required Student to sit in front of the class as part of the behavior modification strategies and accommodations, related to the ADHD. Ms. Lin monitored Student's attention, made sure she remained on task, and addressed Student's oppositional behavior with positive reinforcements. Student did not like writing, so she would initially grumble about a writing task. Yet, Student would do the writing if given a positive incentive or a negative consequence. Student needed to be motivated to stay on task and do the writing assignment.

86. In math, the Mathematics Periodic Assessments showed that math was one of Student's strengths. Student ended the year at near grade-level proficiency, and on numerous subtests given throughout the year had achieved scores of 100 percent.

87. Ms. Lin emphasized that Student worked very hard, maintaining the highest scores for effort, after the first reporting period. Ms. Lin gave Guardian a lot of credit for providing a stable home life. Ms. Lin recalled when Student was in the second grade during the 2008-2009 school year, with a different teacher. Student was



struggling then and Ms. Lin, quite frankly, said she was concerned when she first learned Student would be in her second grade class. However, once Student started the year, and she got her medication and home life stabilized, Student worked very hard and made steady progress.

88. Ms. Lin recalled that, after the winter break, Student had a difficult period when she regressed to some of her unpleasant behaviors and habits. Student was more distractible, increasingly negative, defiant, cursing under breath, and not working well with peers. Ms. Lin often talked with the Guardian. Guardian said that Student's doctor had changed her medication and confirmed Ms. Lin's observations. Also, when Student would visit with Mother, Student might come to school without having taken her medication and have a difficult day focusing and behaving. This too was confirmed by Guardian, who told Ms. Lin that the Guardian would have trouble getting Student to do her homework on such days.

89. Ms. Lin compared the report cards from the 2008-2009 and 2009-2010 school years and noted that Student made progress. During 2009-2010, a steady score across the three reporting periods did not necessarily mean that Student did not progress. Student's scores of "2s" were in the 60 to 69 percent range, and indicated she was able to absorb the additional and increasingly difficult work as the year progressed. The scores indicated that Student was always at grade level in her general education curriculum.

90. Ms. Lin saw Student read books from the class library and books checked out of the school library. The Guardian told Ms. Lin that she was working with Student at home. Student had a reading log at home, with a requirement that she read 20 minutes a day. She was not consistent in turning in the log, but this was not substantially different than the other second graders. Student's writing grade was based on a daily

writing prompts and performance. Every couple of weeks, Ms. Lin would review the daily journals. As the year progressed, Student's journal entries got longer and longer.

91. At the beginning of the year, Student's handwriting was very poor when compared to other students. She had difficulty in spacing, sizing, capitalization, and punctuation. Sometimes, Student's writing was illegible. Student's journal was then more messy than neat. Student's handwriting improved based upon consequences and rewards. When there was motivation, Student would take her time and the handwriting would be much better. Student's primary struggle with handwriting appeared to be her tendency to rush through her writing tasks. Handwriting was about 10 percent of the writing grade. By the year's end, Student's handwriting had improved. Compared with other students, it was a little below average. Student's handwriting could still be messy, but it was legible and the discrepancy with her peers was less.

92. Ms. Lin never saw Student squint or hold a book close to her face to read. She never saw Student wear glasses. She never heard Student complain of double vision or that words jumped about on the page.

93. Student's behavior could be very negative and oppositional. Student had a behavioral intervention implementation aide (BII) who would come to the class about twice a week. Early in the school year, the BII took away Student's crayons, causing her to erupt, flip a table and curse. Ms. Lin evacuated the room while the BII chased student around in an attempt to control the unruly conduct. However, Ms. Lin utilized behavior intervention strategies, like those in the IEP, and Student's behavior improved. Ms. Lin made a deal with Student that Ms. Lin would not get upset if Student played with her crayons, as long as Student completed her work and listened in class. When Student completed her daily assignment, she was then allowed to play with her crayons. Student's behavior steadily progressed and the BII visited less frequently. The BII stopped by winter break.

94. Ms. Lin stated she believed Student to be a very capable, bright child whose behaviors and lack of motivation caused Student difficulty. Ms. Lin believed that Student's focus on schoolwork substantially improved when her medication regimen and home life became more stable. When challenged during cross-examination about whether Student had improved since she was repeating second-grade, Ms. Lin stated that Student made significant gains. She noted that even with repeating second grade, one would not expect a child to jump two levels in one year on the CST.

95. The RSP teacher, Ms. Garcia, received her bachelor of arts in communication from California State University at Fullerton, in 1980. She worked in communication for 20 years, as a manager of public relations at Neutrogena and in community relations. She was involved in the Adopt-the-School program and enjoyed working with teachers. This compelled her to go into education and, in 2003, LAUSD recruited her to be in the Teachers Fellows program, which motivated teachers to go into special education. She went to California State University at Dominguez Hills and received her special education credential, mild to moderate, in 2009. Beginning in 2003, Ms. Garcia interned at Purche, where she has worked as an RSP for seven years.

96. As an RSP, Ms. Garcia worked with learning disabled children who, for example, may have high functioning autism, auditory processing deficits, vision processing deficits, attention deficit disorder (ADD), and ADHD. At the time of hearing, Ms. Garcia was providing services to about 43 students through the Learning Center and had a caseload of 23 students with IEPs. Approximately half of her students had ADD or ADHD. She had 11 students with visual processing deficits. Over the past seven years, she has taught approximately 20 to 30 students with visual processing disorders and 20 to 30 students with ADHD. The majority of her students typically have ADHD and Ms. Garcia considers herself very experienced in providing services to children with ADHD and visual processing disorders.

97. Ms. Garcia utilized various strategies for visual processing deficits, which also address ADHD. These strategies included: the use of engaging texts, larger print, visuals connecting text to photos, texts segmented into smaller areas (e.g., two paragraphs as opposed to four paragraphs per page), keywords in boldface type, modeling (e.g., expressively say a passage, sound out words, intonation, demonstrate segmenting sounds), kinesthetically access the word (e.g., act out the vocabulary word; hands-on experience with the word), and utilization of frequent checks for understanding (e.g., ask the child to summarize, recheck with systematic review program).

98. Ms. Garcia utilizes the Voyager Passport Reading Program (Voyager) in her resource classes. The program addresses the fundamentals of reading, which are phonemic awareness, phonics, fluency, vocabulary and comprehension. Voyager is a very systematic and scripted research-based program. Ms. Garcia does not go off script from the program. She detailed the Voyager program and how it addressed the children's reading needs. Voyager covers five different grades and is scripted to provide consistent delivery. Voyager is divided into segments, which increases the students' sense of success because they can focus on smaller steps and then move on. Voyager has frequent assessments, with good and measurable scripts, timing how long a student should spend on any particular exercise. It starts with phonics and word study, phonemic awareness, then moves to vocabulary, all of which materialize into a story. She discusses the vocabulary words, encouraging the children to personalize the words, which assists in remembering the meaning. After vocabulary, she leads the students into a verbal discussion and they practice the words used in the story. Then, after becoming familiar with topic words, they review the other words from the story that the children identify as difficult. The children and teacher chorally read the story, or the children might read with a partner. With ADHD, the children remain engaged when they have an

exercise that includes peers or the teacher. Finally, after the children have read the exercise, Ms. Garcia will start asking questions to reinforce comprehension. As students progress in Voyager, they are asked questions to which they must respond with written paragraphs in their workbooks. Voyager reading content is tied into state standard content. Connections to California standards for reading, science and social studies are built into the program. At the end of every five lessons, there is a quick check which tests phonics, fluency, and sight words. After 10 lessons, a more in depth assessment measures a student's comprehension with a writing test. One of the strengths of the Voyager program is that it is individualized for each student, allowing them to move at their own pace.

99. Ms. Garcia explained that the reading process comes easily to some, but those with ADHD and visual processing deficits often struggle because of short-term memory. The goal was to assist the pupils in processing information so they were able to remember.

100. Ms. Garcia uses a point system, which encourages the children to be involved. It is a visual reminder of their success that motivates and reinforces having done a good job. With visual processing disorder, Ms. Garcia regularly uses larger print, with fewer words on a page to sort through. This is less intimidating and more engaging to the students.

101. Following Student's October 2009 IEP, Ms. Garcia provided RSP related services to Student. When Student started the Voyager program, Ms. Garcia administered benchmark tests in two categories: reading connected text (RCT), which tested fluency and retell fluency (RF), which tested Student's comprehension by having her retell a story after reading.

102. Student's RCT benchmark score was 38 words per minute and her RF score was 16 percent. By the end of the 2009-2010 school year, Student scored 66 words per

minute for RCT and 20 percent for RF. Ms. Garcia emphasized that Student was using the third grade Voyager text, even though Student was in the second grade. Despite the increasing challenge in vocabulary and decoding as the year progressed, Student continued to improve her RCT and RF performance. Ms. Garcia's professional opinion was that Student made significant progress in accessing her general education curriculum in the 2009-2010 school year.

103. From the October 2009 initial IEP to the end of the 2009-2010 school year, the special education services enabled Student to make significant progress in accessing her general education curriculum, in reading, writing, and math. Student's progress reports (grades), CST scores, Mathematics Periodic Assessments, Voyager performance, and the testimony of Student's general education teacher and RSP teacher support this conclusion.

104. Dr. Simon, Ms. Lin, Ms. Garcia, and Ms. Huynh never heard Student complain of double vision or words jumping around on the page and never saw Student hold reading material close or squint when reading. None reported that Student was clumsy, tripped or fell.

#### AUGUST 2010 OPTOMETRIC REPORT (BALLINGER REPORT)

105. On July 3, July 24 and August 14, 2010, optometrist Beth E. Ballinger, O.D., F.C.O.V.D., conducted an independent visual examination and visual information processing test of Student, and issued a report dated August 30, 2010. The report was addressed to attorney Jill Rowland of ACR. The report did not indicate a copy was sent to Mother or Guardian. Dr. Ballinger testified at the hearing.

106. Dr. Ballinger earned her bachelor of science, cum laude, in 1974 from Fairleigh Dickinson University. She obtained a bachelor of visual science in 1977 and a doctor of optometry in 1979 from Pennsylvania College of Optometry. She is a member

of the American Optometric Association (A.O.A.), Optometric Educators Association, and the California Optometric Association (C.O.A.), where she served on the Agency Services Committee from 1984 to 1990, when she was chair. On behalf of the C.O.A., Dr. Ballinger was consultant with Crippled Children's Services and liaison to California Association of Resource Specialists, California Early Intervention Program, and the Attorney General's Commission on Disabilities.

107. Since 1979, she has been a member of the Orange County Optometric Society, where she served as editor of its news bulletin and trustee in 1980-82. Since 1980, she has been a member of the College of Optometrists in Vision Development (C.O.V.D.), where she has served in many capacities, including the Board of Directors (1988-91), Western Regional Director (1988-91), and Director of Clinical Research and Development Committee (1990-91). She sat as a board member for the American Optometric Foundation for Vision Research (1991-93), Sensory Integration International for Occupational Therapy (1984 to present), and the Studt Foundation (1990 to present). She was on the advisory board to Autism Society of Orange County and the Parkinson's Society of Orange County. Since 1991, Dr. Ballinger was been a member of the Optometric Extension Program Foundation, working on many committees and counsels. She is also a member of various related organizations, including California Association for the Neurologically Handicapped and the California Association of Resource Specialists. For more than 25 years, Dr. Ballinger has been a speaker at many organizations, as well as a lecturer and teacher of numerous conferences and seminars, around the United States and in Monaco, New Zealand, Australia, Italy, England, Sweden, Taipei and Italy. She examined Student as part of her private professional practice in Newport Beach, California.

108. The report began by listing "Present Concerns" that Student demonstrated as challenges. The report noted that Student repeated second grade and had difficulty

spelling, retaining information, following written and verbally presented instruction sets, completing work, and with penmanship. Student's print "runs together" and words "jump around on the page." Student made errors when copying and got very close when she read and wrote. She had difficulty listening to directions and frequently needed instructional sets repeated. Dr. Ballinger indicated that Student was reported to have a short attention span of two to five minutes, daydream, drift, not be "with it" at times, had clumsy behaviors, tripped and fell often, spent 15 hours a week watching TV and playing video and computer games, and had challenges getting along with others. Dr. Ballinger further reported that Student demonstrated poor visual discrimination and had challenges aligning vertically arranged columns. Dr. Ballinger stated that Student had challenges projecting the knowledge of "right and left out into the world" and misunderstood verbally presented instructional sets.

109. Neither the report nor Dr. Ballinger's testimony clearly indicated from where she obtained the list of "Present Concerns." Dr. Ballinger did not talk to Mother and merely said she made contact with Guardian. She did not talk to Student's teachers or other service providers. Dr. Ballinger did not state that Student complained "words jump around" or "words run together" or that she saw double. Dr. Ballinger never observed Student in a classroom, on a playground, or with other children.

110. Dr. Ballinger stated that Student was referred by ACR. Dr. Ballinger testified that she sent an extensive history questionnaire, which was only partially completed. The questionnaire was not presented as evidence and Dr. Ballinger's testimony did not establish who may have completed the form, though she mentioned the Guardian. Although Dr. Ballinger said the questionnaire's answers said that Student had ADHD, Dr. Ballinger did not say so in her report. Her report also did not mention that Student suffered from PTSD and ODD, for which she took medications, and that Student was receiving mental health services for her behavior and past trauma. Dr. Ballinger admitted



in her testimony that many of the observations recorded in her report could be the consequence of Student's medically diagnosed ADHD, a fact Dr. Ballinger only acknowledged when specifically asked at hearing. The report did not consider that Dr. Ballinger's observations and conclusions could have had other possible causes or contributing factors.

111. Dr. Ballinger stated at hearing that to understand Student's needs, one also needed to look at her educational history. However, according to the report, Dr. Ballinger did not review any educational records before making her findings, conclusions, and recommendations. During her testimony, Student's counsel showed Dr. Ballinger portions of Student's records, which the doctor generally said were consistent with her findings.

112. Dr. Ballinger's report was divided into two sections. The first was Visual Evaluation, which addressed the visual system's mechanics, accuracy, or efficiency. She measured Student's visual acuity using standard instruments and tests. Dr. Ballinger then tested Student's eye movement, concluding that Student demonstrated difficulty with saccadic eye movement, which is the abrupt rapid small movements of both eyes, such as when the eyes scan a line of print. According to Dr. Ballinger, this could cause Student to reread or omit words and sentences when reading and copying, lose her place when reading and copying, make errors in copying tasks, and increase the time needed to complete a task.

113. She conducted a developmental eye movement test, and concluded that Student had difficulty with automaticity (the ability to read without consciously thinking about it) and visual scanning, as measured by Student's lack of accuracy in testing. However, because Student scanned with her head and not just her eyes, Dr. Ballinger said the test scores were invalid. She concluded, though, that Student had "fragile visual-motor integrity." Dr. Ballinger also found that Student had a "fragile focusing

ability for sustaining at near point and for reading demands," indicating her focusing ranges became "more fragile with repeated effort."

114. Dr. Ballinger tested Student's eye teaming ability, and concluded that it fluctuated "with sustained visual demand." In testimony, Dr. Ballinger said she liked to test a child's system to failure and see the outer limits of performance. After doing so, Dr. Ballinger noted that Student "intermittently suppressed vision at distance and near" and demonstrated "double vision as her system fatigued during her visual examination." The report stated that this would compromise Student's visual discrimination accuracy, affect penmanship, contribute to miscopying, cause print to "run together," cause words to "jump around" on the page, contribute to clumsy behaviors, contribute to tripping and falling frequently, and contribute to her misaligning vertical columns of numbers.

115. The second part of the report was a Visual Information Processing Evaluation. Dr. Ballinger administered 11 tests: Piaget Left/Right test; Gardner Reversals Frequency test; Jordan Reversal test; TVPS-3; VMI; Visual-Motor Speed and Precision test; Sentence Copy Test of Wold; Auditory Attention to Digits; and Developmental Eye Movement test.

116. The Piaget, Gardner, and Jordan Reversal tests measured laterality and directionality. Dr. Ballinger found that Student had difficulty with directionality for symbols, especially in her environment. Student scored poorly on the Reversals Frequency test which required Student to write numbers and lowercase letters that were given verbally and to look at pairs of numbers and letters and circle the ones that were reversed. Dr. Ballinger noted that Student relied heavily on "tactually tracing" over symbols in an attempt to recall their directional correctness. Dr. Ballinger acknowledged, in response to specific questions, that this conduct could be the Student's physical attempt to maintain her focus and attention, consistent with her ADHD. This was not considered in the report.

117. Like Dr. Simon, Dr. Ballinger administered the TVPS-3 and concluded that Student had a visual information processing disorder. Student's performance on the Getman Visual Recall test indicated Student struggled with visual memory. On the Getman Visual Manipulation test, Dr. Ballinger noted that Student had difficulty following the instructions and said that her results may be invalid. On the VMI, Student scored with an age equivalency of seven years and two months. On the Visual-Motor Speed and Precision, Student scored at the age equivalent of nine years and three months on the timed section and seven years and six months on the precision portion. On the Sentence Copy test, Student copied at 33.67 letters per minute, rather than the 39.7 letters per minute expected of a second grade student. Dr. Ballinger also noted that Student sub-vocalized what she read while copying.

118. Dr. Ballinger administered the Digit Span test, which measures auditory attention. Student scored at the age equivalency of five years and three months for the digits forward and 10 years and four months for the digits backwards. Dr. Ballinger said Student needed instructional sets repeated frequently. Dr. Ballinger then recommended a Central Auditory Processing Evaluation (CAP). The repeating of instructions was another area where Dr. Ballinger acknowledged in testimony could be related to Student's ADHD.

119. Dr. Ballinger stated, in summary, that Student demonstrated difficulty with maintaining accurate and efficient eye movement control, focusing competency, eye teaming integrity without intermittent suppression or diplopia, visual discrimination, visual memory, visual spatial relationships, visual form constancy, visual recall memory, visualization, visual figure ground, visual closure, visual-motor integration, and auditory processing. Dr. Ballinger stated that Student had difficulty sustaining visual stability over time due to poor visual-motor control and would suppress an eye or see double as visual demands became more sophisticated.

120. Dr. Ballinger recommended an individualized program of Optometric Vision Therapy in order to provide Student with the opportunity to develop the necessary visual abilities prevalent in her learning environment. Dr. Ballinger said Student required a minimum of 48 visits for 45-minute one-on-one optometric vision therapy sessions. She stated that Student should begin her vision therapy to build visual-motor and visual information processing abilities.

121. Dr. Ballinger also provided a list of recommendations: extended time to complete work, preferred seating in the classroom to assist in seeing and avoiding distractions, reduced class work and homework, less information on the page, less visual clutter around the board when she copies, keeping spaces organized and free of extraneous visual clutter, "check-off" lists of things she needs to remember, avoid getting too close to her work, cooking, cutting out pictures which Student can use in the grocery store, photo-document the order of daily living routines, celebrate Student daily, chart out Student's day's timeline, and a check-off list of what to bring to school each morning posted on the back of her front door before she leaves the house.

122. Dr. Ballinger testified in great detail regarding her visual information processing testing, referring to the Optometric Clinical Practice Guideline for Learning Related Vision Problems of the AOA. Dr. Ballinger wanted to emphasize that optometrists are trained and capable of fully testing and evaluating visual information processing deficits. Dr. Ballinger testified that, in her professional opinion, visual therapy can both treat and remediate visual information processing deficits. Dr. Ballinger also stated that much of the ophthalmological and medical communities, as well as a portion of the optometric profession, believe that visual therapy cannot assist in treating visual information processing. On occasion, Dr. Ballinger was asked a question which gave her an opportunity to set forth an argument in support of visual therapy's efficacy in treating visual information processing disorder. In making these arguments, Dr.

Ballinger's tone would change and she displayed frustration at the continued resistance to the contention that visual therapy is a legitimate treatment for visual information processing. Many of the projects, organizations, lectures, workshops and seminars listed on Dr. Ballinger's curriculum vitae related to Dr. Ballinger's advocacy for vision therapy as an effective visual information processing deficit treatment.

#### OCTOBER 2010 VISION THERAPY EVALUATION

123. On October 7, 2010, Dr. David G. Kirschen, an optometrist, performed the vision therapy evaluation on District's November 18, 2009 Assessment Plan. Student did not submit any evidence that indicated why Student delayed making an appointment with Dr. Kirschen for more than 10 months. Dr. Kirschen testified at the hearing.

124. Dr. Kirschen is the Chief of Binocular Vision and Orthoptic Services at the Jules Stein Eye Institute, at the David Geffen School of Medicine, UCLA. In his private practice, Dr. Kirschen specializes in pediatric optometry, the treatment of binocular vision anomalies, computer related vision problems, strabismus and amblyopia, contact lenses and sport vision. He obtained his bachelor of science in optometry in 1970, doctor of optometry in 1972, and a Ph.D. in physiological optics in 1977 from the University of California at Berkeley. He possesses optometry, diagnostic pharmaceutical, and therapeutic pharmaceutical licenses for California, as well as a glaucoma certification. Dr. Kirschen is Professor Emeritus at Southern California College of Optometry, where he has taught basic and visual science since 1978. For seven years, he was assistant professor of ophthalmology at UCLA School of Medicine, where he has been a lecturer since 1989.

125. Dr. Kirschen is a member of the American Optometric Foundation, serving as a board member since 2005. His other memberships include the American Academy of Optometry, the American and California Optometric Associations, Orange County

Optometric Society, Association for Research in Vision and Ophthalmology, and Association of Optometric Educators. For more than 30 years, he has been a referee for the Journal of the American Optometric Association and the American Journal of Optometry and Physiological Optics, as well as a reviewer for the National Board of Examiners in Optometry. He is the recipient of research grants from the National Institute of Health's National Eye Institute and the Hearst Foundation and has received various awards for his professional and community service. He has authored or co-authored more than 50 published professional articles and chapters in professional texts. He has presented numerous lectures, seminars and presentations over the past 20 years in the United States and foreign countries. He is the team optometrist for the Los Angeles Dodgers and Boston Red Sox and worked with the 2008 Olympic Team in Beijing, China.

126. Dr. Kirschen conducted a complete binocular vision evaluation, emphasizing those aspects of the visual system necessary for the learning process. Student told him that she thought her distant vision was not as good as it should be. Student expressed the opinion that she sits too close to the television. Dr. Kirschen noted that Student was taking Adderall to control her hyperactivity.

127. Dr. Kirschen determined Student's uncorrected visual acuities by conducting a cover test (where one or the other eye is covered during testing), which checks for a deviation or misalignment of your eyes. The test revealed no oculomotor deviation at distance or near. Her nearpoint of convergence was to her nose, and her pupils were equal and reactive to both light and accommodation. Sensory testing using the Stereo Reindeer (a polarized-free test for double vision) indicated 31 seconds of fast stereopsis (depth perception). Dr. Kirschen determined, after careful refractive analysis, that Student required a prescription for nearsightedness in each eye. When corrected, Student indicated that she saw much better at distance. In fact, her vision improved to

20/20. Dr. Kirschen tested accommodative facility, which is the ability of the eyes to focus on stimuli at various distances and in different sequences in a given period of time. Student had a fast response with equal cadence. He tested the simultaneous movement of both eyes in opposite directions to obtain or maintain single binocular vision (known as "vergence") and Student was able to fuse under all conditions. Specific eye movement tests were given and Student's saccades and pursuits were normal. In other words, convergence and eye teaming were within normal limits. Dr. Kirschen stated that Student did not have double vision. Dr. Kirschen noted that Student struggled with attentional issues during the test, but when Student maintained attention, she easily completed the test. Slit lamp and dilated examinations indicated that Student had normal eye health.

128. Dr. Kirschen concluded that Student had a slight amount of nearsightedness, which could be successfully corrected with glasses. He believed her vision with the glasses was good, as was her binocularity and eye health. He provided Student with a prescription for glasses. Dr. Kirschen concluded from his examination that vision training was unnecessary.

129. Dr. Kirschen testified that, in his professional opinion, vision therapy addresses the "front end" of the visual system. He stated that such vision therapy used to be called "orthotic" or "visual training." Dr. Kirschen has administered visual therapy to patients who have double vision, including those patients who have suffered a traumatic brain injury or stroke.

130. Dr. Kirschen testified that his expertise is limited to the front end of the visual processing system, and does not extend beyond visual information that reaches the brain. In other words, he does not test for visual information processing, as his profession, optometry, only evaluates and treats the front end of the visual processing system. His responsibility is to assure that visual information reaches the brain as

efficiently and accurately as possible. Dr. Kirschen testified that once the visual information involves higher brain functions, school psychologists and trained educators were best qualified to fully evaluate and treat the visual processing deficits.

131. Dr. Kirschen testified that in the early 1980s, certain optometric professional organizations expanded the vision training concept to include therapy for visual information processing. However, Dr. Kirschen stated that the use of visual therapy for visual information processing had not been accepted in the ophthalmological or medical community and that there was insufficient peer-reviewed research to confirm its effectiveness. In his own extensive experience, Dr. Kirschen has found that visual therapy was ineffective in treating visual information processing.

132. Dr. Kirschen confirmed Dr. Ballinger's testimony that there remains a deep division in the optometric, ophthalmological, and medical communities regarding the efficacy of vision therapy for visual information processing. The parties attempted to introduce various scientific research and professional publications, which argued both sides of the vision therapy disagreement. The existence of these various position papers confirmed the depth of the disagreement regarding vision therapy's usefulness for visual information processing. The use of vision therapy to treat or remediate visual information processing was controversial and, as of the time of hearing, had not yet obtained a consensus of acceptance in the professional and educational communities.

133. Dr. Ballinger and Dr. Kirschen criticized various aspects of each other's reports. For example, Dr. Kirschen opined that Dr. Ballinger's use of the phrases "fragile visual-motor integrity" and "fragile focusing ability" was unscientific and bore no substantive meaning. He was also critical of Dr. Ballinger's testing of Student to fatigue or beyond typical limits, stating that the testing should be within normal limits in order to get useful, practical results. Dr. Ballinger, in response, stated that it was necessary to



test the limits of the visual system in order to gain greater understanding of its functioning.

### 2010-2011 THIRD GRADE SCHOOL YEAR

134. Student attended teacher Emily Turner's third grade class in the 2010-2011 school year. Ms. Turner graduated from California State University-Chico (Chico State) in 1999 with a bachelor of arts in liberal studies. In 2001 she obtained a multiple subject teaching credential, with supplements in English and physical education, also from Chico State. She has been a general education third grade teacher for the District at Purche since 2002.

135. Ms. Turner was well acquainted with Student. When Student started the current third grade class in September 2010, she was a model student. However, as the year progressed, Student's behavior started to change. Student was absent for approximately a week in late October or November 2010 and her Guardian informed Ms. Turner that Student had been hospitalized. Ms. Turner was unaware of the reason. Up until that time, Student had remained on task and followed directions. Then, inexplicably, Student's behavior started to deteriorate. Student refused to follow instructions, do her schoolwork during lessons, and she became oppositional. Student did not have any violent outbursts or tantrums, but the behavioral changes were dramatic. Therefore, the behavioral aide and Ms. Turner devised a reward system in an attempt to moderate Student's increasingly difficult behaviors. During this time, the behavioral aide was in the classroom two to three times a week.

136. In February 2011, Student was again hospitalized for five or six days. The Guardian later explained to Ms. Turner that on Sunday night, the Student got extremely angry when asked to wash her hair. Student threatened to cause herself harm and tried to get a knife. Guardian called a support team but, eventually, Student was hospitalized.

137. Guardian informed Ms. Turner that Student's behavior had dramatically changed because of a change in Student's medication. Student's behavior was worse after her return from the last hospitalization. Student was more defiant and disrespectful to teachers and fellow students, saying things like "I hate this," "This is dumb," and "I don't care."

138. Ms. Turner reviewed Student's third grade academic performance. In October of 2010, Student's was slightly below benchmark in reading fluency in the OCR program. At that time, she was also slightly below benchmark in spelling, vocabulary, and writing (applications). Student was below benchmark in reading comprehension, checking skills, writing (strategies), and writing (conventions). After winter break, Student was slightly below benchmark in the OCR program on reading fluency, spelling and writing (application). She was below benchmark in all other tests. In early spring of 2011, Student was slightly below benchmark in the OCR program on reading fluency, checking skills, spelling, and vocabulary. She was below benchmark for writing (strategies) and writing (conventions). Her reading comprehension was lower than the previous two units while she scored only one out of four in writing (applications). Ms. Turner believed that the low writing scores were related to the story prompt for the writing assignment, which was a detailed fantasy story with multiple characters and settings. Ms. Turner believed that this particular prompt played into Student's impatience and inattentiveness.

139. On the Mathematics Periodic Assessments, Students scored in the approaching proficiency range on both the first and second unit math composites. Ms. Turner noted that math remained one of Student's academic strengths.

140. Ms. Turner reviewed Student's grade report for the first two periods of the third grade year. In reading and writing, Student scored two out of four, which is partially proficient. She scored a three, proficient, in listening, speaking, science, and

physical education. She also scored a two, partially proficient, in mathematics and history/social science. In health education, Student's score increased from two to three from the first to second grading period. Student's grades for effort were almost all threes for the first and second grading reports.

141. Student was inconsistent in doing and returning her homework. Ms. Turner talked to Guardian, who said that homework was a big battle at home. Student was required to read 20 minutes a day at home, maintaining a reading log, which Guardian was supposed to sign. Student had turned the log into Ms. Turner only two or three times over the school year. Student's grades were based upon quizzes, assessments, class work, and homework. If Student had turned in her homework consistently, her grades would have been higher.

142. Student's handwriting was sloppy but legible. Ms. Turner had seen Student produce very legible and better quality handwriting, especially at the beginning of the school year before her behavior deteriorated. Ms. Turner never saw Student have a problem seeing words when doing fluency tests. Student never complained of double vision. Student had glasses, but she did not wear them regularly. Ms. Turner never saw Student hold paper or books in close proximity to her face. She did not report that Student was clumsy or fell often.

143. Ms. Turner did not believe that the scores and grades reflected Student's performance capabilities. As Student's behavior deteriorated, Student would rush through assignments, not pay attention, and was often the first to finish a task. This tendency to rush assignments, resist prompting, and ignore instructions, was reflected in Student's performance grades. Ms. Turner knew that Student had ADHD and visual processing deficits. However, Ms. Turner said that she believed Student's oppositional and resistant behavior to be the most significant impact on her performance. Despite

Student's behavioral struggle for much of the year, Ms. Turner believed that Student was accessing the general education curriculum.

#### NOVEMBER 2010 ACADEMIC ASSESSMENT

144. By letter dated October 26, 2010, ACR attorney Ms. Rowland requested that Purche assistant principal, Alex Foster, arrange for "Woodcock Johnson Academic Testing." Ms. Rowland requested that this assessment be presented at the annual IEP. By letter of November 1, 2010, ACR informed Mr. Foster that they would like to also discuss the Ballinger Report and an AB3632 assessment at the annual IEP. The Ballinger Report accompanied the letter. Around this time, District received Dr. Kirschen's visual therapy evaluation. District prepared an assessment plan for the academic testing. Guardian signed the plan on November 3, 2010, which Mr. Foster received on November 4, 2010.

145. RSP teacher Ms. Garcia administered the WJ-III, Form B, on November 12, 2010. In summarizing the results, Ms. Garcia said that Student's English oral language skills were low when compared to others at her age. Her academic skills and fluency with academic tasks were both within the average range. Student's academic knowledge and ability to apply academic skills were both within the low average range. When compared to others at her age level, Student's performance was average in mathematics, math calculation skills, written language, and written expression. Her performance was low average in broad reading. No discrepancies were found among Student's achievement areas.

146. Mr. Garcia concluded from the curriculum-based assessment data, the individual standardized test results, teacher and parent information, work samples and classroom observations that Student had made notable academic progress and was working at an average level in writing and math, compared to the previous year. Reading fluency and comprehension were areas where academic growth had not been

comparable. Those areas tended to be impacted by Student's tendencies toward inattention to detail and impulsive responses, unless cued. The testing indicated her area of relative weakness was oral receptive language skills, which impacted her ability to understand multipart oral directions. Although her academic skills had kept pace with others her age, Student continued to need support in obtaining academic knowledge and science, social studies and the arts.

#### THE FEBRUARY 10, 2011 ANNUAL IEP

147. Student's annual IEP was due November 12, 2010. However, when Ms. Rowland requested the academic testing, the IEP meeting was delayed until the assessment could be completed. This request pushed the due date for the annual IEP to January 24, 2011. Mr. Foster attempted to schedule the annual IEP through the ACR offices. Mr. Foster's testimony and the documentary evidence established that the delay in scheduling the annual IEP meeting until February 10, 2011, was primarily due to scheduling conflicts involving the Guardian and Ms. Rowland. Therefore, the delay in holding the annual IEP within 60 days was not due to any actions on the part of District.

148. Mr. Foster testified at the hearing. He received his bachelor of arts in Spanish language and his master's in education leadership. He was a classroom teacher for first and fourth grades for five years and the bilingual coordinator for three years, at District's Manchester Avenue Elementary School. At the time of the hearing, he was the assistant principal for Gardena Elementary School, Amestoy Elementary School, and Purche, where he started in August 2010. The prior year he was assistant principal at Bonita Elementary School and Wilmington Park Elementary School. Mr. Foster had been a District assistant principal for seven years.

149. On February 10, 2011, District convened Student's annual IEP team meeting. Attending were: Mother, Guardian, Mr. Foster, Ms. Garcia, Ms. Turner, Dr.

Simon, attorney Ms. Rowland, CASA advocate Ms. Wells, OT Rick Abbate, outside therapist Julia Lynch, and ACR legal intern Kathryn Fitzmaurce.

150. Mr. Garcia reported that Student had met all of her goals, including those in reading, math and writing. She testified that in November 2010, when the annual IEP was initially scheduled, Student had not yet met her annual goal in writing, although she had met her objectives. However, the additional time from November 2010 to February 2011 enabled Student to achieve her writing goal by the IEP team meeting. Ms. Garcia had also testified that Student made progress in the 2010-2011 RSP Voyager program, increasing her scores for both RCT and RF.

151. Mr. Abbate provided OT services to Student from September 2010 to February 2011, in accordance with the February 2010 amendment IEP. His OT services addressed Student's handwriting. Mr. Abbate testified at the hearing. He obtained a master of science in occupational therapy from University of Southern California, with his California OT license, in 1999. He had been an OT with the District since November 1999. Previously, he worked in a sensory integrated clinic for pediatrics.

152. Mr. Abbate was aware that Student had ADHD, which affected the OT sessions because of distractibility. When Student would get off task during OT, Mr. Abbate would cue Student. He went to Student's classroom every Monday morning and worked with Student on her IEP goal of writing two lines of work with adequate spacing and letter formation. He used a number of supports to assist in guiding Student, such as raised lined paper, which provided sensory feedback, and high contrast paper, which helped keep the bottom of letters on the line. During his testimony, Mr. Abbate reviewed some of Student's work samples from the OT file. He noted that the words were neat, legible, properly spaced, with properly formed letters. Mr. Abbate said that Student performed very well with regular, segmented lined paper.

153. Mr. Abbate used Student's homework assignments or classroom work for the OT sessions. He never saw Student hold paper up close to her face. He did not see Student wear glasses. She never told him that she saw double or that words jumped around the page. He observed Student copy from near point (paper) and far point (from board). She did not omit words or reverse letters. Student's primary difficulty was that she would rush through her work, which he saw as part of her ADHD. However, when he encouraged her to slow down, she wrote neatly and legibly.

154. Mr. Abbate wrote the PLOP for OT, which the team incorporated in Student's annual IEP. He noted that Student had achieved both OT incremental objectives and the annual goal. He stated that Student wrote with adequate pencil pressure, letter formation, spatial orientation and uniform letter sizing and spacing, and was able to copy or compose multiple sentences without difficulty, when she was on task. Like Student's other teachers and service providers, Mr. Abbate noted that Student liked to rush through her work, which resulted in sloppy written output. However, when cued, Student was able to go back and correct her work as needed.

155. Mr. Abbate concluded that there were no areas of need related to school-based OT at that time. He recommended that Student be exited from OT services. The IEP team, including Guardian, agreed to waive a formal OT assessment and exit Student from DIS OT services.

156. Guardian testified at hearing that she believes Student cannot write legibly, which was one of the reasons that she sought vision therapy for Student. However, based upon the writing samples presented at hearing, and the testimony of Student's second grade teacher, third-grade teacher, RSP, and OT, the evidence showed Student was capable of writing legibly and, even, neatly.

157. Guardian recalled the IEP team discussing vision therapy by Dr. Ballinger at the IEP meeting, although no one discussed the details of the report with Guardian. She

recalled little discussion of Dr. Kirschen's report, who said that Student did not need vision therapy. Beth Wells was the court appointed special advocate (CASA) for Student. She testified at hearing. Ms. Wells said that she had a very good recollection of the annual IEP meeting and that the details of Dr. Kirschen's report were not discussed. She recalled that Dr. Ballinger's report was discussed, but that the IEP team did not review the details of Dr. Ballinger's report. Ms. Wells said that Dr. Simon strongly stated that Student would not benefit from vision therapy and minimized Student's vision processing deficits, especially when compared to Student's struggles with ADHD. Mr. Foster testified that Dr. Kirschen's report was not discussed at the IEP meeting because Ms. Rowland refused to review it, saying she already knew what was in the report. Mr. Foster said that Dr. Simon reviewed Dr. Ballinger's report at the IEP meeting, including some of the testing scores. Mr. Foster said that he primarily relied upon the expertise of Dr. Simon and Dr. Kirschen regarding the need for visual therapy. Some at the IEP meeting thought there should have been more detailed discussion of Dr. Ballinger's testing and findings. The testimony established that the IEP team discussed Dr. Ballinger's report but did not discuss Dr. Kirschen's report.

158. The IEP team also reviewed the PLOPs for health, reading, writing, math, and behavior. New goals and objectives were developed for reading, behavioral support, writing, and math. The IEP included a behavior support plan. The IEP provided RSP services, one to five times a week, of 150 minutes per week for reading and 120 minutes per week in writing. Math related services would be provided using a collaborative service delivery model. The District members of the IEP team did not offer visual therapy for Student.

159. On February 14, 2011, Guardian signed the IEP, with comments by the ACR attorney, which read:



Legal Guardian and court appointed Attorney disagree with the denial of the developmental vision therapy services. The denial was not based upon any review of the August 30, 2010 Dr. Ballinger test results which were summarily dismissed by the IEP team. The denial was based on a pre-IEP team decision made by Jim Astle (not a member of this IEP team) from LAUSD Related Services Department and is an ongoing policy/practice to predetermine the need for developmental vision therapy services for [Student] and all similarly situated students.

## LEGAL CONCLUSIONS

1. Student contends that for the 2009-2010 and 2010-2011 school years, District denied her a FAPE on various grounds by not assessing for, and providing, vision therapy. Specifically, Student contends that District could only have provided a FAPE by having an optometrist like Dr. Ballinger, who believes that optometrists are qualified to assess and treat visual information processing disorders, conduct the assessment, rather than an optometrist like Dr. Kirschen, who believes that optometry is limited to the physical, "front end" of visual processing. Student contends that she was denied a FAPE because District did not provide the type of vision therapy recommended by Dr. Ballinger as a related service to address Student's areas of need in reading and writing. Student generally contends that District has predetermined that vision therapy can never be a related service for a student, as evidenced by the District's refusal to have Student assessed by an optometrist for visual information processing and, if necessary, prescribed vision therapy.

2. District contends that it procedurally and substantively provided Student with a FAPE at all times. Specifically, District contends that it has the right to choose an appropriate professional to assess Student in all areas of suspected disability and that it has chosen to have visual efficiency (the front end of visual processing) assessed by an optometrist and visual information processing (the back end) assessed by the school psychologist, because the medical and educational professional communities have not reached a consensus on the effectiveness of vision therapy for visual information processing. District contends that Student's reading skills have not regressed, that she has made adequate progress in handwriting, and that District has provided appropriate related services to address Student's unique needs.

3. This section will set forth the generally applicable Individuals with Disabilities Education Act (IDEA) principles, followed by an analysis of each of Student's issues. Although covering two different school years, Student's issues will be analyzed together when the same legal principles are applied. As discussed below, Student did not meet her burden of proof on any of the issues presented.

### GENERAL FAPE LAW

4. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, the Student has the burden of proof.

5. Under the Individuals with Disabilities Education Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34

C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

"Related services" are developmental, corrective and support services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) In California, related services are called designated instruction and services (DIS).

6. "Vision services" are considered to be a DIS and include "vision therapy." (Ed. Code, § 56363, subd. (b); Cal. Code of Regs., tit. 5, § 3051.75.) Vision therapy may include remedial and/or developmental instruction provided directly by or in consultation with the optometrist, ophthalmologist, or other qualified licensed physician and surgeon providing ongoing care to the individual. Such therapy must be prescribed by a licensed optometrist, ophthalmologist, or other qualified licensed physician and surgeon and the vision therapy procedures are those authorized by federal and state laws and regulations and performed in accordance with these laws and regulations and standards of the profession. (Cal. Code of Regs., tit. 5, § 3051.75.)

7. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to provide a FAPE. 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 the student 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 a “basic floor of opportunity” that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034, 1037-1038 & fn. 10 (*Mercer Island*).)

8. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130 (*Walczak*); *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

9. Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. For a student in a mainstream class, “the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.” (*Walczak, supra*, 142 F.3d at p. 130.) A district need not guarantee that a student will make a month’s academic progress in a month’s instruction; a student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5<sup>th</sup> Cir. 2000) 200 F.3d 341, 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.) A student derives benefit under *Rowley* when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area*

*School v. Scott P* (3d Cir. 1995) 62 F.3d 520, 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.)

10. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ.* (D.Del. 2001) 162 F.Supp.2d 316, 328.) Whether a student has received more than *de minimis* benefit must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.)

11. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (*Ibid.*)

12. To determine whether a pupil was denied a FAPE, an IEP must be examined in terms of what was objectively reasonable at the time it was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Roland M. v. Concord Sch.* (1st Cir. 1990) 910 F.2d 983, 992.)

13. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).)

ISSUES 1(A)-(B) AND 2(A)-(B)): VISUAL PROCESSING ASSESSMENT BY A LICENSED OPTOMETRIST.

14. Student contends in Issues 1(a) and 2(a) that she was denied a FAPE in the 2009-2010 and 2010-2011 school years because the District failed to provide a visual processing assessment for visual therapy as requested by Student on October 29, 2009. Specifically, Student contends that the District should have, but did not, provide an assessment like that conducted by Dr. Ballinger, rather than an assessment like that conducted by Dr. Kirschner. Student further contends in Issues 1(b) and 2(b) that she was denied a FAPE because the District’s decision regarding vision therapy assessments was based on a predetermined policy. District disagrees, and contends its vision therapy assessment comported with the IDEA.

15. Legal Conclusions 4 through 13, are incorporated by reference.

16. A pupil must be assessed in all areas related to the suspected disability, including vision prior to the development of an IEP. (Ed. Code, § 56320, subds. (f)). A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii) (2006); Ed. Code, § 56320, subd.

(f.) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6) (2006); Ed. Code, § 56320, subd. (f).)

17. Individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. Tests and other assessment materials must be used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subds. (b)(2) &(b)(3).)

18. 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.) "The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.)

19. The personnel who assess the student must prepare a written report of the results of each assessment, and provide a copy of the report to the parent. (Ed. Code, §§ 56327 and 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, (6) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate, and (6) the need for specialized services, materials, and equipment for students with low incidence disabilities. (Ed. Code, § 56327.)

20. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

21. The evidence showed that Student's attorney, Ms. Rowland, requested a "Visual processing assessment for vision therapy by a licensed optometrist, as outlined in Title 5 of the California Code of Regulation section 3051.75." District prepared an assessment plan that listed an assessment for vision therapy by a licensed optometrist, which Mother signed on November 18, 2009. However, Student contends that Mr. Astle's choice of Dr. Kirschen to perform the visual therapy assessment was not in compliance with Student's assessment request or the assessment plan because Dr. Kirschen does not evaluate and prescribe vision therapy for visual information process, the back end of visual processing. (Factual Findings 52, 63-64; Legal Conclusions 16, 18.)

22. Here, Student failed to meet her burden of demonstrating the District denied her a FAPE by failing to conduct a visual processing assessment for vision therapy by a licensed optometrist. Student argued that Dr. Kirschen did not prescribe vision therapy for visual information processing deficits. This contention begs the fundamental question of what visual processing disorders are treatable by vision therapy. Student assumes in this argument that all visual processing disorders can be addressed by vision therapy. In contrast, District's experts indicate that the back end of visual processing (visual information processing) is not amenable to vision therapy.



Therefore, District chose to have the back end of visual processing assessed by a qualified professional, such as a school psychologist, who can address this type of visual processing deficit. (Factual Findings 22-32, 45, 52, 63-69, 130.)

23. The Education Code and the California Code of Regulations do not define the purpose of vision therapy. Though vision therapy may address visual processing disorders, no special education code or regulation refers to visual processing. The law is silent as to what aspects of visual processing disorders can be addressed, if at all, by vision therapy. (Legal Conclusions 6.)

24. During the hearing, and in the pleadings, exhibits, and written argument, terms related to visual processing were sometimes ambiguous and confusing. Though witnesses might have used the same term, they sometimes intended different meanings. Accordingly, the terms "visual processing," "vision therapy," "visual efficiency," "front end of visual system," "visual information processing," and "back end of visual system" were defined in the Findings of Fact. (See Factual Findings 23, 68; Footnotes nos. 7 and 9.)

25. The two parts of visual processing – the front end and the back end – form the crux upon which the parties' positions are divided. Student generally contends that vision therapy is a viable means of treating and remediating both the front end and the rear end of visual processing deficits. According to Student, vision therapy provided by an optometrist not only treats visual efficiency, but also visual information processing. (Factual Findings) District contends that vision therapy is not a viable treatment for visual information processing deficits. Once the visual information reaches the brain, processing deficits must be assessed, evaluated and treated by educational psychologists, trained educators, occupational therapists, and other qualified providers. (Factual Findings 120, 122, 129-131.)

26. The depth and breadth of this professional debate was exemplified by the numerous articles and studies the parties requested be admitted as evidence. This ALJ

ruled the proposed exhibits inadmissible because resolution of the professional debate was not necessary for purposes of making a decision in accordance with special education due process law. However, the continuing scientific research and professional publications clearly affirmed that the debate regarding visual therapy's effectiveness is ongoing. Both Student and District acknowledged this deep division in the optometric, ophthalmological, and medical communities regarding the efficacy of vision therapy for visual information processing. The use of vision therapy to treat or remediate visual information processing is controversial and, at the time of hearing, had not obtained consensus of acceptance in the professional and educational communities. (Factual Findings 122, 132.)

27. Dr. Kirschen, a licensed optometrist, testified credibly and persuasively, based on his impressive professional credentials and experience that vision therapy cannot remediate or treat the back end of visual processing. Dr. Kirschen stated that his optometric expertise stopped once the visual information reached the brain. Dr. Kirschen opined that a brain's vision information processing deficits were best addressed by an educational psychologist. Dr. Kirschen's professional opinion was that vision therapy could not remediate visual information processing. Dr. Kirschen also stated that he would have prescribed vision therapy if he found a visual processing deficit on the Student's visual system front end or in visual efficiency. (Factual Findings 129-131.)

28. Dr. Kirschen is an optometrist licensed to conduct a visual processing assessment for vision therapy. Thus, he met the requirements for a "vision therapy" assessment under the California Code of Regulations. His professional disagreement with Dr. Ballinger that optometrists are not professionally equipped to assess and treat visual information processing does not render him unqualified. The codes and regulations are silent on the issue of what learning disabilities are treatable by vision

therapy. The question of vision therapy's effectiveness for visual information processing is still unresolved by the optometric, ophthalmological, and medical communities. (Legal Conclusion) As long as Dr. Kirschen's and the District's view are substantively supported in the optometric, ophthalmological, and medical professions, the District may exercise its choice of assessor. (Factual Findings 122, 124, 131-132; Legal Conclusions 6, 23, 25-26.)

29. Moreover, Student had been assessed in all areas of suspected disability that were required to be assessed by a school psychologist. Dr. Simon's psychoeducational assessment was thorough. The standardized and clinical tests were properly administered. Student was observed both clinically during testing and in the educational setting (classroom, playground, lunch). Dr. Simon took a complete history and carefully considered the effect of Student's medically diagnosed ADHD, ODD, PTSD, the continuing influence of Student's past trauma, Student's mental health services, Student's sometimes defiant and oppositional behaviors, and the various medications used to address her inattention and difficult behaviors. In addition, when requested, the District conducted an OT assessment and, based on the OT recommendation, provided OT services for Student's handwriting. (Factual Findings 11-51, 63, 70-79.)

30. Student argues that the District dismissed Student's vision processing deficits and ascribed all of Student's struggles to her ADHD, thus failing to assess in all areas. The assertion is not supported by the evidence, especially when Dr. Ballinger's assessment and report are compared to the District's assessments. Dr. Simon's psychoeducational report addressed and explored Student's suspected disabilities by considering Student's many medical, emotional, and educational challenges. Dr. Ballinger's report ascribed visual information processing deficits as the primary driving disability. Dr. Ballinger's report is inherently flawed because it does not address Student's ADHD, her medication regimen, her oppositional and defiant behaviors, her

tendency to rush through tasks, past trauma, or her present emotional state. Dr. Ballinger's failure to note and consider Student's ADHD medical diagnosis and medication regimen, as well as Student's other documented medical, emotional and behavioral challenges, rendered her evaluation and assessment less credible than Dr. Simon's psychoeducational assessment. Dr. Ballinger's omissions in this regard caused her report to be out of compliance with Education Code, section 56327 because it failed to address the educationally relevant health and developmental findings. In addition, Dr. Ballinger was not a licensed school psychologist. (Factual Findings 11-51, 108-111, 116, 118; Legal Conclusions 16-19.)

31. Student further contends that Dr. Ballinger's examination and diagnoses of Student's visual efficiency – the front end of the visual system – was more reliable than Dr. Kirschen's report. Dr. Kirschen stated that his examination determined Student's visual efficiency was basically normal, except for slight near-sightedness. He tested and found Student's stereopsis intact, saccadic eye movement normal, and no convergence insufficiency. Dr. Kirschen persuasively criticized Dr. Ballinger's use of non-specific, unscientific findings, such as "fragile focusing" and "fragile visual-motor integrity," as having little practical meaning. He also credibly doubted the usefulness of testing by pushing the visual system beyond what would be normal usage and by fatiguing the visual system until failure. Dr. Ballinger said that pushing the visual system beyond normal and to fatigue provides more information. Dr. Kirschen, though, opined that such information was not very useful, since the visual system typically functions within normal limits without being fatigued to failure. (Factual Findings 126-128, 133.)

32. Dr. Ballinger stated that her testing found Student struggled with stereopsis, thus revealing that Student saw double, intermittently suppressed an eye, or visually disengaged from tasks. She then concluded that this was why Student had poor penmanship. She also found that Student had deficits in saccadic eye movement

utilizing methods she described as “common sense” tests. Dr. Ballinger interpreted this deficit as the reason Student could not divide her attention. Dr. Ballinger also determined that Student suffered from convergence insufficiency, which she evaluated by focusing and eye teaming tests which stretched Student’s visual system beyond normal limits and repeated the testing until her visual system reached failure from fatigue. Dr. Ballinger then concluded that this was why Student disengaged from and avoided nearpoint work. (Factual Findings 112-114.)

33. These examples typify fundamental difficulties with Dr. Ballinger’s conclusions. Each one of her causal claims – poor penmanship, cannot divide attention, disengagement from and avoidance of close work – could also be consequences of ADHD, trauma, emotional dysfunction, oppositional and avoidance behaviors, reactions to medication, etc. Dr. Ballinger, however, did not consider any other causes or information. In testimony, she dismissed as irrelevant the fact that no teacher or other service provider had ever heard Student say that she saw double or that words moved about on the paper. Dr. Ballinger’s testimony demonstrated a gross disregard of other possible causes, which was demonstrated by her inadequate medical and emotional history of Student. Dr. Kirschen’s assessment of Student’s front-end visual system, or visual efficiency, was more credible than Dr. Ballinger’s report. District reliance on Dr. Kirschen’s conclusions and recommendations was reasonable and appropriate. Since the Student’s visual efficiency was normal, except for slight near-sightedness, District agreed with Dr. Kirschen’s conclusion that vision therapy was unnecessary.<sup>10</sup> (Factual Findings 108-111, 126-128.)

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<sup>10</sup> Student submitted an April 14, 2011 report, entitled Updated Visual Examination and Visual Information Processing of Student by Dr. Ballinger. District objected to its admission as evidence because the report postdated the due process

34. District exercised its right to choose qualified persons who assessed Student in all areas of suspected disability. Dr. Kirschen was a duly licensed and qualified optometrist, as Dr. Simon was a fully credentialed and qualified school psychologist. Their assessments and reports were thorough, appropriate and in accordance with legal and professional standards. Student did not meet her burden of proving Issues 1(a) and 2(a). (Legal Conclusions 18, 29-33.)

35. Student also did not meet her burden of proving Issues 1(b) and 2(b), wherein she contends that District failed to assess Student in a known area of disability due to the District's predetermined policy regarding vision therapy and visual information processing. Mr. Astle's selection of Dr. Kirschen was not based on a predetermined policy regarding vision therapy, but on list of assessors and geography. Moreover, Dr. Kirschen would have recommended vision therapy if he had found the need for it, but he did not. As discussed above, the fact that not everyone agrees with Dr. Ballinger's view of vision therapy and the scope of optometrist opinions does not demonstrate that District denied Student a FAPE. This is particularly true where the "vision services" contemplated as related services are not limited in definition to the type advocated by Dr. Ballinger. The evidence showed District exercised its right to choose qualified assessors who are knowledgeable of Student's disability, who are competent to perform the assessments, 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), and 56322.) District's

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complaint by six weeks and the annual IEP by more than two months. The ALJ ruled that the report, and Dr. Ballinger's related testimony, would be admitted for the limited purpose of assisting in fashioning a remedy, if necessary. Since Student is not entitled to a remedy hereby, this report and testimony are not considered.

position that vision therapy is not an effective related service for visual information processing deficits, as discussed above, does not undermine the breadth, depth, and legitimacy of the District's assessments of Student and does not amount to an impermissible predetermination of assessments. Student failed to meet her burden on Issues 1(b) and 2(b). (Legal Conclusions 16-19, 28.)

#### ISSUE 1(C): WRITTEN REFUSAL TO ASSESS FOR VISION THERAPY SERVICES.

36. Student contends that by choosing Dr. Kirschen to conduct the visual processing assessment for vision therapy, District was refusing to assess for vision therapy services as requested by Student and, therefore, was required to provide Student with prior written notice of its refusal to assess. District disagrees, contending that no notice was required because the offered assessment complied with the IDEA. Student has failed to meet her burden of demonstrating District refused to assess, which would have required prior written notice.

37. Legal Conclusions 14 through 34 are incorporated by reference.

38. A district must give prior written notice to the parents of a child with exceptional needs, and a reasonable time before proposing (or refusing) to initiate or change the identification, assessment, or educational placement of the child, or the provision of a FAPE. (Ed. Code, § 56500.4 subd. (a).) As discussed in Legal Conclusion 20, in matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

39. Student's attorney asked for a visual processing assessment for possible vision therapy by a licensed optometrist and the Mother signed an assessment plan for

visual processing by a licensed optometrist. Only later did Student's attorney complain of the District's choice of Dr. Kirschen, basically asserting that Student wanted another type of licensed optometrist. As already determined above, District's December 19, 2009 assignment of the visual processing assessment for vision therapy to Dr. Kirschen was in compliance with the Student's request and the written consent. District did not refuse to assess and, therefore, District was not required to provide Student with prior written notice. (Factual Findings 63-69, 123-126; Legal Conclusions 28, 34.)

#### ISSUE 1(D): IEP MEETING WITHIN SIXTY (60) DAYS OF A SIGNED ASSESSMENT PLAN

40. Student contends that she was denied a FAPE in the 2009-2010 school year because the District failed to timely hold an IEP meeting following the Mother's consent to District's assessment plan for vision therapy by a licensed optometrist. Similar to Issue 1(c), Student claims that the choice of Dr. Kirschen to conduct the visual processing assessment for vision therapy was not in compliance with the assessment plan. Therefore, Student did not have to be evaluated by Dr. Kirschen and was entitled to demand that District provide an optometrist who believed that visual information processing could be evaluated by an optometrist, who would prescribe vision therapy to treat or remediate any deficits. District disagrees, contending that the only reason the IEP was not held within 60 days was because Student was not taken to Dr. Kirschen for assessment. Student has not met her burden of proof of demonstrating the District failed to hold a timely IEP.

41. Legal Conclusions 36 through 39 are incorporated by reference.

42. The school district or local educational agency is required to conduct an assessment and convene an IEP meeting within 60 days of receiving parental consent to assessment. (20 U.S.C. § 1414(a)(C)(I); 34 C.F.R. § 300.303; Ed. Code, § 56344.) As



discussed in Legal Conclusion 20, in matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

43. Mother signed the assessment plan for a vision therapy assessment by an optometrist on November 18, 2009, which the District received the next day. District's assignment of the visual processing assessment for vision therapy to Dr. Kirschen was in compliance with the Student's request and the written consent. In particular, Student's request for assessment and the assessment plan, on their face, did not refer to the specific type of vision therapy assessment that Student contends should have been offered. Instead, District reasonably offered an assessment by a licensed optometrist and followed up when Student had not made an appointment. Student's attorney received the District's December 10, 2009 letter asking that Mother or Guardian make an appointment with Dr. Kirschen. Student's counsel objected to the District's choice by letter of January 19, 2010. By the time Student's attorney wrote Mr. Astle, the 60-day period had expired. Yet, inexplicably, Student was presented for examination by Dr. Kirschen 10 months later. The only reason that the District could not hold an IEP within 60 days from the date of receiving the parental consent to assessment was because the Mother, Guardian, or ACR refused to present Student for assessment based on their incorrect perception that only the type of vision therapy assessment they wanted had to be offered. (Factual Findings 63-69, 123; Legal Conclusions 28, 34.)

44. Further, Student has failed to demonstrate that any delay in assessment and the IEP meeting was a procedural violation which denied Student a FAPE. As discussed in Legal Conclusions 28-29 and 34, qualified persons assessed in all areas of suspected disability. Further, as discussed in Legal Conclusions 48-51, Student was

found eligible and received related services which provided a FAPE, based upon Student's progress for the 2009-2010 school year.

45. Accordingly, Student has failed to meet her burden of proving that she was denied a FAPE in the school year 2009-2010 based upon the District's alleged failure to hold a timely IEP meeting following parental approval of the assessment plan. (Legal Conclusions 43-44.)

**ISSUES 1(E) AND 2(C): FAILING TO PROVIDE AN EDUCATIONAL PROGRAM THAT PROVIDED ACADEMIC BENEFIT IN READING.**

46. Student contends that she was denied a FAPE in the 2009-2010 and 2010-2011 school years because District failed to provide an educational program that was reasonably calculated to provide some academic benefit in the area of reading. Specifically, Student contends she should have been offered the type of vision therapy advocated by Dr. Ballinger. District contends that the IEPs were reasonably calculated to provide Student with some educational benefit and that Student had made academic progress in reading. Student has failed to meet her burden of demonstrating that her IEPs were not reasonably calculated to provide her with some educational benefit and that she did not receive academic benefit in reading from October 30, 2010, through the remainder of the 2009-2010 school year or during the 2010-2011 school year, which would amount to a denial of FAPE.

47. Legal Conclusions 40 through 45 are incorporated by reference.

48. The November 2009 initial IEP and the February 2010 amendment IEP provided placement, special education, and related services to address Student's unique needs, which were reasonably calculated to provide her with some educational benefit and enable her to access her general education curriculum. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school

district's proposed program. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (See Legal Conclusion 11, and *Gregory K* referred to therein.) Also, the FAPE adequacy of an IEP is measured by what was objectively reasonable at the time the IEP was developed, not in hindsight. (Legal Conclusion 12.)

49. Student has presented no evidence to indicate that the placement and related services provided by the November 2009 initial IEP and the February 2010 amendment IEP were not reasonably calculated to provide Student with some educational benefit. The IEP team used Dr. Simon's psychoeducational assessment and the OT assessment in fashioning a special education program of related services and accommodations to enable Student to access her general education curriculum. The fact that Student's preferred methodology of vision therapy was not offered does not change this result. Student failed to meet her burden as to Issue 1(e). (Factual Findings 53-62, 70-79.)

50. Further, Student's progress reports (grades), CST scores, Mathematics Periodic Assessments, Voyager performance, and the testimony of Student's general education teacher Ms. Lin and RSP teacher Ms. Garcia support the conclusion that the special education services enabled Student to make significant progress in accessing her general education curriculum in reading, as well as writing and math, for the 2009-2010 school year. Ms. Lin considered Student to be a real success and indicated that she was amazed at Student's growth. For example, Student jumped two full levels in ELA and Math on the CST from spring 2008 to spring 2009. Student made significant progress

even though vision therapy for visual information processing deficits was not part of Student's related services. (Factual Findings 81-94, 101-104.)

51. Also, Student received educational benefit up through the time of the February 2011 annual IEP. By that time, Student had achieved all of her IEP goals, including math, writing and reading. Though Student's behavior became more of a challenge in the third grade, she still made progress in the RSP Voyager program on her RCT and RF scores. (Factual Findings 143, 146, 150, 155.) Therefore, not only were the placement, related services, and accommodations reasonably calculated to provide some educational benefit, Student actually received educational benefit as indicated by her significant academic progress.

52. Student presented no evidence to indicate that the placement and related services provided by the annual February 2011 IEP were not reasonably calculated to provide Student with some educational benefit. Student's primary complaint is that the IEP team did not follow Dr. Ballinger's recommendation of vision therapy to address Student's vision processing deficits. To constitute a FAPE under the IDEA, the District was not required to offer the services preferred by the parent. (Legal Conclusion 11.) Instead, the District reasonably accepted Dr. Kirschen's assessment and report that Student's visual efficiency was normal, except for some mild nearsightedness, and that vision therapy was unnecessary. The District also chose to address Student's vision information processing deficits by continuing the related services and accommodations previously adopted by the IEP team, including Dr. Simon's recommendations to address Student's visual information processing deficit. The evidence indicates that the District's February 2011 IEP offer of services was reasonably calculated to provide Student with some educational benefit in the least restrictive environment. (Factual Findings 158.)

53. In sum, the evidence showed that for each school year at issue, Student's IEPs were reasonably calculated to provide her with some educational benefit in each

area of unique need. Student has failed to meet the burden of proving that District's special education program was not reasonably calculated to provide Student some academic benefit in the area of reading in all school years at issue. Student has failed to meet her burden of proof as to Issues 1(e) and 2(c). (Legal Conclusions 48-49, 52.)

#### ISSUES 1(F) AND 2(D): NO VISION THERAPY SERVICES DESPITE REGRESSION IN READING AND HANDWRITING

54. Student contends that District denied her a FAPE because it did not modify her IEP to include vision therapy even though her reading comprehension and reading fluency skills had regressed and her handwriting had not adequately progressed from October 2009 through the 2010-2011 school year. District contends that Student's reading did not regress and that she made progress in her handwriting, thus receiving adequate educational benefits. Student has failed to meet her burden of proving that Student regressed, or that vision therapy would have prevented any alleged regression.

55. Legal Conclusion 16 through 53 are incorporated by reference.

56. A district may reassess if it determines that a pupil's related services needs, including improved academic achievement and functional performance, warrant a reassessment or the pupil's teachers or parents request a reassessment. (Ed. Code, § 56381, subd. (a)(1).) If the assessment warrants, an IEP team meeting would be called to appropriately modify and amend the Student's program. (Ed. Code, §§ 56380.1 & 56381, subd. (a)(2).) Student presented no evidence that any authorized person, on her behalf, requested a reassessment following the October 2009 initial IEP, other than for OT and visual processing. As discussed above, both the OT and visual processing assessments were properly provided. (Legal Conclusions 28-29, 34.) Therefore, the issue is whether the Student's performance put the District on notice that Student required a reassessment and a modification to her IEP program.

57. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) Student's contention parses out certain subtests on standardized tests, claiming regression in reading and fluency. Student's counsel, on cross-examination of District witnesses, would often focus on a subtest score in an attempt to undermine the broader composite scores. Though the subtest may assist in understanding how a child reads or comprehends, the standardized tests have been structured to provide workable measures in core academics in the composite scoring. The composite scores on standardized testing, as well as the CST and Voyager scores, confirm that Student made progress in reading comprehension and fluency, as well as writing. Student's subtest scores could vary, but no evidence supports a finding of regression. (Factual Findings 81-94, 101-104, 143, 146, 150, 155; Legal Conclusions 50-51.)

58. As to writing, both the RSP and second grade teachers indicated that Student's handwriting became more legible as the year progressed. Following the February 2010 amendment IEP, Student received OT to assist in handwriting skills. Student progressed in her handwriting to the extent that the OT recommended, and the IEP team (including Guardian) agreed, that Student could be exited from OT services. All of Student's providers said that Student could write neatly and legibly, when she slowed down and focused on the task. The evidence showed that Student's handwriting improved. As long as Student was making progress commensurate with her abilities, she was not being denied a FAPE. (Factual Findings 91, 142, 150-155.)

59. Student has also failed to provide credible evidence that vision therapy would have improved Student's handwriting. The only evidence submitted was Dr. Ballinger's report and testimony. However, as already discussed, Dr. Ballinger's failure to include a consideration of Student's relevant medical and emotional history rendered her conclusions and opinions unpersuasive. (Legal Conclusions 30, 33.)

60. The evidence established that Student received adequate educational benefit in reading and handwriting. Therefore, the District was not required to seek reassessment or call an IEP meeting to modify Student's program. Student has failed to meet her burden of proof as to Issues 1(f) and 2(d). (Legal Conclusions 57-59.)

#### ISSUES 1(G) AND 2(E): PREDETERMINATION OF VISION THERAPY SERVICES

61. Student contends that by choosing Dr. Kirschen to conduct the optometric examination for visual therapy, and Dr. Simon to evaluate visual information processing in her psychoeducational assessment, the District "predetermined" Student's placement and related service. Student has failed to meet her burden of proving that District predetermined Student's IEP placement and related services, resulting in a denial of FAPE.

62. Legal Conclusions 54 through 60 are incorporated by reference.

63. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important safeguards are those that protect the parents' rights to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

64. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 859.) To fulfill the goal of parental participation in the

IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 681, 693; *Fuhrmann v. East Hanover Bd. Of Educ.* (3d Cir. 1993) 933 F.2d 1031, 1036.) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District, supra*, 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires."].)

65. As discussed in Legal Conclusion 20, in matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

66. Here, Student has misconstrued the legal concept of "predetermination" under IDEA and state law. District was entitled to select qualified assessors to conduct the assessments for the District, and as discussed above, did so in full compliance with the IDEA. Student cannot be considered to have been denied a FAPE if those assessors addressed all areas of need. District determined that school psychologists or educational psychologists were the professionals best qualified to conduct visual information processing assessments; optometrists were qualified to assess and, if necessary, treat visual efficiency. It is well-established that a student is not entitled to the program preferred by a parent or guardian in order to have received a FAPE. As discussed in



detail as it relates to Issues 1(a)-(b) and 2(a)-(b), Student failed to demonstrate that her preferred methodology was accepted in the medical community, let alone was the only method that could address Student's unique needs. Moreover, contrary to Student's assertion on the IEP form, Mr. Astle had nothing to do with the selection of assessors. Thus, the evidence showed that District complied fully with the IDEA in its choice of assessors, and that its failure to use Student's preferred type of assessor was not impermissible "predetermination" of services. (Legal Conclusions 18, 28-29, 33-34.)

67. The evidence showed that the IEP team did not discuss vision therapy at either of the first two IEPs. Mother, Guardian, Student's attorney, and Student's CASA worker attended the November 2009 initial IEP, and Mother, Guardian, and attorney attended the February 2010 amendment IEP. There was no evidence that the District somehow precluded them from participating or made decisions without first hearing their input. The initial IEP found Student OHI eligible and provided special education placement and services. The amendment IEP considered an OT assessment, which the District agreed to do when asked by attorney Rowland. The amendment IEP added OT services. Mother signed and agreed to both IEPs without reservation, from which it was reasonable to assume that she and others attending for Student agreed she had been offered a FAPE. No evidence supports a finding that Student's representatives did not participate or were not heard. No evidence suggests that the District predetermined Student's placement or services at either IEP in the 2009-2010 school year. (Factual Findings 53-62, 70-79.)

68. As to the 2010-2011 school year, the same reasoning applies. As discussed above, the District's selection of assessors was appropriate and not evidence of a policy of predetermination. By the time of the February 2011 IEP, each party had reviewed the reports of Drs. Ballinger and Kirschen. Moreover, the evidence showed no actual

predetermination occurred in that Student's Guardian and legal representative fully participated in the IEP team meeting. (Factual Findings 157-158; Legal Conclusions 66.)

69. During questioning and in written final argument, Student emphasized that some District members of the IEP team did not review Dr. Ballinger's report. As Mr. Foster explained, the IEP team members relied on each other in making decisions. Mr. Foster noted that Dr. Ballinger's report was outside his area of expertise, so he looked to Dr. Simon and Dr. Kirschen for professional direction on the issue. This is not unusual and is contemplated by the IDEA. Certain IEP team members are required to be present to explain relevant assessments, such that the IEP team has members with the knowledge or expertise to guide the team. Mr. Foster and the other District members relied upon Dr. Simon to provide insight and leadership on the issues of visual processing and vision therapy. (Factual Findings 157.)

70. The witness testimony and the documentation established that Dr. Ballinger's report was considered and discussed at the February 2011 IEP. There was no evidence of a district policy of predetermination of vision therapy, particularly in light of Mr. Astle's clerical selection of Dr. Kirscher and Dr. Kirscher's testimony that he would have recommended it if needed. The fact that Dr. Simon and the District IEP team members did not agree with Dr. Ballinger, and instead, like this ALJ, were more persuaded by Dr. Kirscher's opinions, does not establish predetermination. As such, Student has not established that District predetermined services for Student and has failed to meet her burden of proving Issues 1(g) and 2(e). (Legal Conclusions 66-69.)

## ORDER

All of Student's claims for relief are denied.

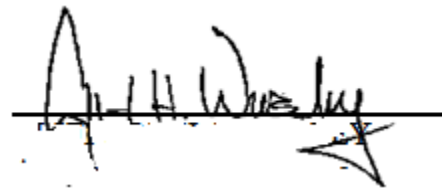
## PREVAILING PARTY

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 all issues.

## 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: July 5, 2011

A handwritten signature in black ink, appearing to read "Clifford H. Woosley", is written over a horizontal line. The signature is stylized with a large initial 'C' and a trailing flourish.

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings