

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015021052

AMENDED* DECISION

On February 20, 2015, Parent on behalf of Student filed a request for a due process hearing with the Office of Administrative Hearings, naming Morgan Hill Unified School District. On April 8, 2015, OAH granted the parties' joint request for a continuance.

Administrative Law Judge Theresa Ravandi heard this matter in Morgan Hill, California, on June 15, 16, and 17, 2015, with a final day of telephonic testimony on June 25, 2015.

Gail S. Hodes, Attorney at Law, appeared on behalf of Parent and Student. Parent attended each day of hearing. Student was not present.

Sarah L. Garcia, Attorney at Law, represented Morgan Hill. Attorney Ryan Tung was also present. Rose DuMond, Morgan Hill's Director of Special Education and Student Services, attended each day of hearing.

At the conclusion of the hearing, the matter was continued at the parties' request to July 23, 2015, for the submission of written closing briefs. The record closed with the

parties' timely submission of closing briefs and the matter was submitted for decision.¹

ISSUES

1. Did Morgan Hill deny Student a free appropriate public education from February 20, 2013, through June 5, 2013, by:

- a. failing to refer Student for a special education assessment; and
- b. failing to assess Student for special education pursuant to parental request?

2. Did Morgan Hill commit a procedural violation which resulted in a denial of FAPE by failing to provide Parent with prior written notice of its refusal to assess Student from February 20, 2013, through June 5, 2013?

3. Did Morgan Hill deny Student a FAPE by failing to make him eligible for special education and offer him an appropriate educational program from February 20, 2013, through June 5, 2013?

* The only change from the original decision is the date on which Parent filed the request for due process – from February 20, 2014, in the original Decision, to the correct date of February 20, 2015.

¹ In his closing brief, Student requests that the ALJ take judicial notice of information regarding attention deficit hyperactivity disorder and "IQ" testing found on the website of the National Institute of Health Medical Encyclopedia. Student's failure to timely disclose this information at least five business days prior to hearing as required by Education Code section 56505, subdivision (e)(7), and failure to produce these documents at hearing, deprived Morgan Hill of the opportunity to question witnesses, submit documents, or raise arguments in response to this proposed evidence. This request is denied as untimely. (Ed. Code, § 56505, subd. (e)(7); *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626, F.3d 431, 440.)

4. Did Morgan Hill fail to offer and provide Student with an appropriate educational program designed to meet his unique and individual needs from June 5, 2013, until the date of the hearing² by failing to offer Student appropriate:³

- a. academic support;
- b. occupational therapy; and

² Student filed this case in February 2015. The complaint contained allegations regarding several individualized education program's including the April 29, 2014 IEP and the September and October 2014 amendments thereto. The last annual IEP in evidence in this matter is dated April 29, 2014. The parties did not present evidence regarding an April 2015 annual IEP team meeting, and Student did not raise any allegations regarding such an IEP developed subsequent to the filing of his complaint, or the lack thereof. No issues were heard or decided regarding any IEP developed after April 29, 2015. Therefore, Student's Issue 4 regarding a substantive denial of FAPE during the 2014-2015 school year is analyzed through April 29, 2015, rather than the date of hearing.

³ Student's oral motion at the start of hearing to add an additional allegation that Morgan Hill denied him a FAPE by failing to offer and provide social-emotional supports and services was opposed and denied. Student is limited to those issues identified in his due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) An amended complaint may be filed if the other party consents or the ALJ grants permission more than five days prior to the hearing. (20 U.S.C. § 1415(c)(2)(E)(i).) Student has the right to file a separate due process complaint alleging issues separate from those adjudicated herein. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c); Ed. Code, § 56509.) Student's issues were further clarified during the prehearing conference on June 8, 2015, as specified in the Order Following Prehearing Conference.

- c. speech and language therapy?

SUMMARY OF DECISION

This Decision finds that Morgan Hill had sufficient reason to suspect that Student had a qualifying disability and required special education such that it should have referred Student for a special education assessment pursuant to its ongoing child find duty. Student further met his burden of proof and established that Morgan Hill should have convened an individualized education program team meeting, found him eligible for special education, and offered an IEP by February 25, 2013, three months earlier than it did. Morgan Hill's delays denied Student a FAPE by depriving him of educational benefit and significantly impeding Parent's participation in the decision making process. This Decision does not reach Student's further issues of whether Morgan Hill, during the same time period, failed to timely refer Student for assessment pursuant to Parent's written request and to provide prior written notice of its refusal to assess. Once Morgan Hill found Student eligible for special education due to an articulation disorder, it failed to identify his unique needs in the areas of academics and language, apart from articulation. Morgan Hill's failure to provide services to address these needs denied Student a FAPE from February 25, 2013, through the 2013-2014 and 2014-2015 school years, through April 29, 2015. Morgan Hill further failed to provide Student with appropriate occupational therapy services to address his fine motor needs during the 2013-2014 school year.

FACTUAL FINDINGS

JURISDICTION

1. Student is a ten-year-old boy who resided with Parent within Morgan Hill's jurisdictional boundaries from the start of second grade, the 2012-2013 school year, through the time of the hearing. Morgan Hill found Student eligible for special

education as a student with a speech or language impairment in June 2013. He completed fourth grade at Paradise Valley Elementary School in June 2015.

2. Prior to his first birthday, Student was diagnosed with Neurofibromatosis Type I, a genetic disorder which can affect the brain and nervous system and result in seizures, developmental delays, learning disorders, and attention deficit hyperactivity disorder. Student's early motor and language skills developed later than most children, and he experienced several seizures, with the last occurring approximately three years ago. Because of his delayed expressive communication skills, Student received weekly speech and language services through the Santa Clara County Early Start Program.⁴ Morgan Hill offered Student an IEP shortly after his third birthday, in November 2007, because of his significant expressive language delays and articulation errors. Testing at that time determined Student's cognitive ability to be in the below average range. Student exited special education sometime prior to the 2009-2010 school year; the circumstances surrounding his exit are unknown.

NORRIS SCHOOL DISTRICT'S INITIAL SPECIAL EDUCATION ASSESSMENT AND NON-ELIGIBILITY FINDING

3. Student moved to the Norris School District in Kern County and attended a general education kindergarten class at Bimat Elementary School during the 2009-2010 school year. His kindergarten language screening noted inconsistent articulation and language errors which Norris addressed within the regular education setting. Student struggled with reading, writing, and math readiness skills throughout the year. In July 2010, a private assessment through Kern Psychological Services, Inc. diagnosed

⁴ Under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), states can receive funding to provide IDEA part C "early start" services to enhance the development of infants and toddlers up to three years old who have disabilities.

Student with pervasive developmental disorder, not otherwise specified, due to symptoms of impaired social interaction, communication deficits, and stereotyped behavior.

4. As a first grader during the 2010-2011 school year, Student received almost daily reading and math general education intervention services at Norris' learning center because of his academic struggles and below grade level performance. Even with these supports, Student did not meet first grade standards, and he repeated first grade the following year.

5. In the fall of 2011, during his second year of first grade, Norris assessed Student for special education eligibility pursuant to Parent's request. Student had deficits in academics, attention, and fine motor skills including writing difficulties. Retention in first grade had allowed Student the additional time and repetition he needed to develop his reading and comprehension skills. By November 2011, he was meeting first grade competencies and no longer required supports from the learning center, though he continued to struggle with writing. Testing showed Student's overall cognitive ability to be in the low range of intellectual functioning, although he scored in the average range on academic achievement tests in reading, math, and written language. Norris concluded that Student's academic skills and cognitive functioning were commensurate with each other. Although Student's speech included substitution errors and distortion on the vocalic /r/ sound, Norris found that these did not affect his intelligibility or academic performance. At an initial IEP team meeting on November 28, 2011, Norris determined that Student did not qualify for special education. Even so, Norris recommended that Student's teacher use prompts, praise, and extra reminders to assist Student, and that Parent be given strategies to use at home to remediate Student's academic deficits. Parent received a copy of her special education procedural rights at this meeting.

6. At the end of the 2011-2012 school year, Student met first grade standards after his second year of first grade. He progressed from being a “dependent reader” in need of frequent teacher remediation, to a “guided reader” who required less assistance. He earned A’s in comprehension, decoding, sight words, spelling, and book reports, though his grades slipped from A’s to C’s in written and oral expression and math concepts across this academic year.

RETURN TO MORGAN HILL, THE 2012-2013 SCHOOL YEAR

7. Parent enrolled Student at Morgan Hill in second grade for the 2012-2013 school year. At the start of the school year, Parent informed Morgan Hill about Student’s diagnoses of Neurofibromatosis-I and pervasive developmental disorder and how these affected him. Student attended Trish Catalano’s second grade class at Paradise Valley Elementary School.⁵ Student told Ms. Catalano he was concerned about making new friends. Parent informed Ms. Catalano of her concerns about Student’s academic delays, his struggle to complete grade level work, and the impact of his diagnoses.

8. On reading and math curriculum tests given at the start of second grade, Student tested below grade level. He entered second grade at a first grade reading level, and, from the beginning of the school year, his struggle with reading comprehension adversely impacted his academic performance across all subjects. Student also struggled with his printing and handwriting, often producing illegible work. Ms. Catalano kept close watch on Student’s academic performance due to her concern regarding his below grade level functioning, especially in light of his retention in first grade. She frequently

⁵ Ms. Catalano obtained her teaching credential in 2000 and earned a master’s degree in curriculum development in 2001. She taught kindergarten and first grade in Morgan Hill from 2000 through 2012, and then second grade from August 2012 until March 2013.

checked in with Student to ensure his understanding and to keep him from rushing through his work. Student would shut down if he did not know the correct answer. He became frustrated and withdrew further when Ms. Catalano attempted to assist him and re-teach key concepts.

9. Given Student's academic struggles, his withdrawal, and increasing frustration, Ms. Catalano asked Parent about strategies that Parent used to reach and engage Student during homework. Homework presented a challenge, and it was a daily battle Monday through Thursday to get him to focus, remember, and understand concepts taught in class and apply them to his work. Student did not demonstrate an understanding of basic reading, writing, or math concepts and struggled to write legibly. Parent and Student's grandmother needed to sit with him, and work with him problem by problem, step by step. Ms. Catalano also asked her colleagues and Paradise's resource specialist Leslie White for guidance as to how to reach Student and break through his frustration.⁶ Ms. White provided her with math and reading strategies but these did not prove successful.

10. Morgan Hill uses a numeric reading level scale to identify students' reading abilities. Second graders at Paradise are expected to start the year with a reading level of at least level 16 and to attain a level 18 by the end of the first trimester; a level 20 by the end of the second trimester; and a level 22 by the end of the year, demonstrating a growth of three reading levels over the year.⁷ At the end of his first

⁶ Ms. White has been a resource specialist teacher with Morgan Hill for 35 years. She earned a master's degree in education in 1984, and holds a resource specialist certificate of competence and multiple subject and learning handicapped life credentials, as well as an autism authorization.

⁷ There are only even-numbered reading levels.

trimester of second grade, in November 2012, Student remained at a reading level 16 which showed he was just meeting first grade standards, for the second time. Writing levels range from level 1 to a level 4, with a level 3 indicating that a student was meeting grade level standards. Student tested below grade level at a writing level 1, indicating he demonstrated little command of standard English language conventions. Further, he was not progressing towards meeting any grade level math standards. Along with his academic difficulties, Student struggled with paying attention, following directions, and handwriting.

11. Despite all of these deficits at the beginning of his second grade year, no one from Morgan Hill referred Student to be assessed for special education. Morgan Hill witnesses did not demonstrate an understanding of their legal duties pursuant to child find. For example, despite Ms. White's many years as a resource specialist, she acknowledged during her testimony that she was not familiar with child find laws or her related responsibilities. Moreover, throughout the first semester, Ms. Catalano suspected that Student required special education instruction and services. She spoke with Parent several times about getting Student tested for special education, including at their parent-teacher conference in mid-November 2012. However, Ms. Catalano never referred Student for an assessment. She felt constrained to follow Morgan Hill's protocols of first requesting a "student study team" meeting for any child suspected of needing special education, even though, in her experience, Morgan Hill unnecessarily delayed services to eligible children.

12. Morgan Hill protocols require a teacher who suspects that a student may need special education testing to request a meeting of school professionals and the parent, referred to as a "student study team" meeting, to discuss concerns and strategies before resorting to special education testing. Swati Dagar, Principal of Paradise, and Ms. DuMond testified about Morgan Hill's child find policies, student

study team meeting process, and the assessment process.⁸ Morgan Hill has a rigorous student study team process consisting of three tiers of progressively intensive interventions for students who are significantly below grade level and not making any progress. Students who cannot make progress with third tier interventions are then referred for special education testing. Ms. Dagar testified that if a student displayed significant academic delays, staff could consult with the special education director about proceeding directly to an assessment with parent consent. However, she and Ms. DuMond preferred the student study team meeting process.

13. Given Student's continuing struggle with the second grade curriculum, Ms. Catalano filled out a request form for a student study team meeting and possible special education testing following parent-teacher conferences the week of November 12, 2012. Ms. White scheduled a meeting for March 2013, four months later. Morgan Hill did not offer Student a special education assessment. Pending this meeting, Student's academic struggles increased as the year progressed. He was unable to complete his work, no longer wanted to read, could not explain how he reached his answers, and became increasingly frustrated with any attempts to correct him. As an accommodation, Ms. Catalano allowed Student to dictate his homework with Parent transcribing it.

14. Following parent-teacher conferences, school was not in session the week of November 19, 2012. By the following Monday, November 26, 2012, the evidence established that Morgan Hill should have referred Student for special education assessment. Morgan Hill was on notice that Student's academic needs adversely affected his education such that it should have referred him for assessment. Morgan Hill

⁸ This is Ms. Dagar's eighth year in the field of education and her second year serving as the Principal of Paradise. She has a master's degree in business administration and in education, and holds a teaching credential and tier one administrative credential.

had a duty to provide Parent an assessment plan within 15 days of this operative date, by December 11, 2012. Although this duty to refer Student arose prior to the statutory period, Student's overall academic functioning did not improve. Therefore, Morgan Hill's duty to refer continued unchanged through February 20, 2013, the start of the statutory period. This duty to refer Student for assessment and provide an assessment plan gave rise to a further duty to timely convene an IEP team meeting. The facts in this case show that it is more likely than not that Parent would have provided immediate consent to assess. Therefore, Morgan Hill would have been required to convene an IEP team meeting within 60 days, by February 25, 2013.

March 2013 Student Study Team Meeting and Parent's Requests for Special Education Assessment

15. Morgan Hill finally convened a student study team meeting on March 8, 2013, to address teacher and Parent concerns that Student was not making academic progress and that he required special education. Morgan Hill witnesses provided no reasonable explanation for the almost four month delay in convening the student study team meeting. Morgan Hill established that the purpose of such a meeting was to discuss concerns and strategies to be implemented before referring a child for a special education assessment. By the March 8, 2013 meeting, Student had completed more than two-thirds of his second grade year. At this pace, using the student study team model espoused by Morgan Hill, any strategies would be implemented at the end of the school year, affording very little time to complete an assessment and convene an IEP team meeting for a student who had been struggling all year.

16. Parent, Principal Erika Benadom, school psychologist Corey Tamblyn, and Ms. Catalano attended the student study team meeting. At the time of the meeting, Student had attained a reading level 18. This was still below grade level, and he was not able to maintain this level, slipping back to a reading level 16. While he progressed to a

writing level two by the end of the second trimester, he failed to demonstrate any progress towards meeting math standards, and continued to need improvement in handwriting, paying attention, and following directions. At the meeting, Mr. Tamblyn minimized Parent's and teacher's concerns by emphasizing that Student was not significantly below grade level, but rather only one reading level behind.⁹ Because his opinion did not account for Student's retention in first grade, it was afforded less weight. Ms. Catalano persuasively established that Student's below grade level reading, after spending two years with the first grade curriculum, was of concern and warranted assessment.

17. At this meeting, Parent submitted a written request for a special education assessment because of Student's academic deficits and inability to understand concepts despite his teacher's attempts to work one-on-one with him. In an email dated March 22, 2013, Ms. Benadom declined Parent's request for assessment because Norris had assessed Student 16 months earlier in November 2011 and found that he was not eligible for special education as he was outperforming his cognitive ability. In this written response, Morgan Hill identified that Student had needs in the area of reading, based on a recent re-determination of benchmarks which showed that Student had regressed to a reading level of 16, two levels below the expected second grade reading level of level 20. To address this need, Morgan Hill offered to include Student in its reading intervention program. Morgan Hill declined Parent's request for handwriting services because this was only available to special education students. Morgan Hill did not provide Parent a copy of the procedural safeguards and parent rights under the Individuals with Disabilities Education Act with its written refusal to assess.

⁹ Mr. Tamblyn has been a school psychologist for 11 years. He earned a bachelor's degree in social science and holds a pupil personnel services credential.

18. On April 22, 2013, Parent again requested, in writing, a full educational evaluation of Student due to his learning difficulties, diagnosed conditions, and failure to make meaningful academic progress. In this second request, Parent shared that she had researched her rights and turned to Student's medical doctor and an advocacy organization for guidance given Morgan Hill's refusal to assess Student. Parent informed Morgan Hill that she would be contacting the California Department of Education for information on how to request a due process hearing and an independent educational evaluation. On May 1, 2013, Parent filed a complaint with the California Department of Education based on Morgan Hill's refusal to conduct special education testing pursuant to her written requests. Morgan Hill provided Parent an assessment plan the next day on May 2, 2013. Parent provided immediate consent and requested that testing be expedited and completed before the end of the 2012-2013 school year; Morgan Hill complied.

Morgan Hill's Initial Assessment, May 2013

19. As part of Student's initial psycho-educational assessment, Mr. Tamblyn conducted a records review, interviewed Parent and Student's teacher, and observed Student in class. Parent reported, and the evidence established, that Student's learning was delayed and labored, and he had struggled with comprehension and retaining information since his preschool days. Student did not pay attention to detail, was easily distracted, failed to complete his homework, and, not unexpectedly, did not like to go to school. Carrie Williams took over Ms. Catalano's second grade class in March 2013. Her report of Student's needs corroborated Parent's observations and experience. Student continued to exhibit many academic and learning needs in class. He had trouble sustaining attention, difficulty organizing, made careless mistakes, gave up easily, and required more one-to-one attention and completed less work than his peers. Ms. Williams was most concerned about Student's lack of conscientiousness and follow-

through on schoolwork which seriously impeded his academic performance. Student was performing below grade level, reading at level 20, a mid-second grade level as opposed to level 22, an end of second grade level. His levels of listening comprehension, basic reading skills, reading comprehension, and math calculation were limited, and his math reasoning, basic writing skills, and written expression were very limited.

20. Mr. Tamblyn administered a variety of psychological tests and behavior rating scales as part of his assessment of Student. On the Wechsler Intelligence Scale for Children, Fourth Edition, standard scores from 90-109 are within the average range, and scores of 80-89 fall within the low average range of functioning. A full scale intelligence quotient or "IQ" score is derived from four composite scores: verbal comprehension, perceptual reasoning, working memory, and processing speed; these index composites are comprised of various subtests. Student's full scale IQ fell in the low average range of cognitive functioning, with a standard score of 86. This score was consistent with his 2011 cognitive testing. Student scored in the low average range on the verbal comprehension index, with low average scores on the vocabulary and comprehension subtests, and on the processing speed index. Although he scored in the average range on the working memory index, Mr. Tamblyn established that Student's low average score on the digit span subtest showed deficits in his ability to attend to and hold information in short-term memory which could impede his processing of complex information and slow new learning. On the Test of Auditory Processing Skills, Third Edition, Student performed in the below average range, indicating that his auditory perception could interfere with his learning to read and to spell. Similarly, Ms. Williams rated Student as having clinically significant issues with learning and school problems on the teacher rating scales of the Behavior Assessment System for Children, Second Edition.

21. Ms. White administered academic testing using the Wechsler Individual Achievement Test, Third Edition. Student scored in the average range on all reading, math and writing subtests, aside from spelling, where he demonstrated academic need. These results were consistent with his November 2011 academic testing by Norris, with the exception of spelling where Student had previously scored in the average range. On the sentence composition subtest, Student was unable, four out of five times, to combine two sentences into one; he was unable, four out of seven times, to compose a sentence using proper capitalization, punctuation, semantics, and spelling when presented with a key word. These results showed that Student had needs in the area of language and sentence composition. Student's average academic test scores showed the opposite of his class performance. Mr. Tamblyn's testimony that teacher reports, based on higher state standards, describe Student's functioning at lower levels compared to scores earned on the nationally normed Wechsler, credibly accounted for this discrepancy. Even so, the evidence showed Student had academic and language needs as reported by his teachers and as discovered through the assessment process. Although Mr. Tamblyn did not recommend special education services, he did recommend that Student's teachers use repetition and allow Student extra time to complete tasks. Student's need for frequent repetition and review, in order to grasp the concepts taught, constituted an area of need.

22. Morgan Hill's occupational therapy assessment of Student established that he also had needs in the areas of fine motor and sensory attention. He used an inefficient quad grasp and needed prompts to initiate a writing task. He was unable to consistently write letters from top to bottom, and had difficulty with spacing and letter size and maintaining line orientation. To address his fine motor needs, the occupational therapist recommended 30 minutes of occupational therapy twice a month. Student was distracted during writing tasks throughout testing, and had a decreased attention span

in class, requiring frequent teacher prompts and check-ins to stay on task. Morgan Hill's assessment concluded that Student's needs in the area of attention could be addressed with accommodations and modifications to the general education setting. However, the occupational therapist also acknowledged that Student needed services to address these needs, namely, a sensory motor program with teacher led self-regulation strategies to improve his ability to attend to and participate in class. Therefore, the occupational therapist recommended an additional 15 minutes of monthly teacher consultation services.

23. Amanda Robinson administered a variety of tests to assess Student's articulation, language, and social skills.¹⁰ Student demonstrated articulation errors in producing the vocalic /r/ sound. This sound error was delayed by a minimum of one year and adversely affected his ability to communicate and be understood. Ms. Robinson recommended articulation therapy to increase Student's intelligibility. Overall, Student demonstrated age-appropriate language and social/pragmatic skills. On the Clinical Evaluation of Language Fundamentals, Student scored in the average range on the overall core language score (standard score of 85).¹¹ However, he scored below average in the expressive language score (80) and the language content score (82), and significantly below average in the language structure score (77) which measures ability in expressive and receptive components of interpreting and producing sentence structure. Student scored significantly below average on the sentence structure and

¹⁰ Ms. Robinson has been a speech language pathologist for seven years, the last four at Paradise. In 2008, she earned a master's degree in education with an emphasis in speech language pathology, and a certificate of clinical competence from the American Speech and Hearing Association.

¹¹ Standard scores from 85-115 are in the average range on this test instrument.

expressive vocabulary subtests, testing at the fifth percentile; and he scored below average on the word classes subtests showing reduced ability to understand logical relationships in the meanings of associated words. Ms. Robinson agreed that Student's significantly below average scores on the language structure score and on the expressive vocabulary and sentence structure subtests indicated that these were areas of significant deficit. Nevertheless, Student did not meet the regulatory criteria of having a language disorder as he did not test at a 1.5 standard deviation below the mean or below the seventh percentile on two or more standardized tests in morphology, syntax, semantics, or pragmatics.¹²

24. By the time of the IEP team meeting on June 5, 2013, Student had needs in the following areas: reading, reading comprehension, math calculation and math reasoning, written expression, writing skills, spelling, sentence composition, language, vocabulary, articulation, verbal comprehension, auditory processing, short-term memory, on-task behaviors, and organization. The evidence established that Student had these same needs as of February 25, 2013. Mr. Tamblyn testified that Student's academic deficiencies did not establish special education eligibility. Regardless, these

¹² Student tested below the seventh percentile on both the sentence structure and expressive vocabulary subtests, however, Student did not introduce any evidence that these tests were in the qualifying areas of morphology, syntax, semantics, or pragmatics. Further, Student's standard score of 77 on the language structure score was more than 1.5 standard deviations (22-23 points) below the mean of 100, but without evidence of the standard error of measurement, Student did not refute Ms. Robinson's testimony that his standard score of 82 on the language content score and standard score of 80 on the expressive language score were not more than 1.5 standard deviations below the mean.

deficits constituted areas of academic need that Morgan Hill would be required to address once it found Student eligible for special education.

Morgan Hill's Initial IEP, June 2013

25. Morgan Hill convened an IEP team meeting on June 5, 2013, to review the results of Student's initial assessment and determine special education eligibility. Student met criteria for speech or language impairment under articulation disorder as he displayed reduced intelligibility in his production of the vocalic /r/ sound below that expected for his age and which adversely impacted his education. In determining eligibility, Morgan Hill used its Eligibility Summary for Speech or Language Impairment which differentiates eligibility criteria for articulation disorder based on age. Student was eight years and seven months of age at the time of testing. Students age eight and above who demonstrate a developmental delay in sound production characterized by one or more misarticulations and consistency of error in two or more speaking situations may be found eligible pursuant to Morgan Hill's Eligibility Summary. Student met these criteria. Had Morgan Hill timely referred Student for assessment and convened an IEP team meeting three months earlier by February 25, 2013, he would have met these same eligibility criteria and qualified as a student with an articulation disorder. Morgan Hill concluded that Student did not qualify under any other eligibility categories, and specifically ruled out the categories of autistic-like behavior, other health impairment, and specific learning disability.

26. Student did not meet the criteria of having a specific learning disability because he did not have a severe discrepancy between his ability and achievement or a processing disorder. Ms. White and Mr. Tamblyn incorrectly concluded that Student did not require specially designed instruction because he was already functioning at his ability level in reading and writing, and exceeding his ability in math. Based on his low average IQ, Morgan Hill did not expect Student to be able to function academically any

higher than he already was. Morgan Hill's further conclusion, that Student did not require any academic supports as he was exceeding his ability level and performing adequately in the general education setting, was not persuasive in light of his academic struggles.

27. Morgan Hill members of the IEP team identified articulation, fine motor skills, and attention as Student's sole areas of need and developed a goal for these three areas. However, Student also had areas of need in reading, reading comprehension, math calculation and math reasoning, written expression, spelling, sentence composition, language, vocabulary, verbal comprehension, auditory processing, short-term memory, and organization.

28. Ms. Robinson established that Student required 30 minutes per week of articulation services to address his single sound error. Student did not refute this. Her opinion that Student's other language deficits could be addressed in the general education class with accommodations and supports, was detailed and convincing. For instance, to address his expressive vocabulary deficits, Student needed to be taught knowledge of words and concepts. According to Ms. Robinson, a speech-language therapist could support the teacher to assist Student to attain necessary vocabulary. Similarly, Student needed to practice expressive language skills and learn the fundamentals of what a sentence looks like, how to put one together, and then how to formulate sentences into a paragraph. Again, with speech consultation services, a speech therapist could cue the teacher on how to prime Student for these learning tasks. However, even though Ms. Robinson identified Student as having these additional needs in the area of language, she wrongly concluded that Student was not eligible for language services as he did not qualify as having a language disorder. Focusing on Student's eligibility category of articulation instead of whether he had additional language needs, she did not recommend any further services or supports, such as the

speech consultation services that Student required based on her testing. Ms. Robinson's own assessment did not support her opinion that Student did not require additional language services. Therefore, her opinion in this regard was afforded little weight.

29. Morgan Hill witnesses repeatedly took the position that Student was able to make academic progress without any special education services and, therefore, neither academics nor language beyond articulation, were areas of need which entitled him to academic or language services. Morgan Hill incorrectly concluded that Student was not eligible for any services targeting an area that was not the basis of his qualification for special education. Morgan Hill witnesses further opined that if Student was to receive special education services for an academic area in which Student was making some progress, this would violate the least restrictive environment requirement. As discussed below in the legal conclusions, this position is not consistent with the law.

30. Morgan Hill's June 2013 IEP offered Student a general education placement at Paradise for 97 percent of the day; 30 minutes per week pull-out group speech and language services to address articulation; 30 minutes twice per month direct occupational therapy services to address fine motor needs; and 15 minutes per month occupational therapy consultation services to address sensory and attending strategies. The June 2013 IEP also included the following accommodations: extra time for assignments, dividing assignments into smaller sections, checking for understanding, redirection to task, and motor breaks. However, this IEP failed to identify or provide services to meet Student's needs in the areas of academics and language, apart from articulation. Parent requested academic services and supports for Student based upon his academic needs as identified by the teachers' reports and his testing scores. Morgan Hill informed Parent that Student did not "qualify" for academic support. Parent consented to this IEP at the end of the meeting.

Student's Academic Functioning at the End of Second Grade

31. On the Spring 2013 California Standards Tests, Student scored below basic in both math and English language arts. He finished his second grade year below grade level in math, reading, and writing. He finished second grade at a reading level 20, below the expected level of 22. That Student was making the expected rate of progress as that of his peers by moving up three reading levels in an academic year, did not mean that he did not have a need in the area of reading. Student's writing regressed from a level 2 back to a level 1 at the end of the year, showing that he had little command of written language and used phrases and unrelated sentences without any editing. Although he advanced in the area of problem solving and math reasoning from a rating of "1" which indicated no progress towards meeting grade level standards, to a "2" indicating some progress towards standards, Student met only 3 of 14 end-of-year math standards. He continued to show deficits in handwriting, working independently, and task completion.

THIRD GRADE, THE 2013-2014 SCHOOL YEAR

32. Student attended Lorraine Bonino's third grade class for the 2013-2014 school year at Paradise.¹³ Student continued to struggle nightly with his homework and needed one-to-one assistance. He did not know how to complete his work or even where to begin. Student's grandmother persuasively testified that he was "lost" and did not have basic skills to be able to read with comprehension, write, or attempt math problems. Student would have "melt downs" during homework time, where he showed anger and frustration and was non-compliant. He would read with his grandmother but

¹³ Ms. Bonino holds a multiple subject teaching credential and has taught second through fourth grade since 1987. She has worked for Morgan Hill for the last 15 years.

then could not recall what he had read, and struggled to produce even the most basic sentence about a passage, with lots of prompting. Parent hired Ms. Catalano to provide academic tutoring to Student one to two times a week for an hour, starting in September 2013. Parent spoke regularly with Ms. Bonino and informed her of this tutoring plan. Ms. Bonino agreed that tutoring would assist Student.

33. Student had regressed over the summer and entered third grade at a reading level 18, a beginning second grade level. Student's reading comprehension struggles continued which made it increasingly difficult for him to learn new concepts. Further, he demonstrated new struggles with previously mastered math concepts and continued to struggle to understand and solve word problems. Given Ms. Bonino's observations that Student needed the most help with reading comprehension and math word problems, Ms. Catalano focused her tutoring on these two areas. Student's confidence had decreased since Ms. Catalano last worked with him in second grade in March 2013. It was harder to encourage him. Student was quick to frustration – slamming down his work, showing anger, breathing hard, clenching his fists, and then shutting down. Because of his emotional responses, Ms. Catalano gave Student a break from tutoring over the winter holidays. In January 2014, she tutored Student once a week as he could tolerate through May 2014, with another break over the spring holiday. His academic struggles during homework and tutoring increased over his third grade year.

34. Throughout third grade, Student had difficulty focusing in class and paying attention even in a small group setting. Ms. Bonino used preferential seating strategies and frequent check-ins with Student to get his attention and help him stay on task. However, Student was not able to maintain attention without constant re-direction and reminders. During the first trimester, Ms. Bonino suggested that Parent consult with Student's pediatrician and have him tested for attention deficit hyperactivity disorder. In

December 2013, Student was diagnosed with attention deficit hyperactivity disorder and began to see a therapist. He started a medication regime in January 2014, though his attention deficits remained.

January 2014 Amendment IEP

35. Morgan Hill convened an amendment IEP team meeting on January 23, 2014, to add accommodations to support Student's previously known but newly diagnosed attentional needs. Parent shared her top concern which remained Student's academic needs including homework struggles and below grade level performance in math and reading. Once again, Morgan Hill team members informed her that Student did not qualify for academic services, and that he was making progress in class. However, in class, Student required clarification on his assignments including re-wording, reminders, and repetition of information and directions. When these were not sufficient, Ms. Bonino needed to again direct him as to how to get started on the first step. Parent and Ms. Bonino also shared their concerns about Student's emotional functioning. Student presented as more sensitive and frequently close to tears; he would cry if he forgot his homework or was unable to do his work; and was reluctant to attend school. The team amended Student's IEP to include the accommodation of preferential seating close to the teacher and modified or reduced classwork and homework. In proposing to modify Student's work, Morgan Hill acknowledged that Student had needs beyond the areas of attending, fine motor, and articulation.

April 2014 Annual IEP Team Meeting

36. Morgan Hill convened Student's annual IEP team meeting on April 29, 2014. Parent continued to voice her concern with Student's overall deficient academic performance and asked the team to identify academics as an area of need. Student tried hard to be successful but did not understand the work, had not mastered basic skills,

and was unable to complete his homework without substantial Parent support. Morgan Hill maintained that Student did not qualify for academic support based on his initial assessment results which showed his academic achievement commensurate with his ability and because he was benefitting from general education interventions.

37. The team reviewed Student's present levels of performance. Student was performing below grade level in reading fluency, oral comprehension, written comprehension, and math fluency. He was performing far below grade level in writing, math comprehension, and math facts. Ms. Bonino worked with Student one-to-one to try to get more content from him in his writing and to help him with organization. With this extra assistance, Student was able to regain writing level two by March 2014. Although Ms. Bonino recalled at hearing that Student's handwriting improved over the year, her report card awarded Student a satisfactory minus (S-) each trimester, indicating no improvement. He required frequent reminders to leave space between words and to write neatly. Ms. Bonino continued to modify Student's math work and required him to complete less work. She provided grade level instruction but with additional one-to-one support and small group instruction. Even so, Student was unable to apply his math computation skills, continued to struggle with math concepts and word problems, and required a lot of practice time. His struggle with reading comprehension intensified. Student had fallen more than a year behind, reading independently at level 20, a mid-second grade level and below grade level of 24. Ms. Bonino's main areas of concern were Student's academics and his self-esteem. Student would become emotional if he felt he could not get the right answer or finish a task. Ms. Bonino's testimony that Student did not require additional academic instruction or supports to receive educational benefit was at odds with her reports of his classroom performance and, as such, is given no weight. Nevertheless, Morgan Hill determined that articulation, fine motor, and attending continued to be Student's only areas of need.

38. Throughout third grade, Student made good progress with his articulation services. He not only met his articulation goal of producing the vocalic /r/ with 70 percent accuracy, he exceeded this goal by achieving 80 percent accuracy. He continued to show sound errors with the vocalic /r/ at the conversational level warranting an updated goal to meet his articulation needs.

39. After initial progress the first part of the school year, Student regressed in his writing skills, showing reduced motivation during his occupational therapy sessions to improve his writing or utilize strategies to increase legibility. At the time of his November 12, 2013 goal progress report, Student was able to write one paragraph with moderate cues. His writing skills regressed by the time of his March 5, 2014 goal report and he required maximum cues to even initiate a writing task. By the time of his annual IEP team meeting on April 29, 2014, Student required moderate to maximum verbal cues to initiate and continue writing tasks, and required prompts to use writing strategies. At times Student refused to use modified line paper. Morgan Hill acknowledged Student's regression of writing skills in the April 2014 IEP team meeting notes. The evidence showed that during the 2013-2014 school year, Student did not receive educational benefit from his occupational therapy services targeting his fine motor skills. Student did not meet his fine motor goal of writing one to two paragraphs using a tripod grasp and demonstrating correct orientation, letter formation, and spacing at 80 percent accuracy; the IEP team agreed to continue this goal. Student did not put forth evidence, however, to show whether Student's lack of educational benefit was caused by a need for additional occupational therapy or whether the occupational therapy services he received were inappropriate.

40. By the time of his annual April 2014 IEP team meeting, Student continued to have difficulty attending to a non-preferred task for more than five to eight minutes. Student did not meet his attending skills goal of being able to maintain focus on a 15-

20 minute task with one cue with 80 percent accuracy. This goal was also continued. Even so, Student did not establish that Morgan Hill denied him educational benefit in this area. Morgan Hill continued to offer the same placement, accommodations, and services with the elimination of occupational therapy consultation services; Student's direct occupational therapy services continued. Parent consented to this IEP, although she expressed her desire for Student to receive academic support the following year.

41. Despite Student's academic struggles, he made slow progress in the general education setting. Even so, Student's progress was measured against his modified work which included separate spelling word lists and reduced assignments with fewer problems, and the provision of extra one-to-one instruction. Having entered third grade reading at level 18, Student made a year's worth of progress just reaching level 24, at the end of the year in June 2014. Student made this progress with the assistance of home tutoring with Ms. Catalano. Still, he remained below the end of third grade reading standard which was level 26. Student remained at a writing level 2 in June 2014, below the third grade standard of level 3. By the end of the year, Student met only 1 of 16 third grade math standards. Despite this, Morgan Hill still failed to address Student's academic or language needs beyond articulation in his IEP.

FOURTH GRADE, THE 2014-2015 SCHOOL YEAR

September and October 2014 Amendment IEP Team Meetings

42. Student attended Johanna Miller's fourth grade class at Paradise for the 2014-2015 school year. Because of Parent's continued concerns with Student's unmet academic and language needs and homework struggles, Morgan Hill convened an IEP team meeting on September 25, 2014. With her advocate, Parent pointed out that Morgan Hill's assessment data and teacher reports from second and third grade showed that Student had needs in the areas of academics including writing, math, and reading;

communication including expressive and receptive language; and social-emotional needs including social skills, self-esteem, and self-regulation.¹⁴ Out of a concern that Student was not being taught and held to the same curriculum standards, Parent requested that Student's work no longer be modified and that he receive resource specialist program services to help him reach grade level standards.

43. According to Morgan Hill, Student was now able to complete grade level work at the start of his fourth grade year, despite his low cognitive skill and the fact that he did not meet third grade reading or writing standards, or 15 out of 16 third grade math standards. Morgan Hill's conclusion that Student could complete grade level work at the start of his fourth grade year, as documented in the September 2014 IEP team meeting notes, was neither credible nor corroborated by witness testimony or documentary evidence.¹⁵

44. Since his April 2014 annual IEP, Student showed increased motivation to use strategies to improve his writing and was able to produce some legible and correct short writing samples in class with teacher assistance. Ms. Miller provided Student daily small group academic instruction as a general education accommodation. At the September 2014 IEP team meeting, Morgan Hill offered to conduct another psycho-educational assessment to determine if Student was eligible for special education due to a specific learning disability or otherwise qualified for academic services. Parent did not agree that Student required further assessment. Ms. DuMond acknowledged at hearing that Student did not have to be eligible under the category of specific learning disability

¹⁴ No findings are made as to Student's social-emotional needs as this was not identified as an issue for hearing.

¹⁵ Ms. Miller did not testify.

in order to receive academic services.¹⁶ However, she agreed with her team that Student did not require such services because he showed academic progress within his grade level in general education. Therefore, she opined, Student did not have a “need” in the area of academics. Morgan Hill continued to operate under the belief that only areas of deficit that could not be remediated in the general education setting constituted educational needs. However, even under Morgan Hill’s inaccurate interpretation of the standard used to address an eligible student’s needs, Student’s deficits were not remediated in the general education classroom as evidenced by the fact he was still well below grade level.

45. The September 2014 amendment IEP team meeting was continued to October 29, 2014. Parent informed Morgan Hill that Student was receiving mental health counseling to address anxiety and depression related to his academic struggles. Student continued to struggle with homework. He did not understand the material; compared himself unfavorably to his twin sister who was an honor student; displayed anger; and called himself stupid, cried, and complained of classmates teasing him because of his academic delays. Parent poignantly described his daily homework struggle as “heartbreaking.” Although Ms. Dagar characterized Student’s homework struggle as typical, especially with the new common core standards, the consistency and increasing intensity of Student’s homework challenges exceeded the range of expected struggles. Parent more persuasively established that Student was not able to understand the work

¹⁶ This was Ms. DuMond’s second year as the Director of Special Education and Student Services with Morgan Hill. She previously served as a program specialist, dean, and coordinator and assistant director of special services in other districts, as well as a school psychologist for 18 years. She earned a master’s degree in school psychology and holds clear professional administrative and pupil personnel services credentials.

or complete his assignments without an inordinate amount of one-to-one assistance and repetition.

46. By October 2014, Morgan Hill inexplicably shifted its position from emphasizing Student's below average cognitive functioning as an explanation for his below grade level performance, to highlighting that Student was now able to complete fourth grade level work. Along with its change in position, Morgan Hill acknowledged that Student could benefit from homework support. Despite its general belief that many students struggle with homework, Morgan Hill came to recognize Student's heightened anxiety associated with homework and his particular struggles. Morgan Hill offered to provide Student homework intervention services with the resource specialist teacher three times a week for 20 minutes to "assist with his areas of need" as stated in the October 2014 IEP team meeting notes. Morgan Hill insisted that this intervention was not a special education intervention or a resource specialist program. Homework intervention would assist Student to start his work, and also allow Ms. White an opportunity to determine any other needs and recommend strategies. Morgan Hill offered an assessment plan for Student dated October 29, 2014. As indicated on the plan, the reason for assessment was "to determine continuing eligibility for special education." Parent did not consent to this assessment plan.

Student's Academic Performance and Completion of Fourth Grade

47. With Parent's consent, Student received homework intervention services from November 2014 through the end of the 2014-2015 school year, for a total of 30 minutes, three times a week. This general education intervention targeted Student's academic needs as well as his anxiety. Parent testified that Student did not benefit from homework intervention as he did not have a good relationship with Ms. White. Her testimony was not persuasive as the evidence showed Student's comfort level with work assignments and his confidence increased during these sessions. Further, although Ms.

White worked with Student for approximately 20 sessions, her instructional aide provided most of the homework intervention throughout the year under Ms. White's supervision. However, even in this structured setting, he needed prompts to persevere and attempt the next problem. Student also participated in Ms. Miller's after school homework club at least twice weekly throughout the year.

48. In class, Ms. Miller allowed Student extra time to complete assignments and continued to reduce and modify his assignments. Because he required repetition in instruction and directions, Ms. Miller provided Student with daily small group academic instruction particularly in math. She re-taught lessons and divided assignments into smaller sections to help him learn and boost his confidence. Student participated in class and was willing to attempt more challenging work, but still struggled with learning concepts, especially in math. Neither party introduced evidence of an annual IEP team meeting held during the 2014-2015 school year or of any progress reports on Student's annual goals or whether he met any of his three goals. Although Student continued to make good progress with his articulation services, he still struggled with his handwriting skills. Even so, he demonstrated some gains from the prior year and received some benefit from his occupational therapy services. Student did not prove that Morgan Hill denied him a FAPE during the 2014-2015 school year, until April 29, 2015, by failing to provide him with appropriate occupational therapy services. Student did not establish that he required additional occupational therapy services to address his fine motor or attention needs during the 2014-2015 school year, until April 29, 2015.

49. On its face, Student's final fourth grade report card did not show that Student was struggling academically. Ms. Miller awarded Student grades of one B and four C's and marks of 3's, indicating he was meeting standards, in math and English language arts, and all but one reading standard, namely, reading accurately and fluently

to support comprehension. Ms. Dagar established that a student can demonstrate mastery of a standard in a variety of ways and that a teacher subjectively determines mastery. Even so, Student's increasing homework struggles and continued anxiety regarding academic tasks; along with Morgan Hill's acknowledgment that Student struggled with key concepts, and its response of providing daily small group instruction, modified work, and homework support, collectively established that Student continued to struggle academically. Further, an assortment of Student's work samples from the end of fourth grade, even without teacher testimony as to context, showed Student's difficulty with reading comprehension, math, and spelling, and his continuing struggle to write legibly. Parent persuasively established that even with weekly homework club and homework intervention, and daily small group instruction, Student was unable to complete his fourth grade homework without continual one-on-one assistance, reminders, and emotional melt downs.

STUDENT'S PRIVATE ASSESSMENTS

50. On October 7, 2014, KidScope Assessment Center for Developmental and Behavioral Health assessed Student to clarify his diagnoses and provide recommendations to help him succeed at school. This medical assessment confirmed Student's diagnoses of attention deficit hyperactivity disorder, inattentive type, and anxiety disorder, and found that Student did not meet the criteria for having a learning disorder or autism spectrum disorder. The assessor supported additional school testing and academic supports in reading, writing, and math. Parent did not share the results of this assessment with Student's IEP team.

51. Children's Health Council further assessed Student in April 2015. Parent received this assessment report in June 2015, and provided a copy to Morgan Hill in preparation for hearing. This assessment also found that Student did not have a learning disorder, or a language disorder, and confirmed Student's prior diagnoses of attention

deficit hyperactivity disorder and anxiety disorder. Student received a full scale IQ of 76, in the very low range (fifth percentile) of intellectual functioning on the Wechsler Intelligence Scale for Children, Fifth Edition. Student did not introduce any evidence as to the significance of this IQ score in terms of Student's ability to perform fourth grade level work. Mr. Tamblyn established that the newer norms of the Fifth Edition could account for the 10-point decrease in Student's IQ from a score of 86 two years earlier, as populations demonstrate greater knowledge over time. This testing concluded that Student's cognitive and academic abilities were commensurate and remained at the low to low average range of functioning, with his learning style characterized as able to learn but at a slower and less consistent rate than anticipated for his age. This report recommended class accommodations, most of which were provided to Student throughout third and fourth grade, including: motor breaks, check-ins, individual support, simplified instructions, repetition, small group learning, and chunking verbal information. At hearing, Mr. Tamblyn agreed with the Children's Health Council's conclusion that Student was able to learn necessary academic skills but at a rate and depth below average same-aged peers, and required more time, more repetition, and linking new concepts to previously learned material.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK ¹⁷

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.;

¹⁷ Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

34 C.F.R. § 300.1 et seq. (2006);¹⁸ Ed. Code, § 56000, et seq.; and 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 to 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); 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.) "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).)

3. 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

¹⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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, 951 [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. 951, fn. 10.)

4. 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. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint, in this case Student, 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 due process hearings is preponderance of the evidence].)

ISSUE 1(A): CHILD FIND DUTY TO REFER FOR ASSESSMENT

5. Student contends Morgan Hill had sufficient information upon his enrollment at the start of the 2012-2013 school year to suspect that he might be a student with a disability based on his struggle to read and comprehend; his difficulty accessing grade level curriculum despite his first grade retention; and his second grade teacher’s expressed concerns that he required special education. Therefore, Student asserts that Morgan Hill had a duty to refer him for assessment; this duty continued

through the start of the statutory period; and its failure to fulfill this duty denied him a FAPE. Morgan Hill contends that although Student was below grade level, he was making progress in the general education class and performing commensurate with his cognitive ability such that it was not on notice that he may have a qualifying disability. Morgan Hill also argues it was not required to assess Student because his prior district found him ineligible in November 2011.

Child Find Responsibilities

6. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as “child find.” California law specifically incorporates child find in Education Code section 56301, subdivisions (a) and (b). This duty extends to all children “suspected” of having a qualifying disability and a need for special education. (34 C.F.R. § 300.311 (c)(1); *N.G. v. Dist. of Columbia* (D.D.C. 2008) 556 F. Supp.2d 11, 26 (*N.G.*)). Pursuant to this standard, the appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Department of Educ., State of Hawaii v. Cari Rae S.*, (D. Hawaii 2001) 158 F.Supp.2d 1190, 1195 (*Cari Rae*)). “[A] child should not have to fail a course or be retained in a grade in order to be considered for special education and related services.” (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46580 (Aug. 14, 2006).) That a student made adequate educational progress is not a valid reason not to assess if there is reason to believe that student may qualify for and require special education. (34 C.F.R. § 300.111(c)(1); *Cari Rae*, *supra*, 158 F.Supp.2d 1190, 1196-1197.) A district’s child find duty is not dependent on

any request by the parent for special education testing. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518 (*Reid*).

7. The federal district court for the Northern District of California recently held, "the state has reason to suspect that a child may have a disability where: (1) there is a suspicion that a student has an impairment that is affecting the student's educational performance; or (2) a parent requests special education services or an assessment of eligibility for special education services." (*Simmons v. Pittsburg Unified School Dist.* (N.D.Cal. 2014) 2014 WL 2738214, 6 (*Simmons*) citing Cal. Code Regs., tit. 5, § 3021(a) and *Park v. Anaheim Union High Sch. Dist.*, (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park*).

8. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.301; Ed. Code, § 56302.1; (*N.G.*, *supra*, 556 F.Supp. 2d 11, 26-27.) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) The school district must provide the child's parent with a proposed assessment plan along with notice of the parent's rights within 15 days of the referral for assessment, not counting vacations in excess of five school days. (Ed. Code, § 56321, subd. (a).) The school district is required to complete the assessment and hold an IEP team meeting to review the results within 60 days of receiving parental consent to assess, exclusive of school vacations in excess of five schooldays and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

9. A school district's pursuit of general education interventions in accord with state policy may not be used to unreasonably delay the special education assessment process. (*Johnson v. Upland Unified School District* (9th Cir. Jan. 8, 2002, No. CV-98-

09501-AHM) 2002 WL 22345 at p. 1; (*Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig* (9th Cir.1992) 976 F.2d 487, 491-492 (*Hacienda*) [An unreasonable delay in identifying and evaluating children with disabilities may result in a legal violation].) Further, a district may not delay assessing a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. (*Memorandum to State Directors of Special Education*, Office of Special Education Programs¹⁹ (OSEP 2011) 56 IDELR 50.) A response to intervention process does not replace the need for a comprehensive evaluation. (71 Fed. Reg. 46648 (Aug. 14, 2006).)

Procedural Violations

10. There are two parts to the legal analysis of whether a school district offered a student a FAPE: whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, 458 U.S. 176, 206-207.) Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae, supra*, 158 F.Supp. 2d 1190, 1196; *D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 249-250 (*D.K.*); *Board of Educ. of Fayette County, Ky. v. L.M.* (6th Cir. 2007) 478 F.3d 307, 313 (*L.M.*); *Park, supra*, 464 F.3d 1025, 1031.)

Tests for Determining Child Find Violations

11. The key question is at what point in time was Morgan Hill required to refer

¹⁹ The Office of Special Education Programs is a division of the United States Department of Education charged with administering the IDEA and developing its regulations.

Student for assessment. When a district has conducted a comprehensive evaluation and found a student ineligible for special education, that district is entitled to monitor the student's progress before considering further evaluation. (*D.K., supra*, 696 F.3d 233, 251-252.) "The IDEA does not require a reevaluation every time a student posts a poor grade." (*Ibid.*, quoting *Ridley School Dist. v. M.R.* (3rd Cir. 2012) 680 F.3d 260, 272-273 [district was not required to re-assess student three months after its initial assessment determined she did not qualify.])

12. Child find is not a shared responsibility between a student's former and current school district. Therefore, that Norris assessed Student in November 2011 and found him ineligible did not entitle Morgan Hill to rely on that prior determination as a substitute for fulfilling its own affirmative obligation to identify, locate, and evaluate Student.

13. The Ninth Circuit Court of Appeals has not yet articulated a test for determining when a district's child find obligation is triggered. In a recent unpublished opinion, the Ninth Circuit advised that the oft-cited test espoused by the federal district court of Hawaii has not been adopted by two sister circuits. (*G.M. v. Saddleback Valley Unified School Dist.*, (9th Cir. July 18, 2014, No. 12-56627) 583 Fed.Appx. 702, 703, fn. 1.) In 2001, the Hawaii federal district court held, "[T]he child-find duty is triggered when the [district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." (*Cari Rae, supra*, 158 F.Supp.2d 1190, 1194 [citations omitted].) The *Cari Rae* court cited the Third Circuit's holding that child find requires districts to identify and evaluate children "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." (*Ibid.*, citing *W.B. v. Matula* (3rd Cir. 1995) 67 F.3d 484, 501, abrogated on other grounds by *A.W. v. Jersey City Public Schools* (3rd Cir. 2007) 486 F.3d 791.)

14. The Sixth and Third Circuits have since promulgated child find tests that

differ significantly from the *Cari Rae* standard. The Third Circuit, while continuing to allow districts who are on notice of a student's potential eligibility a "reasonable period of time" to identify and evaluate, adopted a higher threshold noting that child find does not require "a formal evaluation of every struggling student." (*D.K.*, *supra*, 696 F.3d 233, 249.) The *D.K.* test does not require districts to "rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment." (*Id.* at 252.) The Sixth Circuit established a more stringent test, holding that the individual claiming a child find violation must demonstrate "that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate." (*L.M.*, *supra*, 478 F.3d 307, 313 [citation omitted].)

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

16. Here, Student's medical diagnoses of Neurofibromatosis-I and pervasive developmental disorder; the fact that he had been retained in first grade; and his below grade level screening scores and struggle with reading comprehension upon enrollment, all placed Morgan Hill on notice that he may have a qualifying disability and need for special education. However, even under the *Cari Rae* test, Morgan Hill was entitled to wait a reasonable period of time to monitor Student's adjustment to his new school and to second grade prior to referring him for assessment. Therefore, under even the lowest threshold as articulated by *Cari Rae*, Student did not meet his burden of proof that

Morgan Hill was required to refer him for assessment immediately upon enrollment.

17. However, as the trimester progressed, Student did not acclimate and continued to struggle with reading, writing, and math. Because he was unable to understand the curriculum, homework became an emotional battle. Student's frustration increased and he shut down in class. Student was not able to access the curriculum or perform grade level work even with Ms. Catalano's close monitoring and one-to-one work with him; her collaboration with home and colleagues; and her implementation of strategies suggested by the resource specialist. His frustration mounted and he fell further behind. Following the end of the first trimester, Ms. Catalano requested a student study team meeting for Student, and informed Morgan Hill of Student's academic struggles and possible need for special education and testing which further alerted Morgan Hill that Student should be referred for an eligibility assessment.

18. Morgan Hill was aware from Student's cumulative file and Parent report that Student struggled in first grade; received almost daily academic support at his prior district's learning center, but still failed to meet first grade standards; repeated first grade and did well with continued learning center supports; then slipped again by the start of second grade, such that his teacher concluded he required an eligibility assessment. Student met his burden of proof that by November 26, 2012, following parent-teacher conferences, Morgan Hill had sufficient reason to suspect that he had a qualifying disability such that it was required to assess him pursuant to all three child find tests. Under the *D.K.* test, a district is not required to refer every struggling student for assessment. However, following Thanksgiving break, Morgan Hill was required to refer *this* struggling Student. Pursuant to the *L.M.* test, by this point in time, Morgan Hill had ignored clear signs of a disability and there was no rational basis to delay assessment. Morgan Hill's student study team meeting process, consisting of a multi-tiered instructional framework for monitoring progress and providing interventions, is a

response to intervention approach. As such, Morgan Hill's preference for using this internal process to schedule a struggling student for a study team meeting cannot be used to delay an initial assessment, especially when such a meeting was deferred for four months. Morgan Hill had a duty to refer Student for assessment by November 26, 2012, and timely provide Parent with an assessment plan by December 11, 2012. This duty was still present at the start of the statutory period. Morgan Hill's failure to timely refer Student for assessment pursuant to its child find duty constitutes a procedural violation from February 20, 2013, until May 2, 2013, when Morgan Hill offered an assessment plan.

19. The evidence established that Morgan Hill should have held an IEP team meeting no later than February 25, 2013. As discussed below, the evidence also established that Student met the eligibility criteria for speech or language impairment in the area of articulation from February 25, 2013.

Statute of Limitations

20. Both federal and state law contain a two-year statute of limitations for special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l).) There are only two exceptions to the statute of limitations: when the district has either misrepresented or withheld required information from the parents. (20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511(f); Ed. Code, § 56505, subd. (l).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K., supra*, 696 F.3d 233, 248; *P.P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661-662.) In particular, special education law does not recognize the doctrine of continuing violations as an exemption from the two-year statute of limitations. (71 Fed. Reg. 46697 (Aug. 14, 2006); *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long Beach Unified School Dist.* (C.D.Cal., Jan. 24, 2013, No. CV 09-04430 MMM AJWx) 2013 WL 271686

(*Moyer*); *Patrick B. v. Paradise Protective and Agricultural School, Inc.* (M.D.Pa., Aug. 6, 2012, No. 1:11-CV-00927) 2012 WL 3233036, p. 6; *Baker v. Southern York Area School Dist.* (M.D. Pa., Dec. 8, 2009, No. 1:CV-08-1741) 2009 WL 4793954, p. 5; *Evan H. v. Unionville-Chadds Ford School Dist.* (E.D. Pa., Nov. 4, 2008, No. 07-4990) 2008 WL 4791634, p.5.)

21. "The implementation of the educational program is an ongoing, dynamic activity, which obviously must be evaluated as such." (*O'Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Similarly, the duties to refer for assessment and to convene an IEP team meeting are ongoing obligations. Incidents occurring within the statute of limitations regarding a failure to implement an IEP as written, or of being on notice of the need to assess or to convene an IEP team meeting, will support a due process claim and do not constitute continuing violations.

22. There is no statute of limitations issue in this case. To determine if Morgan Hill violated its duty to refer Student for assessment as of February 20, 2013, and timely find him eligible for special education, it is necessary to look back in time to determine when the obligation to refer Student for assessment arose, even if this predates the relevant time frame, and to determine whether the circumstances triggering that duty remained in place at the start of the statutory period. Although its duty to refer Student arose by November 26, 2012, Morgan Hill is not being held to account for conduct that predates the statutory period. Rather, this duty to refer remained through the start of the statutory period as Student's circumstances giving rise to Morgan Hill's child find duties remained unchanged. Further, its duty to refer for assessment gave rise to a further duty to convene an IEP team meeting and to find Student eligible for special education by February 25, 2013, within the relevant time frame.

23. This case is therefore distinguishable from the continuing violation cases cited above. For instance, in *Moyer*, the student claimed that had the district complied

with its child find duty, it would have been required to provide parents notice of their procedural rights, and that its failure to do so prior to the statutory period tolled the statute of limitations. The federal district court for the Central District of California agreed with the ALJ that this claim was time-barred. There is no request to toll the statute of limitations here to allow Student to seek a remedy for violations that occurred outside the statutory period. Here, if Morgan Hill had timely complied with its child find duty to refer Student for assessment, it would have been required to provide Parent an assessment plan by December 11, 2012, which predates the statute of limitations. However, Morgan Hill also would have been required to complete its assessment and convene an IEP team meeting within an additional 60 days. The establishment of these earlier failures provides the basis for finding violations beginning February 20, 2013. (*J.W. v. Fresno, supra*, 626 F.3d at pp. 440, 445 [in finding challenges to IEP's which predated the statute of limitations to be time barred, the court held that while it is improper to challenge conduct that predates the statute of limitations, it is permissible to consider events that occurred prior to the statutory period].)

Consequences of Procedural Violations

24. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute, ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."]; *Doug. C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d

1038, 1043 (*Doug C.*); *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910 [rejecting a structural defect approach and finding a procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation].)

25. The Ninth Circuit has held that a district's procedural violation "cannot qualify an otherwise ineligible student for IDEA relief" and constituted harmless error where a student was substantively ineligible for IDEA relief. (*R.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir. 2007) 496 F.3d 932, 942; See *D.G. v. Flour Bluff Independent School District* (5th Cir. June 1, 2012, No. 11-40727) 2012 WL 1992302, p.7 ["IDEA does not penalize school districts for not timely evaluating students who do not need special education."].)

26. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304; *Doug. C.*, *supra*, 720 F.3d 1038, 1043["Parental participation ... is critical to the organization of the IDEA."].)

27. Morgan Hill committed a procedural violation by failing to refer Student for assessment beginning on February 20, 2013. However, because this Decision also finds that the evidence did not establish that Morgan Hill should have found Student eligible for special education prior to February 25, 2013, any denial of FAPE can only be considered from February 25, 2013 forward.

28. Here, Parent had no opportunity to participate in the assessment or IEP formulation process prior to receiving an assessment plan on May 2, 2013, because Morgan Hill declined to refer Student prior to that time. Morgan Hill's "proposed 'wait and see' approach ignores that a child's parents are essential members of the IEP team

and are entitled to fully participate in the IEP process." (*Simmons, supra*, 2014 WL 2738214, p. 9, citing *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*) ["Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA."].) This denied Parent the right to meaningfully participate in the IEP development process.

ISSUE 1(B): DUTY TO ASSESS PURSUANT TO PARENT'S REQUEST

29. Student contends that Morgan Hill was required to offer an assessment plan within 15 days of Parent's March 8, 2013 written request to assess Student for special education. Student maintains that Morgan Hill's failure to provide a timely assessment plan constitutes a procedural violation which denied him educational benefit and denied Parent her participatory rights. Morgan Hill contends that it was not required to offer an assessment plan because it had convened a student study team meeting, determined that a special education assessment was not warranted, and provided a written response outlining its reasons for declining an assessment within 15 days of Parent's request. Morgan Hill further asserts that even if it was required to offer an assessment plan by March 22, 2013, this violation did not deny Student a FAPE, as it would have had until May 31, 2013, to convene an IEP team meeting.

30. This decision already holds that Morgan Hill denied Student a FAPE from February 25, 2013, through June 5, 2013, by not referring him for assessment and by failing to make him eligible for special education services. Therefore, there is no need to address this claim of another procedural violation of the same nature during the same time period for which a denial of FAPE has been found.

ISSUE 2: PRIOR WRITTEN NOTICE

31. Student contends Morgan Hill failed to provide Parent with a legally compliant written notice of its refusal to assess Student. Morgan Hill argues that its

March 22, 2013 email to Parent specified the reasons for its determination to not assess Student and met all requirements of a prior written notice in light of the fact that Parent was already aware of her rights. Morgan Hill further contends any violation did not deny Student a FAPE.

32. As with Issue 1(b), there is no need to address this issue as this Decision finds that Morgan Hill denied Student a FAPE for its procedural violations of failing to timely refer Student for assessment and to convene an IEP team meeting and find him eligible for special education from February 25, 2013, through June 5, 2015.

ISSUE 3: STUDENT'S ELIGIBILITY BY FEBRUARY 25, 2013, AND DENIAL OF FAPE

33. Student contends that Morgan Hill should have found him eligible for special education pursuant to the categories of speech or language impairment and specific learning disability and offered him an IEP by February 20, 2013, the start of the statutory period. Student alleges that Morgan Hill's delay in convening an IEP team meeting denied him a FAPE. Morgan Hill asserts it was first required to assess Student pursuant to its May 2, 2013 assessment plan; at Parent's request, it expedited this initial assessment; and it was not required to convene an initial IEP team meeting prior to June 5, 2013.

34. As discussed above, pursuant to its child find duties, Morgan Hill was required to refer Student for assessment by November 26, 2012, and provide Parent an assessment plan by December 11, 2012. Assuming Parent provided immediate consent, and taking into account days of vacation over the winter break, Morgan Hill was required to convene Student's initial eligibility IEP team meeting on or before February 25, 2013.

35. A student is eligible for special education and related services if he is a "child with a disability" such as a speech or language impairment or specific learning disability, and who, by reason thereof, needs special education and related services. (20

U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); See Ed. Code, § 56026, subds. (a) & (b) [uses term “individual with exception needs”].) California law further specifies that the student must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).) A student shall not be determined to be a child with a disability if the student does not otherwise meet the eligibility criteria under federal and California law. (34 C.F.R. § 300.306(b)(2); Ed. Code, § 56329, subd. (a)(2)(D).)

36. It is the duty of the IEP team to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).) Further, an ALJ has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda, supra*, 976 F.2d 487, 492-493.) If a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Cari Rae, supra*, 158 F.Supp.2d 1190, 1196.) A student may qualify for special education benefits under more than one of the eligibility categories. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2014) 758 F.3d 1162, 1175-1176.)

Eligibility Categories

37. The IDEA does not require that a student be placed in the most accurate disability category. “Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in . . . this title and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability . . .” (20 U.S.C. § 1412(a)(3)(B).) Thus, as interpreted by the Ninth Circuit, the IDEA “does not give a student the legal right to a proper disability classification.” (*Weissburg v. Lancaster School Dist.* (9th Cir. 2010) 591 F.3d 1255, 1259.) When a student is found eligible under any category, the analysis of whether he was

denied a FAPE shifts to an examination of whether his IEP was tailored to meet his unique needs. Similarly the Seventh Circuit held,

“The IDEA concerns itself not with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that particular child The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student's] multiple disabilities.” (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.)

38. The United States Department of Education has advised that “a child's entitlement is not to a specific disability classification or label, but to a [free appropriate public education].” (*Letter to Fazio* (OSEP 1994) 21 IDELR 572.) A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial”]. “The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School Dist.*, (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

Speech or Language Impairment

39. Under federal law, a speech or language impairment means a communication disorder, including impaired articulation or a language impairment that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(11).) In California, a student is eligible for special education and related services if he demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his educational performance and cannot be corrected without special education. (Ed. Code, § 56333.) The criteria include

articulation disorders, such that the student's production of speech significantly interferes with communication and attracts adverse attention, as well as a language disorder consisting of inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the student's language performance level is found to be significantly below the language performance level of his peers. (Ed. Code, § 56333, subd. (a) and (d).)

40. Determination of the existence of a language disorder is governed by regulation.²⁰ A student has an expressive or receptive language disorder when he: 1) scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or 2) scores at least 1.5 standard deviations below the mean or the score is below the seventh percentile for his chronological age or developmental level on one or more standardized tests in one of the areas listed above, and he displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances which is recorded or transcribed and analyzed, and the results included in the assessment report. (Cal.Code Regs., tit. 5, § 3030, subd. (c)(4).)

Need for Special Education

41. In deciding whether a student needs special education, courts apply the

²⁰ The citations to the California Code of Regulations regarding the category of language or speech disorder are those which were in effect at the time of the events addressed in this Decision. The eligibility categories have since been re-numbered, although the criteria for speech or language disorder remain the same. (See Cal.Code Regs., tit. 5, § 3030, subs. (b)(11)(D) [effective July 1, 2014].)

Rowley standard to determine if the student can receive educational benefit with modifications in the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].) More recently, in the unpublished case of *C.M. v. Department of Educ., State of Hawaii* (9th Cir. Mar. 1, 2012, No. 10-16240) 2012 WL 662197, p.1), the Ninth Circuit used the *Rowley* standard to determine that the student did not need special education as she was able to benefit from her general education classes.

42. The fact that a child receives educational benefit in a general education setting does not automatically negate his need for a special education program. (*Letter to Pawlisch* (OSEP 1996) 24 IDELR 959.) Just because the specialized instruction a student with a disability requires is already part of the general curriculum, considered best practices, or offered to all students with or without disabilities, does not mean that such instruction does not constitute special education or that a qualified student does not need an IEP which incorporates the specialized instruction. (*Letter to Chambers* (OSEP 2012) 59 IDELR 170.)

After Acquired Evidence

43. While a district's actions "cannot be judged exclusively in hindsight," (*Adams, supra*, 195 F.3d 1141, 1149), the Ninth Circuit has observed that after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006 [later obtained evidence, such as assessments, may supplement the record if the evidence is relevant, non-cumulative, and otherwise admissible].) The Ninth Circuit held that, in reviewing a district's actions, courts may look to evidence not known to the decision makers at the time as "additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date."

(*Ibid*). Similarly, in upholding a child find violation and determination of eligibility pursuant to emotional disturbance, a Pennsylvania federal district court concluded,

“These types of proceedings are necessitated upon the finding that the school district failed to timely discover a subsequently diagnosed disability. While hindsight can seldom be used in law to impute to a party something it should have known, here it is precisely the device used to adequately assess the student's needs and the school district's obligations at the relevant time.” (*Jana K. v. Annville-Cleona School Dist.* (M.D.Pa. 2014) 39 F.Supp.3d 584, 601-602.)

44. Based on the above, it is appropriate to consider Morgan Hill's subsequent assessment and eligibility finding in June 2013 in determining whether Student would have qualified for special education by February 25, 2013, had Morgan Hill timely referred him. Based on Ms. Robinson's speech and language assessment conducted in May 2013, Student qualified for special education as a child with a speech disorder, specifically an articulation disorder, at the June 5, 2013 initial IEP team meeting. Student's articulation errors in producing the vocalic /r/ sound were delayed by a minimum of one year and affected his ability to communicate and be understood. Student was approximately eight years and seven months of age at the time of testing. Had Morgan Hill assessed Student pursuant to a December 11, 2012 assessment plan, Student still would have been older than eight years of age. This determination of Student's age is important as Morgan Hill's Eligibility Summary for Speech or Language Impairment, which it used to establish eligibility, differentiates criteria based on age. Morgan Hill found Student eligible under the age category of "eight and above"

because of one or more misarticulations and consistency of error in two or more speaking situations. Based on its May 2013 speech and language assessment, as well as its June 2013 eligibility determination, Student would have qualified for special education as a student with a speech disorder by February 25, 2013, had Morgan Hill timely assessed him.

45. Having determined that Student qualified for special education pursuant to the category of speech disorder by February 2013, there is no need to analyze eligibility under any additional category. Even so, once Student qualified for special education under any eligibility category, Morgan Hill was required to identify all of his disability-related needs and develop an IEP with goals and services targeting these needs and reasonably calculated to provide educational benefit. That Student only met the eligibility requirements for having a speech disorder, did not mean he did not have other needs. As determined herein, Student had needs in the areas of academics and language which Morgan Hill failed to address.

46. Morgan Hill was required to have assessed Student and convened an IEP team meeting by February 25, 2013. Had it done so, it would have found Student eligible for special education. Morgan Hill's failure to timely convene an IEP team meeting constituted a procedural violation. This violation denied Student a FAPE because it prevented Parent from participating in the decision making process as Morgan Hill did not convene an IEP team meeting until the end of his second grade year, on June 5, 2013. Further, this violation also deprived Student of educational benefit as Morgan Hill did not develop an IEP or offer him any special education services until June 2013, a delay of three academic months. The next inquiry is whether Morgan Hill provided Student a FAPE beginning with its initial IEP.

ISSUE 4: PROVISION OF FAPE IN THE AREAS OF ACADEMICS, OCCUPATIONAL THERAPY, AND SPEECH AND LANGUAGE THERAPY

4(A): ACADEMIC SERVICES

47. Student contends that Morgan Hill denied him a FAPE when it failed to identify his unique needs in the area of academics and thus failed to devise any academic goals or provide any special education instruction, support, or services to meet his academic needs through the time of hearing. Morgan Hill contends that Student did not have academic needs as demonstrated by his progress in the general education setting. Morgan Hill further argues that Student's academic performance exceeded his cognitive capability such that it was not required to provide specially designed instruction, and that doing so would violate Student's right to be educated in the least restrictive environment.

Unique Needs

48. A student's unique educational needs are to be broadly construed to include his academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1468 (*San Diego*).)

Evaluating the IEP Offer

49. To determine whether a school district offered a student a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents even if that preferred program will result in greater educational benefit to the student. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the his IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley, supra*, 458 U.S. 176, 203.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate that children with disabilities are educated with non-disabled peers. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56040.1; 34 C.F.R. 300.114 (a); see *Sacramento City Unified School Dist., Board of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 [adopting a four-part test to determine whether general education appropriate].)

50. The Ninth Circuit has held that a district's decisions in writing an IEP cannot be judged exclusively in hindsight, since "an IEP is a snapshot, not a retrospective." (*Adams, supra*, 195 F.3d 1141, 1149.) "In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041 [citing *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992].)

IEP Requirements

51. 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)(1).) An IEP must contain a statement of the child's present levels of academic achievement and functional performance as well as a statement of measurable annual goals designed to meet the child's needs that result from his disability, to enable him to participate and progress in the general education curriculum, and which meet each of the child's other educational needs resulting from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(I) & (II); 34 C.F.R. § 300.320(a)(1) & (2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (*Letter to Butler* (OSEP 1988) 213 IDELR 118.) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

Educational Benefit

52. There is no one test for measuring the adequacy of educational benefit conferred under an IEP. (*Rowley, supra*, 458 U.S. 176, 202.) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d 1025, 1033.) Furthermore, educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in the IEP. (*San Diego, supra*, 93 F.3d 1458, 1467.) However, a district may not discharge its duty under the IDEA by providing a program that "produces some minimal academic advancement no matter how trivial." (*Amanda J., supra*, 267 F.3d 877, 890 citing *Hall v. Vance County Board. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

53. From at least February 25, 2013, through April 29, 2015, Student had academic needs in the areas of reading, writing, spelling, and math as reported by his teachers and reflected in his below grade level performance. Further, assessment data

revealed that Student had short term memory and auditory perception deficits which could slow learning; spelling and sentence composition delays; and that he required repetition and review to grasp academic concepts. Morgan Hill was aware of these areas of need and that they adversely affected his education. Morgan Hill provided no legal authority or principled support for its contention that because Student was performing academically at or above his cognitive ability, it was not required to offer any specialized academic services.

54. Morgan Hill's determination that Student did not have academic needs because he made some academic progress in the general education classroom was neither supported by the law nor defensible in light of Student's academic struggles. Morgan Hill incorrectly determined that a student making even minimal progress, without special education support, did not require special education. This is not the standard. Once a child meets eligibility requirements, the local education agency must identify all areas of need and include corresponding goals and services in the IEP. Morgan Hill crafted its own definition of need as an area of deficit that cannot be addressed in the general education setting. In doing so it erroneously imposed the second prong of the eligibility criterion, that Student must require special education as a result of his disability, onto its determination of need. Morgan Hill's determination reflected a fundamental misunderstanding of its duty to identify all disability-related needs of an already qualified student, and to tailor services to meet all needs. Just because Student was progressing in his reading levels for instance, did not mean he did not have a need in the area of reading, worthy of a goal and targeted services to assist him to meet his goal. Morgan Hill's reasoning that because Student was able to make some academic gains in the general education classroom, providing him with specialized academic instruction in a more restrictive setting would violate his right to be educated in the least restrictive environment, was equally flawed. Morgan Hill failed

to account for its duty to first identify all of Student's areas of need; then develop goals to address these needs; and next consider various program options from consultation services, push-in services within the general education setting, or pull-out services in a separate classroom to support the goals. In failing to identify academics as an area of need for Student, Morgan Hill's IEP offers were fatally flawed as they did not identify Student's present levels of academic performance, contain annual measurable goals designed to meet his areas of academic deficit, or offer academic services or supports to enable Student to meet his goals.

55. Morgan Hill failed to offer any academic services to target Student's reading, writing, spelling, and math needs until its offer of homework intervention services in the October 29, 2014 IEP. Morgan Hill acknowledged this was not a special education service. Further, homework intervention did not target an identified academic need or support an academic goal. Even so, Student benefitted from this intervention. Morgan Hill denied Student a FAPE beginning February 25, 2013, by failing to provide any specialized academic services to address Student's academic needs. Morgan Hill continued to deny Student a FAPE from November 2014 through April 29, 2015, even with its provision of general education homework intervention. Morgan Hill did not provide any relevant legal authority for its position that it is not liable for any denial of FAPE after October 29, 2014, because Parent refused to consent to its offer on that date to further assess Student.²¹ Here, Parent refused to consent to an assessment plan which

²¹ Its reliance on *M.S. v. Mullica Township Board of Educ.* (D.N.J. 2007) 485 F. Supp.2d 555, *affd.* by *M.S. v. Mullica Township Board of Educ.* (3rd Cir. Feb. 7, 2008, No. 07-2466) 263 Fed. Appx. 264 [parent of preschooler prevented district from determining eligibility and developing an IEP by withholding consent to assess and who privately

Morgan Hill offered for the purpose of determining Student's continued eligibility for special education. Parent's failure to consent did not prevent Morgan Hill from providing Student a FAPE based on his known needs. Further, if Morgan Hill believed it needed to assess Student in order to provide him a FAPE, it had a duty to file a request for due process; it did not do so.

4(B): OCCUPATIONAL THERAPY

56. Student contends that Morgan Hill failed to provide him appropriate occupational therapy services during the 2013-2014 and 2014-2015 school years (until April 29, 2015) as demonstrated by his regression, continued struggle with handwriting, and failure to meet his occupational therapy goals. Morgan Hill contends that it offered appropriate occupational therapy services that addressed Student's identified fine motor and attention needs.

Related services

57. Related services include occupational therapy, speech and language therapy, and other services as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a).) State law adopts this definition of related services. (Ed. Code, § 56363, subd. (a) & (b).)

58. Morgan Hill identified fine motor and attention as areas of need for Student and developed a goal for each of these needs. To help Student attain these goals, pursuant to its June 2013 IEP, Morgan Hill provided Student 30 minutes of occupational therapy services, twice a month, as well as 15 minutes per month of consultation services to help Student's teachers implement sensory and attending

placed student was not entitled to reimbursement for tuition, evaluations, or services] is misplaced as that case is factually distinct.

strategies to help Student engage in the learning process. During the 2013-2014 school year, not only did Student fail to meet his fine motor skills goal, his writing skills notably regressed. He went from being able to write a paragraph with moderate verbal cues in November 2013, to requiring maximum cues to even initiate a writing task in March 2013, to requiring moderate to maximum cues to initiate and continue with a writing tasks and requiring prompts to use his writing strategies in April 2014. Student met his burden of proof that Morgan Hill denied him a FAPE during the 2013-2014 school year by failing to provide him appropriate occupational therapy services to meet his fine motor needs.

59. Once Morgan Hill learned of Student's attention deficit hyperactivity diagnosis, it formally offered additional accommodations in its January 2014 IEP to address Student's attention issues, and continued to provide monthly occupational therapy consultation services to help Student's teachers implement strategies to improve his focus. Although Student continued to struggle in the area of attention, and failed to meet his attending skills goal by the time of his annual IEP in April 2014, this did not mean that the services were deficient. Under *Rowley*, Morgan Hill was not required to guarantee any particular outcome or any particular level of success. (*Rowley*, *supra*, 458 U.S. 176, 192.)

60. The April 2014 annual IEP continued Student's fine motor and attending skills goals as well as his 30 minutes of twice monthly occupational therapy services. Student showed increased motivation to utilize his writing strategies and he demonstrated improved legibility in class. Even though the April 2014 IEP eliminated monthly consultation services, Student's teachers continued to utilize daily strategies throughout the 2014-2015 school year to help Student stay focused, and they implemented his accommodations of allowing extra time, redirecting, checking for understanding, motor breaks, and preferential seating. Student did not meet his burden

of proof that he required additional occupation therapy services to receive a FAPE during the 2014-2015 school year, until April 29, 2015. Student's private April 2015 assessment from the Children's Health Council did not recommend any occupational therapy services but did recommend accommodations to address his difficulties with paying attention. The recommended class accommodations targeting Student's attentional deficits, including motor breaks and frequent check-ins, were included in Student's IEP since June 2013 and implemented daily.

4(C): SPEECH AND LANGUAGE THERAPY

61. Student asserts that Morgan Hill failed to identify his unique language needs beyond articulation and, therefore, failed to develop appropriate language goals and offer and provide appropriate language services. Morgan Hill contends that Student's only communication need was in the area of articulation and that it developed an appropriate goal and provided appropriate articulation therapy as demonstrated by Student's progress.

62. Student exceeded his articulation goal by April 2014. His weekly articulation services were successful, and Student benefited from this service. Student did not contend otherwise. However, even though Student did not establish that he had a language disorder as defined by eligibility regulation, Student clearly had language needs, identified by his speech assessor and therapist, in the areas of expressive and receptive components of understanding and producing sentences; understanding logical relationships in the meanings of associated words; and vocabulary. Morgan Hill failed to identify these additional language needs and, therefore, failed to develop any goals or offer or provide any language services to assist Student to address his language deficits. In acknowledging that Student's language needs could be addressed in the general education setting, Morgan Hill admitted that Student had these additional needs, but failed to develop any goals or a plan to meet these needs. Morgan Hill's

failure to identify Student's needs in the area of language, other than articulation, and failure to offer any services to address these needs denied Student a FAPE from February 25, 2013, through April 29, 2015.

REMEDIES

1. This Decision did not reach Issue 1(b) or Issue 2. Student prevailed as to Issues 1(a), 3, 4(a), and 4(c), and partially prevailed as to Issue 4(b). As a remedy, he requests independent educational evaluations in the areas of academics and neuropsychology; reimbursement for tutoring; staff training; and compensatory education in the form of academic tutoring, occupational therapy services, and speech and language services.²² Morgan Hill asserts that Student is not entitled to any remedy as it offered Student a FAPE as demonstrated by his progress and ability to meet grade level standards throughout his fourth grade year.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Town of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Id.* at p. 1497.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at 1496.) An award to compensate for past violations must rely on an individualized assessment, and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the

²² Student introduced no evidence as to the costs incurred for tutoring services. As such, no reimbursement is awarded.

first place." (*Reid, supra*, 401 F.3d 516, 524.) Compensatory education is intended to make up for prior deficiencies in a student's program. An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

3. Bringing a student to grade level is not the goal of the IDEA. Even a gifted student can be eligible for special education if his disability adversely affects his educational performance. (*Letter to Anonymous* (OSEP 2010) 55 IDELR 172; *Williamson County Bd. of Educ. v. C.K.* (M.D.Tenn., Feb. 27, 2009, No. 3:07-0826) 2009 WL 499386 [nonpub. opn.] [student with an IQ of 143 who scored in the average-to-superior range on academic achievement tests, and received A's, B's and C's, found eligible for special education and awarded two years of compensatory education].) "Under the law, it is not enough that [student] managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level." (*Id.* at p. 18; see also 34 C.F.R. § 300.101(c)(1) [child may be eligible even if advancing from grade to grade].) Therefore, even if Student had attained fourth grade level academic skills as posited by Morgan Hill, he would still be entitled to compensatory education.

4. Student offered no evidence concerning the type or amount of compensatory educational services necessary to provide the educational benefit he was denied because of Morgan Hill's failure to timely find him eligible and to provide him with appropriate academic, occupational therapy, and language services. Student is nonetheless entitled to compensatory education for Morgan Hill's failure to offer any language services to meet his significant language deficits from the time he should have been found eligible on February 25, 2013, through April 29, 2015, approximately 78 academic weeks. Ms. Robinson established that Student's language needs could be addressed in the classroom with additional practice as well as speech and language

consultation services to his teachers. Having weighed all the evidence of Student's language needs, it is determined reasonable and equitable for Morgan Hill to provide Student compensatory education in the form of direct, individual language therapy for 30 minute weekly sessions for a total of 39 hours to compensate for the 78 weeks Morgan Hill failed to provide Student any language services. Further, Morgan Hill shall provide Student with 19.5 hours of language consultation services with Student's classroom teacher, calculated at 15 minutes per week. These hours shall be provided by a credential speech and language pathologist to address Student's language needs in the areas of expressive and receptive components of understanding and producing sentences, understanding logical relationships in the meanings of associated words, and vocabulary. The direct language therapy services shall be provided outside of Student's regular school day, unless the parties agree otherwise, and may be provided during the regular school year and extended school year and may not substitute for any speech and language services Student may receive under any future IEP. Morgan Hill shall reimburse Parent at the federal mileage rate for transportation costs for one round trip per session.

5. Student is additionally entitled to compensatory education for Morgan Hill's failure to offer any academic support to meet his needs in the area of reading, writing, spelling, and math from February 25, 2013, through October 2014, a period of 59 weeks, and for a reduced award of compensatory services from November 2014 through April 29, 2015, a period of approximately 19 academic weeks, during which time Morgan Hill provided general education academic support in the form of homework intervention. Given that Student had four areas of academic need, and in light of the evidence that he benefitted from three 30-minute sessions per week of homework intervention, Student is entitled to compensatory education in the form of 90 minutes per week of academic tutoring for 59 weeks, and 60 minutes per week for the remaining

19 weeks for a total of 107.5 hours. Morgan Hill shall contract, at Parent's discretion, with a certified non-public agency or credentialed special education teacher, of Parent's choice, to provide these hours of academic tutoring. Parent may also request that Morgan Hill provide a credentialed special education teacher who is an employee to provide these services. Student shall be allowed to access these hours through the 2016-2017 school year. Morgan Hill shall reimburse Parent at the federal mileage rate for transportation costs for one round trip per session.

6. As compensation for Morgan Hill's failure to offer and provide Student appropriate occupational therapy services during the 2013-2014 school year as evidenced by his loss of writing skills, Student is entitled to an independent educational evaluation in the area of fine motor skills to determine what type and level of occupational therapy services he requires. No award of compensatory education is made for occupational therapy as Student failed to introduce any evidence as to whether his skills regression resulted from insufficient services in terms of frequency or duration or from otherwise inappropriate services. Parent shall choose the evaluator in accord with Morgan Hill's independent educational evaluation criteria. Morgan Hill shall fund the presence of the assessor at an IEP team meeting to discuss the results and shall consider the results of the assessment when formulating its IEP.

ORDER

1. Within 45 days of this Decision, Morgan Hill shall begin to provide Student with 39 hours of individual language therapy services and 19.5 hours of language therapy consultation by a certified speech language pathologist to address Student's language needs including the areas of expressive and receptive components of understanding and producing sentences, understanding logical relationships in the meanings of associated words, and vocabulary. These hours shall be in addition to any language therapy provided by Student's IEP. Student's direct language services shall be

delivered in 30-60 minute increments, up to twice per week. The direct language therapy services shall be provided outside of Student's regular school day, unless the parties agree otherwise, and may be provided in both the regular school year and extended school year. These hours shall be completed by December 31, 2016. Morgan Hill shall reimburse Parent at the federal mileage rate for transportation costs for one round trip per session.

2. Within 30 days of Parent providing Morgan Hill with the name and contact information of a certified nonpublic agency or credential special education teacher, Morgan Hill shall contract with the identified provider for the provision of 107.5 hours of academic tutoring in the areas of reading, math, spelling, and writing. The timing and delivery of the academic instruction shall be coordinated between Parent and the provider. Student shall be allowed to access these hours through the end of the 2016-2017 school year, and Morgan Hill shall reimburse Parent at the federal mileage rate for one round trip per session.

3. Within 60 days of this Decision, Student shall provide Morgan Hill with the names of a qualified assessor to conduct an independent occupational therapy evaluation. Within 30 days of Student's identification of a qualified and available assessor, Morgan Hill shall contract with and directly pay the assessor for the independent assessment. Morgan Hill shall reimburse Parent at the federal mileage rate for related transportation costs, although Morgan Hill will not be required to pay for travel costs in excess of 150 miles from Morgan Hill, if the chosen assessor is located outside of that geographic area.

4. Morgan Hill shall fund the presence of the independent assessor at an IEP team meeting to review the results of the independent assessment. This IEP team meeting shall be convened within 30 days of receipt of the independent assessment and Morgan Hill shall consider the results of the assessment when formulating Student's IEP.

5. Student's additional requests for relief are denied.

PREVAILING PARTY

Pursuant to California 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. Student prevailed as to Issues 1(a), 3, 4(a) and (c). Student partially prevailed as to Issue 4(b) for the 2013-2014 school year. Morgan Hill partially prevailed as to Issue 4(b) for the 2014-2015 school year, through April 29, 2015. This Decision did not reach Issue 1(b) or Issue 2.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, 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: August 17, 2015

_____/s/
THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings