

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

MAGNOLIA ELEMENTARY SCHOOL  
DISTRICT,

v.

GUARDIAN ON BEHALF OF STUDENT.

OAH CASE NO. 2014050832

DECISION

On May 14, 2014, the Magnolia Elementary School District filed with the Office of Administrative Hearings a request for due process hearing naming Guardian on behalf of Student (Student).

Administrative Law Judge Robert Helfand heard this matter in Anaheim, California on June 10 and 11, 2014.

Deborah R.G. Cesario, Attorney at Law, represented Magnolia. Annette Cleveland, Magnolia's executive director of special education and student services for Magnolia, was present throughout the hearing.

No one appeared to represent Guardian on behalf of Student.<sup>1</sup>

The record remained open for the submission of a written closing brief. Magnolia timely filed its closing brief and the matter was submitted on June 27, 2014.

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<sup>1</sup> On May 23, 2014, the Special Education Law Firm filed a notice of representation for Student; it did not appear at the hearing to represent Student.

## ISSUES<sup>2</sup>

The following issues were determined:

- a) Was Magnolia's 2014 multidisciplinary psychoeducational assessment appropriate?
- b) Did the March 2014 individualized education program, as amended, offer Student a free appropriate public education in the least restrictive environment?

## SUMMARY OF DECISION

Student in this case is a nine-year-old, third grade boy who has severe attention and learning deficits plus extreme problem behaviors. Magnolia conducted a triennial assessment in 2014. Student requested Magnolia fund an Independent Educational Evaluation. Magnolia presented an IEP offer on March 14, 2014, amended on April 24, 2014, which included a change in eligibility categories and placement, which Student opposed. Student objected at the IEP meeting to Magnolia changing Student's eligibility category to Emotional Disturbance and placing him in a non-public school because of Student's severe behavioral problems. This decision finds that Magnolia performed an appropriate triennial assessment of Student, and that the March 14, 2014 IEP, as amended on April 24, 2014, offered Student a FAPE in the least restrictive environment.

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<sup>2</sup> The ALJ has reformatted the issues. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

## FACTUAL FINDINGS

### BACKGROUND INFORMATION

1. Student is a nine-year-old, third grade boy who resides with his grandmother, who is his legal guardian, and his father within the geographical boundary of Magnolia. For the first 28 months of his life, Student did not have a stable living arrangement. Mother apparently had a history of illegal drug usage, using alcohol and smoking during pregnancy. Student's mother left Student in the care of Guardian at the age of 28 months. Student was diagnosed with Attention Deficit Hyperactivity Disorder in December 2008 by Ayesha Munir, M.D.

2. Student was found eligible for services by the Orange County Regional Center in December 2007 under speech and language disorder. In June 2008, Student was initially found eligible for special education under the eligibility category of Speech and Language Impairment by the Savanna School District. Student attended pre-school and kindergarten at the Cypress School District. Student began attending the Mattie Lou Maxwell Elementary School, which is part of Magnolia, in first grade after it was discovered that Student actually lived within the boundaries of Magnolia rather than Cypress.

3. Magnolia assessed Student, then a first grader, in November 2011. Student received an IQ score of 96, which is in the average range, on the Pictorial Test of Intelligence. He also scored low average on the Test of Auditory Processing Skills-Third Edition, and below average on the Comprehensive Test of Phonological Processing. He scored below average on the Test of Visual Perception-Third Edition. On the Test of Kindergarten Grade Readiness Skills, Student scored in the 16th percentile in spelling and the second percentile in both reading and arithmetic. On the Woodcock-Johnson-Third Edition, Student received scores in the "below kindergarten" level in 11 areas with 15 areas in the kindergarten range.

4. At the January 7, 2013 IEP, the IEP team found Student eligible for special education and related services under the primary category of Other Health Impaired, based on the ADHD diagnosis, and Speech or Language Impairment. The IEP noted that Student's disability affected Student's involvement and progress in general education thusly: "[Student's] attention deficit in addition to his speech-articulation errors inhibits his ability to sustain attention to fully and successfully access grade level standard curriculum in the general education environment."

5. Student has had a history of behavioral and attention problems, which have interfered with his ability to access the curriculum since entering first grade at Maxwell. Student's behaviors included frequent tantrums, outbursts, physical aggression directed at staff and peers, elopement, and refusal to engage in class activities. Behavior support plans have had no discernable effect on Student, whose behaviors have intensified over time.

6. At the annual IEP team meeting on November 7, 2013, the IEP team found that Student's disability affects involvement and progress in general curriculum thusly: "[Student's] attention deficit in addition to his speech-articulation errors inhibits his ability to sustain attention to fully and successfully access grade level standard curriculum in the general education environment for appropriate learning and academic progress." As to social/emotional present levels of performance, the team noted that Student yelled and made demands, used profanity, talked out of turn, and intimidated others when he was denied preferred activities. Student was also noted to hit or kick adults and was physically aggressive with peers.

#### CONSENT BY GUARDIAN TO THE TRIENNIAL ASSESSMENT PLAN

7. On December 11, 2013, Magnolia received a letter from attorney Jennifer Guze Campbell of the Special Education Law Firm notifying it that Guardian had retained the firm to represent her in this matter. Ms. Campbell noted that Student's areas of

suspected disability were in the areas of anxiety and possible depression and ADHD. Ms. Campbell then requested that Magnolia conduct a thorough assessment of Student and schedule an IEP team meeting.

8. On January 10, 2014, Deborah Cesario, Magnolia's attorney, responded to the December 10 letter. Magnolia informed Ms. Campbell that there was an already scheduled IEP team meeting for January 28, 2014. Magnolia agreed to conduct an assessment and included an Assessment Plan dated January 9, 2014. The assessment plan listed the following areas which would be assessed: academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional, functional behavior assessment, mental health, and central auditory processing.

9. On January 14, 2014, Ms. Campbell forwarded a letter to Ms. Cesario stating that the Guardian consented to the January 9, 2014 assessment plan.

#### KAISER 2014 ASSESSMENTS

10. Kaiser Permanente was retained by Guardian to conduct an assessment of Student. On January 14, 2014, Lisa A. Snider, M.D., a developmental-behavioral pediatrician, authored a letter report. Dr. Snider noted that Student presented with ADHD primarily hyperactive and impulsive. She also noted that learning difficulties were affecting Student's academic performance although he has "suspected average cognitive skills." She found that Student presented with sleep disorder and speech-language disorder. Dr. Snider diagnosed Student with a developmental articulation disorder. She referred Student for a speech therapy evaluation.

11. Student was assessed on January 22 and 29, 2014 by Kelsie Brucia, a speech pathologist at Kaiser. Student was given the Comprehensive Assessment of Speech Language (CASL) which was an in-depth evaluation of oral language processing, knowledge and use of words and grammatical structure, and the ability to use language.

On the CASL, Student scored in the first percentile or below in all areas except for paragraph comprehension of syntax where he was within the third percentile. Ms. Brucia rated Student as "poor" in the pragmatic/social use of language which was based on eye contact, joint attention and turn taking. He scored in the first percentile on the Goldman Fristoe Test of Articulation-Second Edition. Ms. Brucia found that Student had significant delays in the areas of receptive, expressive and pragmatic language as well as in articulation. She recommended that Student receive speech language therapy twice per week.

#### MAGNOLIA'S TRIENNIAL ASSESSMENT

12. The assessment team that conducted the triennial assessment of Student on behalf of Magnolia was comprised of persons who were trained and knowledgeable:

- (a) Armando Gonzalez has been a school psychologist since August 1999. He has a B.A. in psychology and an M.A. in school counseling. Mr. Gonzalez possesses a pupil personnel services credential in school psychology. He has known Student for two years and has provided counseling and behavior interventions when Student suffers an emotional problem. Mr. Gonzalez conducted the psychoeducational portion of the assessment.
- (b) Cindy Hoffman has been involved in special education since 1983. She had been a special education teacher in the Ontario-Montclair School District from 1983 through 1986, a resource specialist from 1986 through 2001 at the Centralia Elementary School District, and has been a program specialist with the Greater Anaheim Special Education Local Planning Area (Greater Anaheim). She possesses a B.S. in physical education, a M.Ed. in special education, and a doctorate in educational leadership in reading. Dr. Hoffman holds credentials for severely handicap, learning handicap, physically

handicap, resource specialist, and language development. Dr. Hoffman conducted the academic portion of the assessment.

- (c) Pamela Greenhalgh has a B.A. and M.A. in communication disorders. She possesses a state rehabilitative services credential, speech-language pathology license, and a certificate in assistive technology in education. Ms. Greenhalgh also possesses a certificate in clinical competency by the American Speech-Language and Hearing Association. She has been a practicing speech therapist since 1985 and in education since 1989. Since 2001, she has been an adjunct faculty member at Santa Ana College in the speech language pathologist assistant program. Ms. Greenhalgh has published two articles and has made numerous presentations in the field. Ms. Greenhalgh has provided speech language services to Student since 2011 and previously assessed him in speech and language in 2011.
- (d) Patricia Polcyn has been an occupational therapist since 1979 and has been a school-based occupational therapist since 1984. Since 1992, Ms. Polcyn has been the lead occupational therapist with Greater Anaheim. She has a B.S. in occupational therapy. She has co-authored a book on sensory motor implementation in the classroom and has been a frequent speaker on various occupational therapy topics. She has provided services to Student since he was in kindergarten at Cypress. Ms. Polcyn conducted the occupational therapy portion of the assessment.
- (e) Mary Olander possesses a B.S. in Spanish and communication disorders, a M.A. in audiology, and a Doctor of Audiology. Dr. Olander possesses a certificate of clinical competence in audiology from the American Speech-Language and Hearing Association, clinical/rehabilitative services credential from the California Commission on Teacher Credentialing, a license in

audiology, and a certificate of authorization to dispense hearing aids from the State of California. From 1999-2000, Dr. Olander served as a clinical fellow with Providence Speech and Hearing Center of Orange County. Since 2000, she has been employed as an educational audiologist by the Centralia School District.<sup>3</sup> Dr. Olander conducted the audiology assessment.

- (f) Diana Jones conducted the functional behavioral assessment of Student. She possesses a B.A. in psychology, an M.A. in school counseling and a second M.A. in educational psychology. She is credentialed in school counseling and school psychology plus child welfare and attendance. She has attended several training sessions in behavioral intervention and received a Behavioral Intervention Case Management designation. Ms. Jones has been involved with special education since 1997 as a school psychologist or program specialist. She has conducted numerous functional behavioral analyses as a program specialist.
- (g) Tan Vinh, a licensed clinical social worker, conducted the mental health evaluation. Mr. Vinh is employed by the Behavioral Health Services section of the Children and Youth Services of the Orange County Health Care Agency. Mr. Vinh was under the supervision of Thomas W. Shaw, Ph.D. Nam Hee Thompson, Psy.D., a clinical psychologist, also participated in the evaluation.

13. The purpose of the assessment was to determine (a) whether Student continued to be eligible for special education under the categories of Other Health Impairment as his primary disability and Speech and Language Impairment as his secondary category; and (b) whether Student should also be eligible under the

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<sup>3</sup> Centralia is a member of Greater Anaheim and provides audiology services on its behalf to other member districts including Magnolia.



categories of Autism, Specific Learning Disability, and/or Emotional Disturbance. The assessment report also included background information including Student's family history and a review of assessments conducted by Cypress in 2010, Magnolia in 2011, and Kaiser in 2014.

14. The tests and other evaluation materials used, had been validated for the purposes for which they were used. The testing, evaluation materials, and procedures were not racially or culturally discriminatory, and the tests were administered pursuant to publisher's specifications. Each assessment tool was administered according to the publisher's instructions or manual. Each assessment tool utilized was valid and reliable for the purposes which it was used.

#### Health and Developmental

15. Lisa Armstrong, the Maxwell school nurse, wrote the health and developmental portion of the assessment report. The Guardian provided information that Student's mother had smoked, consumed alcohol, and possibly used illegal drugs during pregnancy. She also noted that Student had a history of ear infections and difficulty hearing background noise. Student had been diagnosed with ADHD in 2008 and 2014. Student had stopped taking medication for this condition prior to the assessment. Ms. Armstrong conducted vision and hearing screenings which showed Student was within normal limits.

#### Academic Functioning

16. Dr. Hoffman conducted the academic functioning portion of the assessment. Dr. Hoffman administered standard tests on January 29 and 31, 2014. On the first day, Student was cooperative and was rewarded by being given stickers and a chance to play a board game. On the second day, Student refused to cooperate, as it appeared he had problems regulating his behavior. This resulted in Student not

attempting to do 18 subtests. This was similar to when Dr. Hoffman administered the same tests in 2011. Student's behavior had no impact on the results obtained since Dr. Hoffman administered other tests to cover the same areas.

17. In reading, Dr. Hoffman administered the Phonics Inventory, the San Diego Quick, Burt Sight Word Test, Yopp-Singer Segmentation Test, the Phonemic Awareness Screener, and the John's Reading Inventory. Dr. Hoffman noted that Student does not know the complete alphabet. He would not attempt to say compound words. Student's results showed that he was reading at the kindergarten level while he should be at least on the level of a second grader. Student did show improvement in phonemic awareness by scoring 73 percent correctly as opposed to 29 percent in 2011. But in reading fluency, Student scored in the less than kindergarten range.

18. Student was also administered the Woodcock-Johnson-Third Edition to measure his academic skills. Student scored a standard score<sup>4</sup> of 60 which is at grade level of first grade, one month. In 2011, Student received a standard score of 83 which was at the kindergarten, fifth month. Student scored in the grade level range between below kindergarten and first grade, nine months in all areas except for quantitative concepts (second grade, two months), story recall (fourth grade), and story recall-delayed (13th grade) where Student received standard scores of 104 and 115, respectively. Dr. Hoffman would have expected that Student would make seven to eight months progress per year taking into effect Student's cognitive level and his learning disability. Instead, Student's total progress since 2011 was mainly within one grade level except in story recall.

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<sup>4</sup> Number scores referred to will be standard scores. Standard scores above 120 are in the "high" range, 110-119 are "high average," 90-109 are "average," 80-89 are "below average," 70-79 are "borderline," and scores below 69 are "deficient."

## Audiology

19. Student was referred for an audiological evaluation including auditory processing. Audiometric testing demonstrated that pure tone thresholds were within normal limits and word recognition was good when words presented at a soft conversational level. Student had normal inner and middle ear function. Dr. Olander administered the SCAN-3 Tests for Auditory Processing Disorder. Overall, Student scored in the "disordered" range. Dr. Olander concluded that Student can detect most if not all sounds necessary for understanding speech but he may struggle to process auditory information, especially if there is background noise or the speaker does not speak clearly and slowly. Dr. Olander recommended that an FM system should be considered and that Student repeat instructions to ensure he understood them. Dr. Olander also recommended that Student be referred for a central auditory assessment.<sup>5</sup>

## Adaptive Behavior (Self-Help)

20. Ms. Polcyn conducted the section of the report entitled "Adaptive Behavior (Self-Help)." Ms. Polcyn administered the Test of Handwriting Skills-Revised, Benbow Observations for Writing Skills Acquisition, School Function Assessment, and the Sensory Profile School Companion. She also reviewed Student's current IEP and school file, reviewed work samples, reviewed the January 13, 2014 letter report from Dr. Snider at Kaiser, observed Student on three occasions during school activities, and conducted interviews of school staff including Mr. Dixon. During testing, Student was cooperative

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<sup>5</sup> On March 12, 2014, Magnolia forwarded an Assessment Plan to conduct a central auditory assessment of Student. On April 3, 2014, Ms. Campbell informed Magnolia that Guardian had consented to the assessment, which is currently ongoing.

but was easily distracted causing Ms. Polcyn to use multiple verbal prompts to stay on task.

21. The Sensory Profile is a questionnaire utilized to determine a student's sensory processing abilities on daily functional performance in the school milieu. Mr. Dixon completed the questionnaire. The results demonstrated that Student added sensory input to every experience in daily life and has an avoiding pattern to cope with stimuli by withdrawing or engaging in emotional outbursts. Pupils with this profile tend to become overloaded very quickly in typical learning environments which interfere with their ability to get instructions, complete independent work, or cooperate with others in a group setting.

22. The Benbow is an observation checklist to review the basic foundation skills for fine motor and penmanship skills. Student did well. The Test of Handwriting Skills is to assess neurosensory integration ability by cursive writing. Modifications were used to keep Student motivated to perform. Student was able to produce legible letters although he often produced the letters from the bottom up rather than top down. This test has several subtests of which four were given. Student scored in the fifth percentile in writing from memory where he struggled to recall the proper order of the alphabet. Student reversed one letter and wrote wrong case on five other letters. Student also was in the fifth percentile in writing from dictation due to reversing one letter and writing the wrong case for four other letters. In copying letters, Student scored in the ninth percentile for upper-case letters and the 37 percentile for lower-case letters. Student's score was lowered because of letter formation and failure to write on the baseline.

### Speech-Language

23. Ms. Greenhalgh conducted the speech-language evaluation over a five day period. Student was inconsistently cooperative and required reinforcement. Ms. Greenhalgh administered five standardized tests. On one of these tests, the CASL, Ms.

Greenhalgh utilized several techniques permitted by the manual including repeating questions, and offering Student verbal encouragement. Ms. Greenhalgh also gave Student unlimited time to complete the subtests. Ms. Greenhalgh contacted the CASL publisher who informed her that the results would still be valid. The CASL had been administered by Kaiser within one week of the Magnolia administration.<sup>6</sup> After she learned of the Kaiser assessment, Ms. Greenhalgh contacted the CASL publisher as to whether her scores would be valid because of the Kaiser administration of the CASL. The publisher informed her that the CASL scores she obtained were valid as there is no practice effect for this test. Student scored much lower on the Kaiser testing which occurred days prior to Ms. Greenhalgh's administration. Ms. Greenhalgh opined that her results on the CASL were a more accurate representation of Student's abilities than the Kaiser testing, because Student had a relationship with her as she had been providing speech language services since 2011, she had previously evaluated him, and she used permissible techniques to help maintain Student's attention during the testing.

24. Ms. Greenhalgh examined Student and found no oral-facial anomalies to prevent speech functions. Student's speech-motor skills were within normal limits. Student's vocal parameters for pitch, loudness, and quality were normal for his age and gender, as was speech-fluency levels during conversational speech. On the Goldman-Fristoe Test of Articulation, Student misarticulated /r/ and /th/ phonemes. During conversation, Student often replaced /l/ with /w/. Ms. Greenhalgh noted that Student was sometimes difficult to understand in the classroom. These difficulties resulted in Student often having to repeat himself and becoming frustrated.

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<sup>6</sup> Ms. Greenhalgh was unaware that Student was being assessed by Kaiser at the time she conducted her evaluation.

25. As to language, Ms. Greenhalgh evaluated Student in the areas of semantics, morphology/syntax, and pragmatics. Semantic vocabulary skills were measured by the Receptive One-Word Picture Vocabulary Test-Fourth Edition, the Expressive One-Word Picture Vocabulary Test-Fourth Edition and the antonyms subtest of the CASL. Student scored in the low average range in both the Receptive and Expressive One-Word tests, placing him in the 10th and ninth percentiles, respectively. On the CASL antonym subtest Student was in the seventh percentile which was in borderline low average to below average range.

26. Morphology/syntax refers to grammatical language skills. Ms. Greenhalgh administered the Token Test for Children-Second Edition, Structured Photographic Expressive Language Test-Third Edition, and the syntax construction and paragraph comprehension subtests of the CASL. Because Student refused to cooperate while taking the Token Test, Ms. Greenhalgh discontinued the test, which made any results invalid. On the Structured Photographic test, Student scored in the above average range. The CASL syntax construction subtest assesses one's ability to formulate sentences. Student scored in the average range. The paragraph comprehension subtest of the CASL measures comprehension of syntax embedded in spoken narratives. Student scored in the average range. Ms. Greenhalgh noted that Student often makes revisions by stopping and changing what he says during conversations. Ms. Greenhalgh observed that such language was consistent with Student having ADHD.

27. Ms. Greenhalgh measured Student's pragmatic language skills using the nonliteral language and pragmatic judgment subtests of the CASL, and the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF). The CASL nonliteral language subtest assesses the ability to comprehend the intended meaning of spoken utterances where the literal meaning was not conveyed in the message. Student scored in the average range. On the pragmatic judgment subtest, which measures knowledge and use

of pragmatic rules of language, Student scored in the average range. The CELF is a questionnaire and was administered to Guardian, Mr. Dixon, and Ms. Greenhalgh. Student's pragmatic language/social skills varied widely. Student demonstrated ability to exhibit normal levels of pragmatic/social skills to access the curriculum and to develop normal relationships with peers and adults. But these skills are dependent on his compliance and cooperation level. Student's behaviors interfered with the appropriate/functional use of his pragmatic/social skills.

28. In her separate written report, Ms. Greenhalgh recommended that Student did not meet eligibility under Speech and Language Impairment as his expressive and receptive language skills were at his expected levels for his age, cultural background and cognitive levels. She did find that Student had an articulation disorder which made him eligible for special education under Speech and Language Impairment.

#### Cognitive and Social/Emotional

29. Mr. Gonzalez conducted the cognitive development, sensory motor processing, auditory processing, and social/emotional/behavior functioning evaluations. Mr. Gonzalez conducted his evaluations on February 3, 4, and 5, 2014, and March 3, 2014. On the first two days, Student was cooperative and was easily redirected. On the third day, Student refused to go with Mr. Gonzalez and was defiant and had trouble regulating his behavior. On the fourth day, Student was cooperative and worked for 30 minutes without a break.

#### COGNITION

30. To establish Student's cognitive development and learning ability, Mr. Gonzalez administered three tests. The Naglieri Nonverbal Ability Test is designed to provide a nonverbal measure of general ability independent of academic skills. Student scored within the average range with a score of 97. The Kaufman Assessment Battery for

Children-Second Edition measures the processing and cognitive abilities of children and adolescents. Student was given the nonverbal scale. Student's nonverbal score was 82 which placed him in the below average range. The Wechsler Abbreviated Scale of Intelligence-Second Edition is designed to assess specific and overall cognitive capabilities or comprehension of children through adults. Student had a full IQ score of 80 which is in the low average range. Student's verbal IQ was 75 which placed him in the borderline range. Student received a performance IQ of 90 which placed him in the average range. Thus, Student possessed low average to average intelligence.

#### SENSORY MOTOR PROCESSING

31. Mr. Gonzalez administered the Beery Developmental Test of Visual-Motor Integration (VMI) and the Developmental Visual Perception Test. Visual-motor integration is the degree which visual perception and finger-hand movements are coordinated. The VMI consists of 24 geometric forms which are to be copied with paper and pencil. Student scored in the average range. Student scored in the above average range in the Developmental Visual Perception Test.

#### AUDITORY PROCESSING

32. Mr. Gonzalez administered the Test of Auditory Processing Skills-Third Edition, which is designed to assess the processing of auditory information pertaining to the cognitive and communication aspects of language. Overall, Student tested in the below average range with a score of 83. He was in the below average in phonologic and memory while borderline in cohesion (which is similar to the verbal IQ of the Wechsler Abbreviated Scale of Intelligence).



## SOCIAL/EMOTION/BEHAVIORAL FUNCTIONING

33. The Connors Comprehensive Behavior Rating Scales were given to Guardian, Mr. Dixon, Student's teacher, and Mr. Gonzalez. The Connors is designed to be used to obtain information on a child's behavior in the home and school settings. The three raters reported significant concerns in the following symptoms: hyperactivity/impulsivity, separation fears, academic difficulties, language difficulties, ADHD inattentive type symptoms, ADHD predominately hyperactive-impulsive, and generalized anxiety disorder. Guardian indicated "very elevated" scores in math and worrying. She gave "elevated" scores in social problems, oppositional defiant disorder. Guardian rated Student as "average" in upsetting thoughts, defiant aggressive behaviors, perfectionistic and compulsive behaviors, and physical symptoms. Mr. Dixon and Mr. Gonzalez gave "very elevated" scores in emotional distress, upsetting thoughts/physical symptoms, social anxiety, defiant aggressive behaviors, social problems, perfectionistic and compulsive behaviors, violence potential behaviors, conduct disorder, oppositional defiant disorder, major depressive episodes, maniac episodes, obsessive compulsive behavior and social phobia. Mr. Gonzalez concluded that the results indicate that Student has great difficulty regulating his behavior in the classroom.

34. Guardian, Mr. Gonzalez, and Mr. Dixon also completed the Gilliam Autism Rating Scale-Second Edition, which screens individuals between the ages of three and 22 for indications (stereotyped behaviors, communication, and social interaction) related to autism. The results demonstrated that it was "unlikely" Student was on the autism spectrum.

## Eligibility and Other Recommendations

35. The written Assessment Report, which comprised five separate reports, totaled 75 pages, reviewed several special education eligibility categories which may apply to Student.<sup>7</sup>

- (a) The assessment team opined that Student did not meet the criteria for the category of Autistic-like Behaviors based on the Gilliam and the assessment of Dr. Snider of Kaiser. Student did not demonstrate any of the characteristics required: an inability to use oral language for appropriate communication, obsession to maintain sameness, extreme preoccupation with objects or inappropriate use of objects, extreme resistance to controls, display of motoric mannerisms and motility patterns and self-stimulating ritualistic behaviors.
- (b) The assessment team opined that Student met the eligibility category of Other Health Impaired due to his ADHD. The assessment team indicated that Student has received a medical diagnosis of ADHD-hyperactivity/impulsivity by Dr. Snider. The assessment team also found that Student exhibited limited strength, limited vitality, and limited alertness including heightened alertness to environmental stimuli with respect to the educational environment. The assessment team also indicated that Student's condition adversely affects Student's educational performance and is not a temporary condition. The assessment team also recommended Student met the eligibility categories of

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<sup>7</sup> The five reports were psycho-educational (36 pages), audiology (three pages), functional behavior assessment (17 pages), speech and language (16 pages), and mental health (seven pages).

Speech and Language Impairment, due to his articulation deficit, and Specific Learning Disability in reading, writing, and math.

- (c) The assessment team recommended that Student be found eligible for special education under the category of Emotional Disturbance. The assessment team concluded that: (a) Student's behavior precludes him from learning and making progress commensurate with his abilities despite behavioral and instructional interventions; (b) Student was unable to maintain appropriate social relationships with peers and staff; (c) Student engaged in inappropriate behavior under normal circumstances both at school and at home; and (d) Student exhibited, both at home and at school, clinical symptoms of mood disorders, anxiety disorders and ADHD. Additionally, Student had exhibited one or more of these characteristics over a long time period and to a marked degree which adversely affected Student's educational performance.

36. The assessment team made several recommendations to assist Student. These included that Student be placed in a small classroom with minimal auditory distractions, behavioral supports throughout the school day, extra processing time, establishing a "time away" place for Student to go, placing Student closer to teacher in the classroom to improve his attentiveness, have Student repeat instructions, teach Student to self-monitor his behavior, and to use fidget tools so Student can be more attentive during instruction.

#### Functional Behavior Analysis

37. Ms. Jones conducted the functional behavioral assessment by directly observing Student on four occasions over a three-day period; conducting interviews with Guardian, Mr. Dixon, and the classroom aide; reviewing the results of a functional assessment screening tool filled out by Mr. Dixon and Ms. Williams; and reviewing

school records, reports, and behavioral data.<sup>8</sup> Ms. Jones produced a written report dated March 12, 2014.

38. During Ms. Jones observations of Student's instructional time, Student engaged in a lot of non-compliant behaviors which included use of profanity, work refusal, statements of low esteem, and aggression. Student often refused Mr. Dixon's or the aide's requests to complete work by refusing verbally and walking away. On one occasion, Student responded to a question about a story about cars by stating that guns are for shooting people. While the class continued to work on the car story, Student made up a story about shooting people. On another occasion, Student was redirected to take his seat. On the way to his desk, he pretended to kick a peer and taunted him by calling him "scaredy cat." Student would sing or hum aloud when he refused to work. Class staff tried hard to get Student to comply, which often resulted in Student ordering staff to get away or leaving the work area.

39. Ms. Jones listed Student's undesired target behaviors as non-compliance when asked to perform non-preferred activities and physical aggression when his non-compliant behavior escalated. Student's non-compliant behavior consisted of verbal protesting which could last for between five and 35 minutes; pushing away work materials, which could last from one to five minutes and could occur within a chain of behaviors lasting up to 35 minutes; leaving the area without permission, which occurred during Ms. Jones' observations ten times with seven being rated "severe;" knocking over furniture, which occurred in a chain of behavioral episodes; aggression to staff, which consisted of open-handed slaps, fisted punches, kicking and head butting and occurred as part of a chain of behaviors; and aggression towards peers, which occurred as a chain

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<sup>8</sup> The behavioral data was gathered by Mr. Dixon and Ms. Williams, who were trained by Ms. Jones on proper data gathering procedures.

of behaviors and consisted of open-handed slaps to closed fist punching and head butting. Ms. Jones found that Student's target behaviors could occur in isolation or as part of a chain. Ms. Jones found that verbal protesting, pushing away materials and leaving the work area were attempts of Student to escape work which he perceived to be difficult or overwhelming. Aggression and knocking over furniture appeared to be Student's attempt to escape redirection and intervention by staff after he had engaged in attempting to escape work.

#### Mental Health Evaluation

40. Mr. Vinh conducted his mental health evaluation on six days during the period from March 24, 2014 to April 14, 2014. Dr. Thompson conducted a review of school and Kaiser records. Magnolia referred Student for a mental health evaluation due to Student's problem and intense behaviors.

41. Mr. Vinh interviewed Guardian as to Student's family history, medical history, developmental history, Student's behaviors, and history of treatment. Guardian informed Mr. Vinh that she believed that 95 percent of Student's problems relate to him having dyslexia. She denied Student having a mental disorder. She attributed his meltdowns to problems reading and writing. She also opined that Student's behaviors were much worse when he had taken medication.<sup>9</sup>

42. Mr. Vinh also interviewed Mr. Gonzalez, Mr. Dixon, and the school principal, Marcy Chant. They reviewed Student's problems in class including his behaviors and aggressiveness, frequent mood swings, unpredictableness of his behaviors, his lack of motivation to learn, and that Student's behaviors intensify later in the week.

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<sup>9</sup> Student had previously been prescribed Risperdal, Concerta, Adderall, and Focalin.

43. Mr. Vinh observed Student on Tuesday, March 11, 2014 and Thursday, March 13, 2014, for a total of one hour. On both occasions, Student recognized Mr. Vinh during the observations. During the first observation, Student was in the library during group play. Student acted appropriately on both settings. On the second observation, Student was in class during a reading lesson. Student was attentive and was redirected after refusing to do a task.

44. Based upon the 2014 evaluations by Magnolia, psychological reports, IEP's since kindergarten, and background information, Mr. Vinh concluded that Student "met the medical necessities for mental health service due to having difficulty with concentration, having learning disorder evidenced by 'severe discrepancy between intellectual ability and achievement' from the result of psychological testing, and significant level of distress and anxiety." He also noted that Student's condition can not be described as social maladjustment or temporary in nature. Mr. Vinh proposed a client service plan which included cognitive behavioral therapy to teach coping, social skills, communication, and conflict-resolution skills for a one hour session per week; parent counseling for a 45-minute session per week; and 30 minutes for the first month for therapist to consult, coordinate, and monitor the program.

#### THE IEP TEAM MEETINGS

45. Student's IEP team met on January 28, 2014. Guardian and her attorney, Mark Allen of the Special Education Law Firm, requested that Magnolia continue Student's placement in a mild/moderate class which implements a multi-sensory approach. Both sides agreed to continue the IEP meeting until the triennial assessment was completed.

46. On January 28, 2014, Magnolia forwarded to Guardian, through her counsel, an IEP team meeting notice scheduling the continued meeting for March 3, 2014. The attorneys exchanged letters attempting to find a mutually convenient date to

hold the assessment review IEP team meeting. On February 18, 2014, Ms. Campbell forwarded a letter to Ms. Cesario consenting to the IEP team meeting to occur on March 12, 2014. On February 18, 2014, Ms. Campbell, in a letter to Ms. Cesario, agreed to March 14, 2014, as the continuation date to complete the March 12, 2014 IEP meeting. On March 10, 2014, Ms. Cesario forwarded to Mr. Allen "close-to-final drafts" of the multi-disciplinary report and behavior report."

#### March 12, 2014 IEP Meeting

47. On March 12, 2014, the IEP team convened for a meeting to review the triennial assessment. IEP team members from Magnolia in attendance included: Student's assessment team; Mercy Chant, Maxwell principal; Tracy Mercado, a third grade general education teacher; Ms. Cleveland; and Deborah Cesario, Magnolia's attorney. Attending on behalf of Student were Guardian; Student's father; Jim Campbell, an education advocate; and Mark Allen, an attorney.<sup>10</sup> Guardian and Father were offered a review of their rights. Mr. Allen declined this review. Final copies of the assessment reports were provided to Guardian, Father, and their advocate and counsel.

48. The members of the assessment team reviewed their individual assessments. Student's IEP team members actively asked questions and discussed the assessment findings. Ms. Cleveland asked Student's team members if they thought the picture presented of Student was accurate. Student's team members responded that the assessment picture of Student was "fairly accurate." The full team then discussed the Kaiser assessments, which had been provided to Magnolia the day prior to the meeting.

49. Mr. Gonzalez then led a discussion regarding areas of suspected eligibility -- Autism, Specific Learning Disability, Other Health Impairment, and Emotional Disturbance. The most discussion occurred on Mr. Gonzalez's recommendation that

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<sup>10</sup> Both Mr. Campbell and Mr. Allen are with the Special Education Law Firm.

Student's eligibility be under Emotional Disturbance. Mr. Dixon shared that there was no specific trigger to Student's outbursts. Ms. Jones offered that Student's behaviors and social emotional issues stand in the way of his ability to learn. Mr. Campbell countered that Student should be classified under Specific Learning Disability because of his ADHD, auditory processing, reading and writing. School staff responded that Student's behaviors occur in and out of the classroom and are not always related to academics. Guardian offered that Student's behavior problems resulted from his frustration with his academic problems. Mr. Campbell then suggested to the team that they defer finding that Student was eligible under Emotional Disturbance until the mental health assessment was completed. Mr. Campbell informed the team that if Student was found to be eligible under Emotional Disturbance as the primary disability, this would not be acceptable to Guardian. The IEP team found Student eligible for special education under the categories of Specific Learning Disability, Speech and Language Impairment, Other Health Impairment, and Emotional Disturbance. Because the IEP forms require the listing of a primary eligibility category, Emotional Disturbance was listed as primary with Speech and Language Impairment as secondary.

#### March 14, 2014 IEP Meeting

50. The IEP team reconvened on March 14, 2014, to complete the triennial meeting. The team identified Student's areas of need were in articulation, reading decoding, reading comprehension, math, grammar, writing, and emotional/behavioral/peer relationships. Student's attorney, advocate, and Guardian actively participated in all discussions.

51. The IEP team then discussed goals to meet Student's needs. The team adopted 15 goals in the areas of self-regulation/behavior and social/emotional (six goals - behavior regulation, self-regulation, compliance, expression of emotions, social/emotional, and peer interactions), reading (three goals -- decoding, word



recognition, and comprehension), writing (two goals -- fine motor and written expression), mathematics (two goals -- problem solving and calculations), speech and language (two goals -- articulation and sentence formulation with proper verbs and pronouns), and task completion. Each goal included benchmarks and was measureable. All of the IEP team members opined during the meeting that the goals were appropriate to meet Student's identified unique needs.

52. Ms. Jones reviewed her proposed behavior intervention plan which was based on her FBA. The team discussed classroom accommodations, breaks, reinforcements, behavior/emotional regulation, and proposed supports.

53. The team then discussed placement and services. The team was in agreement that Student would benefit from multi-sensory supports, behavioral supports, plus social/emotional supports such as counseling. The team discussed and adopted service options in the areas of speech and language therapy, occupational therapy, audiology, and counseling. The team discussed the continuum of placement options including general education, specialized academic instruction in the general education setting, specialized academic instruction outside of the general education setting, non-public school, and residential treatment. Student's team members requested that Student continue to be placed at Maxwell with a one-to-one behavioral aide assigned just to Student. The school members disagreed that this would be beneficial to Student as an aide would tend to isolate him even more than he currently was. The school members felt that Student's behaviors had become more frequent and had intensified which required a greater level of support than Magnolia could provide. Student had failed to make notable progress at Maxwell because of his behaviors as his behavior was impeding his ability to learn. The school team members opined that Student required a highly structured environment which could provide therapeutic support, especially at crisis times. School team members felt that Student's behaviors

were caused by internal reasons which were required to be addressed by counseling in a therapeutic setting of a non-public school.

54. The IEP offer for the 2014-2015 school year was:

- (a) Placement in a special day class within a non-public school for 300 minutes per day to focus on Student's social/emotional problems;
- (b) Speech and language therapy for 25 minutes twice per week in a small group;
- (c) Occupational therapy in a group once per week for 30 minutes;
- (d) Individual counseling one 30-minute session per week;
- (e) Group counseling one 30-minute session per week;
- (f) Behavior intervention services one 30-minute group session per week;
- (g) Use of an FM system<sup>11</sup> with audiological services during a 45-day trial for an FM system totaling three 30-minute sessions; and
- (h) Accommodations including repeated directions; longer response time; verbal and visual prompts; help/break card; visual schedule; visual checklist; modeling correct articulation by teacher; and small group instruction in the areas of reading, writing and math instruction.

55. Magnolia also found Student eligible for extended school year services from June 30, 2014 to July 31, 2014, in a non-public school for 210 minutes for five days; speech and language therapy for 25 minutes once per week; occupational therapy for 30 minutes once per week; individual counseling for 30 minutes once per week; behavior intervention services for 30 minutes once per week; and the accommodations offered during the regular school year.

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<sup>11</sup> An FM system is a sound amplification system which transmits a teacher's voice through a microphone to a receiver worn by the student.

## April 24, 2014 IEP Meeting

56. The IEP team reconvened on April 24, 2014, to review the Orange County mental health assessment. Mr. Vinh presented his evaluation and proposed a client service plan. The team agreed that the proposed mental health services and the proposed self-regulation goals were appropriate. Mr. Vinh concluded that with the proposed mental health services Student would be able to attend Maxwell. Mr. Gonzalez and Mr. Dixon felt that a non-public school with a therapeutic environment was the appropriate placement for Student as Student's behaviors and moods are unpredictable, disruptive, and that Student's anxiety increased his behaviors regardless of academic demands. They also opined that Student required psychotherapy to address these behaviors. The team then amended Magnolia's offer to include individual counseling for one 60-minute session per week, one 30-minute session monthly for case management, one session of group counseling for 45 minutes once per month, and one 45-minute session of parental counseling.<sup>12</sup>

## GUARDIAN'S PARTIAL CONSENT TO THE IEP AND REQUEST FOR AN INDEPENDENT EDUCATION EVALUATION

57. On April 25, 2014, Ms. Campbell, in a letter to Ms. Cesario, informed Magnolia that Guardian was consenting to (a) accommodations/modifications; (b) transportation; (c) speech and language services; (d) occupational therapy services; (e) individual and group counseling; (f) behavior intervention services; (g) audiological services; and (h) educationally related services and goals. Ms. Campbell also stated that Guardian was not consenting to eligibility and placement. Guardian also requested an Independent Education Evaluation at public expense. On April 30, 2014, Ms. Cesario

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<sup>12</sup> The mental health services were to be provided throughout a one year period and not limited to the school year.

responded by letter. Magnolia denied the request for an Independent Education Evaluation as it had determined that "all assessments were appropriately administered to [Student] by qualified and trained staff."

#### APPROPRIATENESS OF THE OFFERED MARCH 2014, AS AMENDED, IEP

##### Behavior During School Year 2013-2014

58. At the annual IEP team meeting on November 7, 2013, the IEP team found that Student's disability affects involvement and progress in general curriculum thusly: "[Student's] attention deficit in addition to his speech-articulation errors inhibits his ability to sustain attention to fully and successfully access grade level standard curriculum in the general education environment for appropriate learning and academic progress." As to social/emotional present levels of performance, the team noted that Student yelled and made demands, used profanity, talked out of turn, and intimidated others when he was denied preferred activities. Student was also noted to hit or kick adults and was physically aggressive with peers.

59. Mr. Dixon is Student's current third grade teacher. Mr. Dixon's mild/moderate special day class consists of eight students, an instructional aide and a behavioral aide assigned mainly to Student. Mr. Dixon has a B.S. in kinesiology and possesses a mild/moderate, level one education specialist credential. Mr. Dixon was a substitute teacher with Magnolia during school year 2011-2012. He commenced teaching Student's class in December 2013. Mr. Dixon opined that Student's behaviors and lack of attention are so severe that he is prevented from learning.

60. Student's attention deficits caused him to be off task between 60 and 70 percent of the time. He was constantly fidgeting, putting his head down on his desk, interrupting lessons, and refused to do work.

61. Student's behaviors were, and continue to be, a constant disruption to class routine and often comprised a refusal to do work, elopement, and the use of profane language addressed to adults. Student's behaviors often suddenly escalated to violence without warning. On those occasions, Student would strike peers for no reason. Student's behaviors often resulted on his being off task five to ten times in an average day for periods of 20 minutes to 40 minutes. About 10 times after December 2013, Student's behavior resulted in the classroom being evacuated to prevent other children from being injured. On those occasions, it took Mr. Dixon almost two hours to get the class to refocus on instruction. Mr. Dixon noted that the class comprised pupils who have attention issues as part of their disabilities. Mr. Dixon broke down how the class was impacted during these incidents as the class being off task during the incident until removal at between 30 and 60 minutes. Each incident caused the class to be out of the classroom for 30 to 60 minutes while Mr. Dixon and others calmed Student. It then could take up to another hour to get the class back on track to learn.

62. The result of Student's behaviors was that his classmates were fearful of Student and were stressed when the class broke into small group instruction that they would be teamed with Student. As a result, Student had no friends.

63. Dr. Hoffman, a program specialist who has been assigned to Student since 2011, observed that Student's behaviors had become more aggressive and escalated much faster than the previous year. Dr. Hoffman noted that Student was extremely difficult to redirect as he was unable to regulate his behavior. Ms. Polcyn, Student's occupational therapist since he attended kindergarten,<sup>13</sup> also observed that Student's levels of behavior had become much more intense and violent both in and out of the

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<sup>13</sup> Ms. Polcyn is employed by the Greater Anaheim Special Education Local Planning Agency which includes Cypress.

classroom. Ms. Polcyn noted Student lacked control during these outbursts. An example was on May 27, 2014, when Student taunted a peer verbally and then exposed his private parts.

64. Student has struck Mr. Dixon and thrown objects at him. Mr. Dixon suffered injury at least once. Michelle Williams, the behavior aide, has been injured on three to four occasions since December 2013. On February 13, 2014, Student refused to do a work assignment. When Ms. Williams had Student leave the class to walk outside in an effort to calm him, Student began to cry and hit his head against a trash bin while screaming he wanted to kill himself. When Ms. Williams tried to calm him, he began hitting her. After she tried to protect herself by grabbing his arms, Student head butted her causing her to bleed.

65. Mr. Gonzalez is the Maxwell school psychologist and has known Student for two years. He observed that Student's behaviors have become more aggressive in the classroom and severe as compared to the preceding school year. Mr. Gonzalez opined that Student has the potential to harm others as well as himself.

66. Annette Cleveland is Magnolia's executive director for special education and student's services. She has been in this position since November 1999. She has been in special education as a teacher or administrator since 1980. She has known Student since he entered Magnolia in the first grade. She opined that Student's behaviors had worsened over time and he was a threat to injure others and himself. Ms. Cleveland, whose office is at the district offices, was called often to Maxwell to help deal with Student's behaviors. Because of Student's disruptions, Ms. Cleveland had reassigned Ms. Mitchell to work with Student instead of being available to assist with the class. She had also kept the size of Mr. Dixon's class at eight students instead of the 14 which the class is designed to hold.

## Academic Progress

67. Student has made limited academic progress since first grade. In first and second grades, Student received marks of "below basic" in all areas. He also received "needs improvement" in all areas of responsibility for learning and behavior with the exception of completing homework on time where he was rated either satisfactory or excellent. On the Spring 2013 STAR test, Student scored "far below basic" in both English-Language Arts and Math. During third grade, Student received similar grades except for reading comprehension where he was graded as basic.

68. Prior to Student's annual IEP meeting on November 7, 2013, Magnolia conducted academic testing. On the Wechsler Individual Achievement Test-Third Edition, Student received a grade equivalency score of kindergarten, six months in reading, kindergarten, five months in writing, and first grade, four months in math.

## Appropriateness of the Triennial IEP

69. Magnolia had proposed the non-public school placement be at the Canal Street School in Orange. Canal Street specializes in educating students with emotional and psychological needs in a therapeutic milieu. It comprises 135 students and 80 staff members. Canal Street uses a level system to assist in teaching students to regulate their behaviors. The level system starts at the time that the individual is picked by the bus until drop off at the end of the day. Canal Street uses grade level curriculum which is taught by credentialed teachers in small, highly structured classes. It utilizes a multi-sensory approach to reading. Since all students have similar problems, the system allows students to support each other emotionally. If a student has an outburst, trained staff, including counselors, immediately intervene. Ms. Cleveland stated that Magnolia had referred other students with similar problems to Canal Street with successful results.

70. Mr. Dixon noted that Student had made no significant progress on his academic goals as his frequent behaviors had disrupted his ability to learn. He noted

that Student's behavior tended to accelerate when he was asked to do academic tasks, although his behaviors could be triggered when no academic demands were placed on him as well. Mr. Dixon needed to call for assistance because of Student's outburst three to four times per week. That compared to the frequency of outbursts noted on the November 15, 2012 Behavior Support Plan which listed frequency at once or twice per week. Even when not having behavior problems, Student was off task 60 to 70 percent of the time. Additionally, Student had no peer relationships because of his behavior and aggressive tendencies. Because of these reasons, Mr. Dixon opined that placement at a non-public school with a therapeutic environment was appropriate.

71. Ms. Greenhalgh noted that Student constantly refused to do assignments, refused to interact with peers in his small group, and often would engage in verbal abuse of her. She opined that Student should be placed in a non-public school due to the intensity of his behaviors. Ms. Polcyn also opined that a non-public school placement was appropriate as no interventions to date had had any effect on Student's behaviors. She noted that Student's behaviors had become more intense, preplanned, and more aggressive. Ms. Polcyn was familiar with Canal Street and believed that it would be an appropriate placement. Ms. Jones also agreed that a non-public school, with a therapeutic milieu, was appropriate as Student had been receiving significant support which had not resulted in any improvement. She believed that Student needed to be in a placement where psychologists were immediately available to de-escalate Student when he tantrumed or had an outburst.

72. Mr. Gonzalez observed that the intensity of Student's behaviors and emotional problems were beyond the level of counseling available at Magnolia. Mr. Gonzalez noted that Guardian informed him that Student cannot be left alone in his



home as he would engage in destructive behavior.<sup>14</sup> Mr. Gonzalez observed that Student's behaviors had become more severe and aggressive. Student had verbally threatened to hurt peers, adults and himself. Mr. Gonzalez noted that Student had injured staff by hitting, kicking and head butting. Student had eloped and jumped off playground equipment. Mr. Gonzalez believed that Student posed a danger to others as well as himself. Mr. Gonzalez disagreed with the recommendation of Mr. Vinh as to Maxwell being an appropriate placement. He felt that Mr. Vinh did not have a true picture of the intensity of Student's behaviors because Mr. Vinh observed Student for only one hour during a time when Student was compliant and on task. Mr. Gonzalez opined that placement in a non-public school with a therapeutic environment was appropriate. The ALJ gave great weight to the opinion of Mr. Gonzalez as he was familiar with Student having worked with him for two years and experiencing first hand Student in the school setting as opposed to two observations lasting a mere one hour total. Also, Mr. Gonzalez's opinion was corroborated by each of the other Magnolia personnel who have had the experience of teaching and providing educationally related services to Student.

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<sup>14</sup> This was in contrast to Guardian's responses on rating scales where she rated Student's behaviors at home as average.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>15</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) Related services include speech and language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v.*

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<sup>15</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

*Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program. (Ed. Code, § 56363, subd. (a).)

3. In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

4. 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 Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it

desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

#### WAS MAGNOLIA’S 2014 MULTIDISCIPLINARY PSYCHOEDUCATIONAL ASSESSMENT APPROPRIATE?

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

7. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) Here, Magnolia complied with this requirement.

8. Reassessments, such as the triennial assessment conducted by Magnolia, have the same basic requirements applicable to initial assessments. (20 U.S.C. §

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

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

10. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the

producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

11. Magnolia's triennial assessment was comprehensive as Student was assessed in all areas of suspected disability. The areas assessed were health and developmental history; intellectual/cognitive functioning; adaptive behavior; academic levels; motor functioning; audiology and central auditory processing; social-emotional/behavior functioning (including a functional behavior assessment); and an educational mental health evaluation. The assessment team determined areas of suspected disability by reviewing Student's academic performance, behaviors, and past assessments and IEP's. Most of the assessment team were familiar with Student because they had provided educational services to him.

12. The assessment team was comprised of persons who were well trained and knowledgeable in their areas of expertise. The team utilized a variety of assessment tools comprising of standardized tests, observations, interviews, and parental input. The team did not rely on a single measure or assessment as the sole criteria for determining whether Student was a child with a disability. The test instruments used were technically sound and to assess Student's cognitive and behavioral levels. The tests were also administered in accordance with test producer's instructions and used for the purposes for which they were designed.

#### The Written Assessment Report was Appropriate

13. The law requires the personnel who assess a student to prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if

any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), and the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

14. In the instant case, the Magnolia assessment team produced five detailed written reports totaling 75 pages, which found that Student required special education and related services; gave the basis for such determination; listed Student's behavior during observations; the relation of Student's behavior to academic and social functioning; and Student's level of academic and social functioning. The reports were the psychoeducational report (36 pages), audiological evaluation (three pages), functional behavioral assessment (17 pages), speech-language evaluation (16 pages), and the mental health evaluation (seven pages). The thoroughness and accuracy of the assessment results was underscored by the evidence that over the course of several IEP team meetings, discussing the findings, Student did not articulate a specific challenge to a particular score or finding. Student's request for an Independent Educational Evaluation appears to be based on a general disagreement over whether Student is Emotionally Disturbed.

The Assessment Team Recommendation as to Eligibility was Appropriate

15. Student objected to the IEP team finding Student eligible for special education under the category of Emotional Disturbance both at the IEP meetings and by correspondence. Student did not object to the Student being found eligible under the categories of Other Health Impaired, Speech and Language Impairment, and Specific Learning Disability. Because there was no dispute as to the IEP team finding eligibility

under these three categories, this Decision will review only the appropriateness of the determination of eligibility under the category of Emotional Disturbance.

#### EMOTIONAL DISTURBANCE

16. California Code of Regulations section 3030 subsection (i) states that a student is eligible for special education under the category of Emotional Disturbance when a pupil exhibits one or more the following characteristics over a long period of time and to a marked degree, which adversely affects the pupil's educational performance: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems. As will be demonstrated below, Student met the first four of the five characteristics.

17. The IEP team's finding of eligibility under Emotional Disturbance was appropriate. Student's behavior problems have existed since he started attending the first grade at Magnolia. Student has failed to make academic progress commensurate with his cognitive and intellectual ability, which scored in the low average to average range. Student's academic progress has been less than two years progress since kindergarten. Student's outbursts have become more frequent over time, to now occurring three to four times per week and to such a serious degree as to require the removal of peers from the classroom. His behaviors, including work refusal, often require Student to miss instruction which has meant that he had made almost no progress on his annual goals or academically as illustrated on his academic testing scores. Student's constant class interruptions and aggressive behavior toward peers has resulted in his classmates fearing him and preventing Student from having any friends.



He has also failed to have satisfactory interpersonal relationships with teachers as he frequently engages in verbal, as well as physical, aggression towards them as illustrated by his kicking and head butting his aide, Ms. Williams. On occasion when frustrated, Student threatens to kill others or commit suicide which demonstrates a general pervasive mood of unhappiness or depression.

**DID THE MARCH 2014 IEP, AS AMENDED, OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?**

18. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

19 The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child related to the taking of state and district-wide assessments. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

20. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).)

21. Student's parents or legal guardians are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1); Ed. Code, §§ 56341, subd. (b); 56342.5 [parents must be part of any group that makes placement decisions.].) Thus, the parents or legal guardian of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4) Here, Guardian, as well as Student's counsel and advocate, were active participants at all of the IEP meetings.

22. 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"], citing *Rowley, supra*, 458 U.S. at p. 207.)

23. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.*, (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

24. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the followed factors: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Bd. of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

25. The March IEP, as amended on April 24, 2014, offer provided: (a) placement in a special day class in a non-public school; (b) two 25-minute speech and language therapy sessions per week; (c) one 30-minute session of occupational therapy; (d) 30 minutes of group counseling by the school psychologist per week; (e) behavior intervention services in a group for 30-minute session per week; (f) use of a FM system; (g) various accommodations including, but not limited to, repeated instructions, longer response time, visual and verbal prompts, visual schedule, and small group instruction in reading, writing and math; and (h) mental health services including individual counseling once per week for 60 minutes, one 45-minute group counseling session per month, and one 45-minute monthly parental counseling session.

## Analysis

26. The triennial assessments clearly indicated that Student's emotional needs and attention deficits had an adverse impact on Student accessing the curriculum and receiving any meaningful educational benefit from his education. Student's attention problems, coupled with his behaviors, have interfered with him making anything more than minimal education progress as demonstrated clearly by the results of the Woodcock-Johnson from 2011 and 2014. Student progressed to levels of no more than the first grade levels in 24<sup>16</sup> out of 27 subtests. Student's actual performance was indicative of his assessment results. His report cards, since coming to Maxwell, were "below basic" in every area. The goals in academics were designed to meet Student's academic needs. Mr. Dixon found that Student had made almost no progress academically because either he was inattentive, refused to do work, or missed instruction because of frequent outbursts which many times were so severe as to necessitate the removal of the class from the classroom for safety reasons. Student's behavior isolated him from his peers, who feared him because he would often strike them for no reason. The severity and intensity of Student's behaviors increased as demonstrated by his head butting Ms. Williams and threatening to kill himself on February 13, 2014; talking about shooting people during Ms. Jones' assessment observation; and taunting a classmate by exposing his private parts on May 27, 2014.

27. Ms. Greenhalgh's assessment, as well as the Kaiser speech and language evaluation, indicates that Student requires speech and language therapy relating to his articulation problems. The assessments also demonstrate Student's need for

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<sup>16</sup> In six of those subtests, Student continued to be at the kindergarten level. On three, Student was above the second grade level.

occupational therapy. The levels of services, as dictated by the adopted goals in these areas, show that the IEP services were appropriate based on the assessment results.

28. In examining the appropriateness of placement at a non-public school like Canal Street, the *Rachel H.* factors must be examined to determine whether such a placement would be in the least restrictive environment. Such an examination indicates that a non-public school placement is appropriate.

- (a) Student's educational deficits, severe problem behaviors, and inattentiveness prevent him from being able to be placed in a regular education class. Student is off task 60 to 70 percent of the time, is constantly disrupting the class, and has made almost no educational progress in three years. Student requires special academic instruction in a small, highly structured class to be able to access the curriculum.
- (b) By being in a small class within a therapeutic environment, Student would be taught to deal with his problem and aggressive behaviors as opposed to being in a classroom lacking such supports and interventions. Presently, Student has missed a great deal of time because of his behavioral outbursts and refusal to do work. Additionally, Student's behaviors and aggression resulted in him being isolated socially, as his peers feared him due to his aggressiveness towards them and class staff. Mr. Vinh's evaluation clearly indicates the need for supports in excess of school based counseling.
- (c) Student's presence has had a tremendously negative effect on his peers and teachers. Student's violent outbursts necessitate the removal of his class on a frequent basis which results in at least one to two hours of lost instruction time. Classmates fear Student because of his behaviors and aggressiveness to such a degree that he has no friends. Student's behaviors, as well as his outbursts, require teacher and instructional aide time which means others in

the class miss instruction time. Also, Student's violent behavior has caused injuries to peers and staff.

## ORDER

1. Magnolia's 2014 Assessment was appropriate.
2. The March 14, 2014 IEP, as amended on April 24, 2014, was appropriate and constituted a FAPE in the least restrictive environment. Magnolia may implement the March 14, 2014 IEP, as amended, immediately.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Magnolia prevailed on both issues heard and decided in this matter.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56506, subd. (h).). Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code § 56505, subd. (k).)

Dated: July 11, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
ROBERT HELFAND  
Administrative Law Judge  
Office of Administrative Hearings