

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT.

OAH Case No. 2015050320

DECISION

Administrative Law Judge Dena Coggins heard this matter in Foster City, California, on November 3, 4, and 5, 2015.

Attorney Susan Foley represented Student at the hearing. Sonia Melgoza, paralegal assistant to Ms. Foley, attended each day of hearing. Parents attended each day of hearing. Student was not present.

Attorney Laurie Reynolds represented San Mateo-Foster City School District at the hearing. John Bartfield, San Mateo-Foster City's Director of Special Education, attended each day of hearing.

At the conclusion of the hearing, the matter was continued to November 30, 2015, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

ISSUES¹

1. From April 30, 2013, through November 3, 2015, did San Mateo-Foster City deny Student a free appropriate public education by failing to find her eligible for special education as a student with a specific learning disability and other health impairment, and offer her an individualized education program?

2. From April 30, 2013, through June 30, 2015, did San Mateo-Foster City deny Student a FAPE by failing to meet its child find obligation by not offering Student an assessment plan when:

- a. San Mateo-Foster City was on notice of Student's deficits and disabilities; and
- b. Parents raised concerns of Student's needs not being met within her educational setting?

3. Did San Mateo-Foster City deny Student a FAPE when it failed to provide Parents with a copy of their rights and procedural safeguards when Parents provided San Mateo-Foster City a copy of Student's private assessment and asked for information regarding services and supports on May 13, 2013?²

4. Did San Mateo-Foster City deny Student a FAPE by failing to release all of her educational records, specifically e-mails, pursuant to her request on June 24, 2015?

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² Issue Three was amended at hearing after both parties were heard on the proposed amendments.

SUMMARY OF DECISION

Student generally contends that she was denied a FAPE by San Mateo-Foster City because she has been eligible for special education since at least April 30, 2013, as a student with a specific learning disability and other health impairment, and that an IEP should have been developed for Student. Student also contends that San Mateo-Foster City committed procedural violations resulting in a denial of FAPE by failing to offer her an assessment plan prior to June 30, 2015, failing to provide Parents with a copy of their rights and procedural safeguards, and failing to release all of her education records as requested by Student. San Mateo-Foster City denies it committed the alleged procedural violations and contends Student has never been eligible for special education under the Individuals with Disabilities Act and the California Education Code; and, therefore, Student should not be entitled to relief.

This Decision holds that Student did not establish that she was eligible for special education during the contested time period. Student did show that San Mateo-Foster City committed procedural violations by not meeting its child find obligations and failing to provide Parents with a copy of their rights and procedural safeguards. However, those procedural violations did not result in a denial of FAPE because Student failed to establish she was eligible for special education and related services at the time the violations occurred.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is a 12-year-old girl who has not been found eligible for special education and related services. Student resides with her Parents and younger sibling within the educational boundaries of San Mateo-Foster City at all relevant times.

HIGHLANDS ELEMENTARY SCHOOL (KINDERGARTEN THROUGH THIRD GRADE)

2. Student attended Highlands Elementary School from kindergarten (2008-2009 school year) through fourth grade (2012-2013 school year). Highlands is a public school within the boundaries of San Mateo-Foster City.

3. During kindergarten, Student did well academically, meeting or exceeding all grade level standards in language arts and mathematics. During first grade, Student began to display difficulty with focus and required redirection to remain on task. That school year, Student began seeing a therapist at Children's Health Council because Parents believed she was displaying signs of anxiety while school was in session. Student continued receiving counseling at Children's Health Council until 2012 to address her feelings of anxiety and behavior issues that occurred when Student was at home. According to Parents, Student was diagnosed with an attention deficit hyperactivity disorder by Children's Health Council between 2010 and 2012, and underwent medication trials of Ritalin and Zoloft, both of which were discontinued by Parents. Despite these challenges, by the end of first grade, Student met all grade level standards except for one writing standard and one speaking standard, for which Student was approaching grade level standards. Overall, Student excelled at math and reading.

4. By the beginning of second grade, Mother became concerned Student was experiencing anxiety about school. Student's private therapist made recommendations that Mother provided to Student's teacher. Examples of the therapist's recommendations included providing firm and clear instructions and reminding Student to take deep breaths if worried. Student continued to struggle with focus and inattention, but she did not display anxiety symptoms at school. She continued to meet or exceed all grade level standards.

5. Student participated in the state's Standardized Testing Reporting (STAR) program in the spring of her second grade year. The STAR tests measure the progress of

students in meeting California academic content standards that describe what all students should know and be able to do at each grade level. Student's STAR results indicated she was proficient in English-Language Arts, which included testing in areas such as reading comprehension, writing conventions, and writing strategies. Likewise, Student performed at a proficient level in Mathematics. A score of proficient means Student met grade level standards in that area.

6. Throughout her third grade year, Student was meeting all grade level standards in language arts, reading, writing/written and oral language conventions, and listening/speaking. In mathematics, Student was approaching or meeting grade level standards. Student's STAR test results during her third grade year indicated Student continued to perform at a proficient level in English-Language Arts and Mathematics.

2013 PSYCHOEDUCATIONAL ASSESSMENT REPORT AND STUDENT'S FOURTH GRADE SCHOOL YEAR

7. During Student's fourth grade year, Mother observed Student avoiding homework. Homework time was a struggle for Student. Mother worked with Student on her homework for many hours each night. During that time, Student was anxious, bit her nails down to the cuticles, cried, curled into a ball, and screamed at Mother. There was no indication that Student exhibited these behaviors at school. Parents obtained a tutor for Student two days per week for sessions that lasted between one hour and one hour and a half. The purpose of the tutor was to give Mother a break and out of a concern that Mother and Student were forming a bad relationship because of the struggles Student endured while Mother tried to help Student with her homework. Mother shared her concerns about Student's homework struggles with Student's fourth grade teacher Cassandra Hauseur.

8. During her first term in fourth grade, Student struggled with attention and focus, and she was not meeting grade level standards for most language arts and

mathematics standards. However, by the second term, she had begun to focus more and was approaching or meeting all grade level standards in language arts and mathematics.

9. Parents decided it would be beneficial for Student to undergo a psychoeducational assessment by Linda Maheras. Ms. Maheras, a licensed educational psychologist, received her bachelor's degree in Psychology from California State University, Stanislaus in 1989. She received a master's degree in Educational Psychology from University of California, Davis in 1992. She has been an educational psychologist for 23 years, working primarily with children between the ages of five and 18. She worked as a school psychologist in public schools for 13 years before transitioning into a full time private practice in San Mateo. As a school psychologist, Ms. Maheras participated in approximately 2,000 IEP meetings, administered assessments, provided counseling, and made classroom observations.

10. Ms. Maheras' assessment of Student was conducted over three days in December 2012. On December 4, 2012, Father informed Ms. Hauseur by e-mail that Student would be absent from class on two separate days because Student was being assessed to make sure she did not have any "latent learning disabilities."

11. The following month, on January 31, 2013, Father again emailed Ms. Hauseur. In the e-mail message, Father reminded Ms. Hauseur that Student was being assessed, and he expressed concern about Student's academic performance. Father indicated that he left a teacher survey form in the office for Ms. Hauseur to complete as part of the assessment process. Ms. Hauseur completed the Teacher's Report Form about Student on or about February 4, 2013. On the form, Ms. Hauseur indicated she knew Student very well. Ms. Hauseur stated that Student was performing at grade level in math, spelling, reading, writing, science, and social studies, but expressed concerns about Student's ability to focus and follow directions in class. Ms. Maheras received and

used Ms. Hauseur's completed form in preparing her psychoeducational assessment report.

12. The psychoeducational assessment conducted by Ms. Maheras was completed in February 2013, and evaluated Student in the areas of intellectual functioning, information processing (memory and learning), academic achievement, and social-emotional functioning. Ms. Maheras' assessment consisted of a review of Student's education records, an interview with Student and Parents, review of the Teacher's Report Form completed by Ms. Hauseur, review of a health and development questionnaire completed by Parents, and formal assessments of Student. Ms. Maheras did not complete a classroom observation of Student, finding it unnecessary because she received information about Student from Ms. Hauseur on the Teacher's Report Form and based on her understanding that Children's Health Council had already assessed and treated Student's attention and focus issues.

13. During Ms. Maheras' testimony she credibly explained all of the formal tests she administered, the areas each test covered, and Student's performance on each test. Ms. Maheras is qualified to administer and interpret Student's test results based on her education, training, and work experience. However, certain areas of Ms. Maheras' report and testimony were not given much weight, as discussed more fully below.

14. Ms. Maheras interviewed Parents for about 30 minutes as part of Student's assessment. Parents discussed their concerns about Student's increased feelings of stress and avoidance of homework as well as Student's handwriting struggles, loss of focus, impulse control, disorganization and Student's lack of confidence in her own abilities. During testing, Ms. Maheras observed Student to be frequently restless, easily bored, and her attention and ability to focus on various types of information was variable.

15. Ms. Maheras gave Student the Wechsler Intelligence Scale Fourth Edition

(WISC-IV), which evaluated Student's intellectual functioning in four specified cognitive indexes: verbal comprehension (tests requiring auditory comprehension and communication); perceptual reasoning (primarily nonverbal measures emphasizing visual processing and visual problem solving); working memory (measures the ability to maintain information in short-term and working memories); and processing speed (primarily visual-motor speed of processing). Student received a General Ability Index (GAI) score of 99, which indicates overall intellectual functioning in the average range.³

16. Ms. Maheras administered the Wechsler Individual Achievement Test – Third Edition (WIAT-III) to test Student's academic achievement.⁴ Student received the

³ Ms. Maheras noted that the estimate of Student's full scale score for intellectual ability on the WISC-IV cannot be interpreted meaningfully and should be deemphasized because Student displayed considerable variability among the four Indexes (26 points); therefore, Student's GAI score of 99 was used as the benchmark for her intellectual ability. Ms. Maheras found a significant difference between the coding subtest and the symbol search subtest results, which made up the Processing Speed Index. She admitted the WISC-IV provides another test, the cancellation test, that can be given to a student in this situation but she "just did not do it." If she had, the Processing Speed Index score may have been different. It is also important to note that Ms. Maheras' report refers to a GAI score of 98 under the Ability-Achievement Discrepancy section. However, this seems to be a typographical error.

⁴ In addition, to the WISC-IV and WIAT-III, Ms. Maheras administered the Wide Range Assessment of Memory and Learning 2; Developmental Neuropsychological Assessment II; Rey Complex Figure Test and Recognition Trial; Process Assessment of the Learner Second Edition; Test of Written Language Fourth Edition; Child Behavior Checklist; and Beck Youth Inventories Second Edition.

following scores: Listening Comprehension (116), Oral Expression (111), Oral Language Composite (116), Sentence Composition (97), Essay Composition (80), Spelling (87), Written Expression Composite (85), Reading scores ranging from 83 in Basic Reading and Psuedoword Decoding, to 112 in Reading Comprehension, and Mathematics scores ranging from 92 in Math Fluency – Addition, to 102 in Math Problem Solving.

17. In California, a school district may determine that a child has a SLD by using a severe discrepancy method, wherein a severe discrepancy is demonstrated by comparing standardized achievement and ability test scores and finding that they are more than 1.5 standard deviations apart. (See Ed. Code, § 56337, subd. (b); Cal. Code Regs., tit. 5, § 3030, subd. (j).) Using a standard deviation of 15, a 1.5 standard deviation would be a difference of 22.5 points. (*Ibid.*) Thus, a severe discrepancy may be shown by test scores that are 22.5 points or more apart, however, applying the standard error of measurement to the scores obtained by test takers may result in a discrepancy as low as 18 points being considered a severe discrepancy. (*Ibid.*) In this case, there was no testimony establishing that a severe discrepancy for Student was anything other than 22.5 points.

18. In Ms. Maheras' assessment report, she makes no mention of a severe discrepancy. She did not numerically calculate whether a severe discrepancy existed between Student's intellectual ability and achievement scores. Ms. Maheras relied on the predictive difference (regression) method, a computer program that calculates the predicted and actual achievement analysis. The predictive method looks at a person's IQ and makes predictions of the level of achievement a child should be able to achieve based on the child's ability. She testified that under the predictive method, Student had "discrepant areas" in reading, spelling, and written expression. Ms. Maheras relied exclusively on this computer program and did not independently interpret or independently analyze the data to determine whether a discrepancy existed. In her

report, Ms. Maheras did not find a severe discrepancy existed between Student's intellectual ability score and academic achievement scores.

19. In her report, Ms. Maheras did not conclude Student had a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, and she did not conclude Student met the eligibility criteria for OHI or SLD. In her report, Ms. Maheras did opine that Student demonstrated weaknesses in visual spatial reasoning ability (discriminating between objects; synthesizing elements into a meaningful whole; and understanding the location, directionality, and relationship of objects in space), orthographic processing (short term visual memory and retrieval), and her capacity to process phonemic information (decoding and spelling unknown words), but did not indicate these weaknesses amounted to a disorder in one of the basic psychological processes.

20. In Ms. Maheras' report, she found that Student continued to meet diagnostic criteria of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV) for ADHD. According to Ms. Maheras, Student's symptoms have been present for over six months and onset before the age of seven. In addition, she found the degree of these symptoms to be inconsistent with Student's developmental level and "severely impacting directly on [Student's] social and academic functioning." Ms. Maheras opined that Student's attention skills are "clearly impacting her performance in the school setting and also in the home setting especially when completing schoolwork." Ms. Maheras did not base this finding on an observation of Student while in the classroom; rather, these opinions were based on Parents' input and her clinical observations of Student. Ms. Maheras did not have sufficient information to support her opinions about Student's ADHD symptoms and their impact on Student's academic functioning in the school setting. San Mateo-Foster City did not challenge Ms. Maheras' ADHD diagnosis or that Student continued to exhibit those symptoms during all relevant periods,

although San Mateo-Foster City did not agree that these symptoms were interfering with Student's academic functioning.

21. The report also found that Student met the diagnostic criteria of the DSM-IV for dyslexia (a reading disorder) and dysgraphia (a disorder of written language). Ms. Maheras' diagnosis of dyslexia was based on Student's weaknesses in accuracy and rate of word decoding, word reading, and spelling, which she reports is seen in children diagnosed with dyslexia. Ms. Maheras' diagnosis of dysgraphia was based on Student's "severe impairment" in spelling skills.

22. While Ms. Maheras provided many recommendations and strategies to assist Student in her areas of weakness, Ms. Maheras did not conclude in her report that Student needed special education and related services that could not be provided with modification of the regular school program. In fact, Ms. Maheras did not make a specific finding about Student's eligibility for special education whatsoever. Instead, she urged Student to share the assessment report with a "team of professionals at her school to discuss recommendations and classroom accommodations" and to determine if Student meets eligibility criteria for special education.

23. At hearing, Ms. Maheras' opinions were significantly different from her assessment report. For the first time, Ms. Maheras opined that Student met the eligibility criteria under SLD. She also testified that Student met the criteria for a psychological processing disorder in attention, auditory processing, and visual processing, which manifested itself in Student's ability to use language in written expression and involving her capacity to do academics. These opinions were given little weight because Ms. Maheras' testimony differed so significantly from the findings she made in her detailed assessment report, which she drafted close in time to Student's assessment and her clinical observations, and she did not establish that information contained in her report supported her new opinions.

24. Heather Gomez, Highlands' principal from 2013 to 2015, testified at hearing. Ms. Gomez received her bachelor's degree in Kinesiology in 1996 and a master's in Educational Leadership in 2007. She obtained a multiple subject teaching credential in 1997, a single subject teaching credential in English in 2007, and an administrative credential in 2011. Before becoming Highlands' school principal, Ms. Gomez was an elementary and middle school teacher for San Mateo-Foster City for nine years and a vice principal for two years. Her duties as a school principal included supervising teachers and school facilities, business management, discipline, and work on school curriculum. Her duties relating to special education included overseeing and supervising special education teachers and being on IEP teams and Student Study Teams (SST).

25. Ms. Gomez credibly testified that almost all of the accommodations and strategies recommended by Ms. Maheras were available through general education. Ms. Maheras' suggested accommodations included providing Student with extended time on class and standardized tests, a low distraction environment to complete her exams, assistance with note taking, access to Franklin Speller or use of a word processing spell checker, providing a quiet place in the classroom where Student can work on a difficult task, assisting Student with staying on topic during a class discussion, meeting with a teacher on a regular basis to review work, and providing extra practice with irregular words emphasizing the irregular elements. The two recommendations that were only available through a 504 plan or IEP were for a reader if Student is unable to independently read the passages on an exam and specific accommodations for Student when learning a foreign language. However, the evidence did not establish that Student needed either of these two accommodations during the time periods at issue in this case.

26. By the end of her fourth grade year, Student continued to make

educational progress and her report card indicated she was approaching or meeting all grade level standards. Student's STAR test results during her fourth grade year indicated Student was advanced in both English-Language Arts and Mathematics. The STAR results also indicated that Student's narrative writing addressed most of the writing task; demonstrated a general understanding of purpose; maintained mostly consistent point of view, focus, and organizational structure, including paragraphing when appropriate; presented a central idea with mostly relevant facts, details, and/or explanations; contained errors in the conventions of the English language (grammar, punctuation, capitalization, spelling), but those errors did not interfere with the reader's understanding of the writing; and provided an adequately developed sequence of significant events to relate ideas, observations, and/or memories.

PARENTS PROVIDE ASSESSMENT REPORT TO SAN-MATEO FOSTER CITY

27. On April 17, 2013, Father sent an e-mail message to Ms. Hauseur and Ms. Gomez informing them that Student had been assessed by Ms. Maheras. Father attached a summary of the assessment report to the e-mail, which Father put together by copying and pasting portions of the report into the attached document. The summary contained Ms. Maheras' diagnoses and suggested accommodations and strategies. Ms. Hauseur was already implementing some of the suggestions, including providing additional time and a quiet environment for Student, and was willing to implement some of Ms. Maheras' other suggestions immediately. Ms. Hauseur proposed a formal SST meeting to write a plan that would allow Student to have the recommendations and strategies implemented going forward, so that Student would receive the help that she needed.⁵

⁵ An SST meeting is a meeting with a school team and a general education student's parents to discuss concerns about the student's learning or performance in

28. The following day, April 18, 2013, Father responded to Ms. Hauseur, and copied Ms. Gomez, stating that Parents wanted to pursue two tracks: "1) Understand what services are available from the public school for children like [Student] with diagnosed material learning differences 2) Investigate specialty schools/programs that focus on children with LD." Father informed Ms. Hauseur and Ms. Gomez that Parents were considering sending Student to Charles Armstrong, a private school for students with language based learning disabilities, including dyslexia, for the upcoming school year. Father requested Ms. Hauseur complete the Current Teacher Information form attached to the e-mail message in support of Student's application to the school.

29. The same day, Griffith Montgomery, resource specialist at Highlands, and Jennifer "Wini" McMichael, school psychologist at Highlands, received forwarded copies of the e-mail correspondence between Father, Ms. Hauseur, and Ms. Gomez. Ms. McMichael sent an e-mail to Mr. Montgomery about Student and Ms. Maheras' assessment report. In the e-mail, Ms. McMichael acknowledged Father asked about what services were available for Student, but she believed that Father's e-mail was not an "overt request for assessment." After receiving the forwarded e-mail, Ms. McMichael did not believe Student was eligible for special education at that time because she had not received enough information about Student to indicate special education eligibility.

30. Ms. McMichael was a school psychologist for San Mateo-Foster City from 2006 to June 2015. She now works for San Mateo-Foster City as a wellness coordinator. Prior to her San Mateo-Foster City employment, Ms. McMichael was a school psychologist intern for another school district. She received a bachelor's degree in Communications and a master's degree in School Psychology. She has a Pupil Personnel

school and to generate a plan to address those concerns. An SST meeting could lead to a request for special education assessment of a student.

Services credential in school psychology and school counseling, and a preliminary administrative credential. Her duties as a school psychologist included administering psychoeducational assessments, consulting and collaborating with parents, students and school staff teams focused on helping students, writing behavior intervention plans, participating in manifestation determinations, and attending IEP meetings in a leadership role while educating parents and staff members about the special education process and eligibility. Ms. McMichael actively participated in making special education eligibility determinations. She has conducted approximately 500 psychoeducational assessments.

MAY 13, 2013 SST MEETING

31. On May 13, 2013, an SST meeting was convened. SST members that attended the meeting were Ms. Gomez, Ms. McMichael, Mr. Montgomery, and Parents. Ms. Hauseur did not attend the meeting per Parents' request.

32. At the SST meeting, SST members discussed Ms. Maheras' report and Parents discussed Student's homework struggles. Parents agreed to provide Ms. Maheras' full assessment report to the team, which they did that day or the following day. SST members agreed to implement Ms. Maheras' accommodations and teaching strategies and to reconvene at some point in the future to assess the effectiveness of the accommodations.⁶ No discussion of an assessment plan for Student occurred at the meeting, and no witness testified that there was an understanding at the SST meeting that an assessment plan would be sent to Parents in the future. Parents did not receive a copy of their rights and procedural safeguards under the Individuals with Disabilities

⁶ Father contended Parents never received the meeting notes, and disagreed that there was ever a discussion about the team meeting in the future. Even if there was a discussion of another SST meeting in the future, that meeting never occurred.

Education Act at the SST meeting.

MAY 17, 2013 ASSESSMENT PLAN

33. On May 17, 2013, Ms. McMichael drafted a letter to Parents that referenced an assessment plan that she enclosed with the letter. Also, Ms. McMichael enclosed a Notice of Procedural Safeguards, developmental inventory questionnaire, and behavior rating forms. Nevertheless, Ms. McMichael has no specific recollection of mailing the letter, but believes she did so because it would have been her standard practice to mail the letter once the letter was drafted. Parents persuasively testified that they did not receive the letter, assessment plan, or any of the other enclosures. Parents continued to interact with school personnel regarding both Student and her sister, and at no time did anyone follow up with them about the assessment plan, even though it was San Mateo-Foster City's typical practice to follow up if an assessment plan was not returned. Parents would not have followed up because up to that point there had been no discussion with them about a proposed assessment plan. In light of the fact that Ms. McMichael had no specific recollection of sending the letter and never followed up regarding its return, and that Parents emphatically denied receiving it, the weight of the evidence established that it was not received.

ENROLLING AT ATHENA ACADEMY

34. At the end of March or in early April 2013, Parents contacted Charles Armstrong School and began the application process. Charles Armstrong is a private school for students with language based learning disabilities, including dyslexia. Student's application materials included a Current Teacher Information form about Student that was completed by Ms. Hauseur on or about April 18, 2013, at Parents' request. On the form, Ms. Hauseur expressed concerns about Student's focus difficulties in class and her belief that Student would benefit from a reduced class size. Charles

Armstrong School staff conducted observations and informal assessments of Student in June 2013.

35. Despite the concerns raised by Ms. Hauseur in the Current Teacher Information form, by the end of her fourth grade year, Student's report card showed she had vastly improved in all academic areas. She was approaching or meeting grade level standards in reading, writing/written and oral language conventions, listening/speaking, and mathematics.

36. Student was not admitted to Charles Armstrong because the school had no available openings. Parents enrolled Student in Athena Academy, and informed San Mateo-Foster City that Student would not be returning for the 2013-2014 school year by sending an e-mail to the Highlands' office.

37. Athena Academy is a non-profit private school devoted to educating children with dyslexia and concurrent ADHD, and other related language-based learning disorders. Athena Academy is located in Palo Alto, California, and currently serves 50 students from first through eighth grade. Shama Hinard testified at hearing about Athena Academy. Ms. Hinard is the Associate Head of School at Athena Academy. She has a bachelor's degree in Education and had a multiple subject general education teaching credential that expired in 2003. Ms. Hinard has never had a special education teaching credential.

38. At Athena Academy, in the elementary school grades, the teacher/student ratio is 1-to-6. In middle school, the teacher/student ratio is 1-to-8. Daily language arts and mathematics blocks are 80 minutes each, and provide students with one-on-one time with their teacher. Student received instruction in art, physical education, music, technology, drama, and social/emotional functioning, in addition to her core academic classes. An Athena Academy teacher meets with students once a week to teach social/emotional skills for 55 minutes and is available during recesses. Ms. Hinard

testified that all students, and especially Athena Academy students with learning challenges, need some support around how to express themselves, communicate, and solve problems with peers.

39. Student began fifth grade, during the 2013-2014 school year. Ms. Hinard opined that Student struggled with putting ideas together and being able to share her ideas and organize her thoughts at that time. According to Ms. Hinard, having Student in a small class helped Student with these struggles. Ms. Hinard's opinions about Student's struggles were given little weight, as Ms. Hinard was not one of Student's teachers at Athena Academy and it is not clear she observed Student in the classroom setting on a regular basis.

40. In the fifth grade, Student's teacher was Katherine Peckham. Student did not establish that Ms. Peckham held a special education teaching credential. Student's fifth grade report card showed Student making progress toward, meeting, or being consistently above grade level standards in reading, writing, and mathematics, based on end of the year expectations.⁷ First semester comments on Student's report card noted that Student "reads well aloud and with great expression," and in mathematics, Student "does well working independently when asked and finishes work in an appropriate amount of time."

41. During Student's fifth grade year, Ms. Peckham administered the Developmental Reading Assessment for her students, including Student, to assess their reading ability. Student's DRA results were contained in an Individual Student Plan for

⁷ The standards in the report card do not contain all state grade level standards. Rather, some standards for equivalent grade levels, have been removed from the report card or the language of the standards were edited to focus on what Athena Academy students were working on in their respective classrooms.

the 2013-2014 school year. Athena Academy staff members are trained to administer the DRA by a neuropsychologist affiliated with Athena Academy. The Comprehensive Mathematics Ability Test (CMAT) was administered to students to assess Student's mathematical ability. No standard scores for those assessments were admitted into evidence, however, Student's grade level equivalents improved during the year, and Student's reading assessment at the end of the year showed she had a late fifth/early sixth grade level equivalent and had surpassed the year end goal set for her. The same was true of her math assessment results — Student's grade level equivalent improved during the year, and her math assessment results at the end of the year showed she was performing at a late sixth/beginning seventh grade level equivalent and had surpassed the year end goal set for her. Student's improvements were not the result of special education, as Student did not establish she was receiving special education during her fifth grade year at Athena Academy or that she received instruction from a special education teacher. Student failed to establish that she needed specialized instruction in order to receive educational benefit.

42. In sixth grade, during the 2015-2016 school year, Student remained in a classroom with a teacher/student ratio of 1-to-6. Student did not provide any evidence that her teachers in sixth grade had special education teaching credentials. By the end of her sixth grade year, Student was meeting nearly all reading, writing and mathematics standards. Similar to her DRA assessment results during her fifth grade year, Student's grade level equivalent improved during the year, and she met the year end goal set for her. Likewise, her mathematics assessment results steadily improved throughout the year, and she also met the year end goal set for her in mathematics. Student did not establish that she received special education during her sixth grade year at Athena Academy or that she needed specialized instruction in order to receive educational benefit.

43. Student is currently in seventh grade. Colleen Farley, Student's language arts teacher, testified at hearing. Ms. Farley received a bachelor's degree in U.S. History in 1998 and a multiple subject teaching credential in 2000. She received a master's degree in Interdisciplinary Education, with a reading emphasis, and a reading specialist credential in 2006. She is a National Board Certified Teacher. She has been a teacher in public and private schools for the last 15 years, and is in her second year of teaching at Athena Academy. At the time of hearing, Ms. Farley had been teaching Student for two months. She has never had a special education teaching credential.

44. In addition to low teacher/student ratios, Ms. Farley considered Athena Academy different from a school with general education classes because of the 80-minute blocks of time provided to students for instruction, and one-to-one instruction that is provided to students each day. Ms. Farley opined that Student needs frequent check-ins to make sure she is staying on task and stressed the importance of having Student in a classroom with a small class size.

45. Ms. Farley believes that Student has made progress during Student's time in Ms. Farley's class, and opined that Student could learn in a "public school classroom" with accommodations, although it is not clear whether she meant in a general education or special education setting. The accommodations she discussed were frequent check-ins with her teacher to make sure she is on task and understands what is expected of her, assistive technology (i.e. audio books), additional time in class and extended time for homework, flexibility on assignment due dates, one-to-one time outside of class with her classroom teacher or resource teacher to practice reading aloud instead of while in class, low teacher/student ratios, and small group discussions in the classroom. Ms. Gomez testified that all of these accommodations are available to general education students at Highlands. Ms. Gomez did not state whether low teacher/student ratios were an accommodation that could be made for general education students, but she did

indicate that one-on-one time with teachers was available and frequently provided to general education students.

46. Linda Lau, Student's mathematics teacher, also testified at hearing. Ms. Lau received a bachelor's degree in Cognitive Science in 1997, and a master's degree in Education in 1998. Ms. Lau has a California teaching credential in mathematics. She has been teaching mathematics for about eight years, and has been a teacher at Athena Academy since 2014. She has never had a special education teaching credential.

47. Ms. Lau began teaching Student during the 2014-2015 school year. Ms. Lau explained Student needs additional time to make sure she can process and understand reading, check-ins, and prompts to redirect her behavior. Ms. Lau recommended one-on-one instruction for about five minutes per day per class with a teacher, extra time on tests and reading assignments, and instruction in organization for Student to benefit from her education. As discussed above, Ms. Gomez indicated that these accommodations are available, and have been provided, to general education students at Highlands. Ms. Lau opined that Student is performing at grade level in mathematics based on state standards in math and Student's assessment results at Athena Academy.

48. In Fall 2015, Athena Academy staff conducted formal and informal assessments to determine each student's individual strengths and areas of need, and provided test result summaries to students. No standard scores for those assessments were admitted into evidence, but grade level equivalents, for Fall 2015, showed Student's reading assessment results to be below grade level. Student's mathematics assessment results were at or above grade level for all mathematical subject areas, except math operations. These assessment results were based on Student's performance on new math and reading assessment tests. For the first time while Student was enrolled at Athena Academy, the school used the Gray Oral Reading Test to assess Student's

reading and reading comprehension abilities, and KeyMath to assess Student's mathematical ability. Student's assessment results during the beginning of her seventh grade year cannot be used to reliably compare her assessment results in fifth and sixth grade because different assessments were administered. Ms. Hinard testified that the GORT is a more stringent examination than the DRA. Many Athena Academy students received lower scores on the GORT as compared to the DRA, so Ms. Hinard did not consider the decreased scores to be evidence of regression over the summer. At the time of hearing, Student had not received report cards for the 2015-2016 school year.

49. Briana Barrett has been a school psychologist at three different San Mateo-Foster City elementary schools since 2014. Her primary duties include completing psychoeducational assessments and triennial psychoeducational evaluations and helping to implement and monitor behavioral supports for students. Ms. Barrett received a bachelor's degree in Psychology in 2007 and a master's degree in Educational Psychology and a Pupil Personnel Services credential from Loyola Marymount University in 2010. She worked at Los Altos School District in two therapeutic special day classes providing individual and group counseling for students with a wide range of emotional and behavioral disorders during her first year as a school psychologist. The next three years, she worked in the Cupertino School District at three different elementary schools completing psychoeducational assessments and triennial evaluations. Ms. Barrett has completed approximately 200 psychoeducational assessments, and of those, approximately 100 assessments involved application of the specific learning disability criteria. Ms. Barrett appeared credible at hearing and her testimony was given great weight.

50. Ms. Barrett asked for, and reviewed, the standard scores for Student's GORT and KeyMath assessments because Ms. Barrett believed those scores to be more statistically reliable than the grade level equivalents provided to Parents. Ms. Barrett

found Student's standard scores on both assessments to be in the average range.

SAN MATEO-FOSTER CITY'S 2015 PSYCHOEDUCATIONAL ASSESSMENT OF STUDENT

51. On June 30, 2015, San Mateo-Foster City provided Parents an assessment plan offering to assess Student's eligibility for special education services and present levels of academic performance and functional achievement. The proposed evaluation areas were in academic achievement, health, intellectual development, motor development, social/emotional, and adaptive/behavior. Parents consented to the assessment plan by signing the document on the same day.

52. San Mateo-Foster City conducted a psychoeducational assessment of Student on October 6 and October 9, 2015. The assessment report was completed on October 26, 2015. Ms. Barrett and Megan Viera assessed Student.

53. In preparing her assessment report for Student, Ms. Barrett reviewed Student's records from Athena Academy, including report cards from Athena Academy, Ms. Maheras' assessment report, and Student's fourth grade report card from Highlands; observed Student in class at Athena Academy; administered direct assessments to Student; and reviewed input provided by Parents. Ms. Barrett did not have access to Student's cumulative file from Highlands, as the school was out of session during Ms. Barrett's assessment period. Ms. Barrett relied on Ms. Maheras' report to gather information about Student's educational records from kindergarten through third grade. Ms. Barrett testified that as the school psychologist for San Mateo-Foster City, if she learned that parents are concerned about their child possibly having a learning disability and considering sending their child to Charles Armstrong, this would trigger her to provide an assessment plan for the child. If the assessment plan was provided to parents and she did not receive a response, this would typically trigger her to follow-up with parents.

54. During Ms. Barrett's 60-minute observation of Student in her math classroom, she found Student to be attentive, followed along, engaged in the lesson and work she was completing, task oriented, and finished her homework within the class period. Ms. Barrett observed Student calling out on occasion in class, but this appeared to be the norm, as other students were also calling out. Student fidgeted with her pencil and seemed a bit restless, but overall, did not need redirection to return to the task at hand. Student had positive interactions with her peers and her behavior was not remarkable.

55. Ms. Barrett administered the NEPSY-II, a comprehensive instrument intended to assess neuropsychological development in preschool and school-aged children.

She also administered the Kaufman Assessment Battery for Children – Second Edition (KABC-II). The KABC-II assesses processing and cognitive abilities of children and adolescents aged three through 18. The KABC-II is intended to assess the general intellectual functioning in children. Student earned a Fluid-Crystallized Index (FCI) score of 107, which falls within the average range for her age. Ms. Barrett concluded that this score is commensurate with Student's GAI score of 99 on the WISC-IV when assessed by Ms. Maheras in December 2012. Because the standard scores were within one standard deviation of one another, the scores are not considered statistically different from one another. Ms. Barrett did not find that Student had a deficit in one or more of the basic psychological processes and she did not find Student needed special education to access her education. Her testimony at hearing was consistent with her findings in her assessment report.

56. Ms. Viera administered the WIAT-III to assess Student's academic achievement, which is the same test Ms. Maheras administered in 2013. Ms. Viera is a special education teacher for San Mateo-Foster City. She has a bachelor's degree in

Interior Design with an emphasis in designing spaces for children with special needs and a minor in psychology, which she received in 2008. She also received a master's degree in Special Education and has a mild/moderate special education credential, which she received in 2012. She has been working with children with special needs for seven years, and for the last three years she has been a resource teacher for San Mateo-Foster City. Her duties include working with children with IEP's, implementing IEP goals, and administering formal assessments. She has conducted more than 50 assessments, which includes assessments she administered while student teaching.

57. Student's achievement scores on the WIAT-III ranged from 89 in mathematics to 111⁸ in written expression. More specifically, Student received the following scores: Oral Language Composite (109), Listening Comprehension and Oral Expression (108), Total Reading Composite (92), Reading scores ranging from 83 in Pseudoword Decoding to 102 in Word Reading, Written Expression Composite (111), Essay Composition (115), Sentence Composition (128), Spelling (84), Mathematics scores ranging from 89 for Mathematics Composite and Numerical Operations to 96 in Math Fluency – Subtraction. While Student improved in written expression from 2013 to 2015, there was a difference of 24 and 23 points, between her FCI score of 107 and her subtest scores in pseudoword decoding (standard score 83) and spelling (standard score 84), which were used as part of the calculation in determining Student's written expression composite score. The pseudoword decoding subtest required Student to read nonsense

⁸ Ms. Viera testified that she made a calculation error in adding the essay composition subtest score. The essay composition standard score should have been 115, not a score of 117, as it appeared in the assessment report. Based on this error, the Written Expression Composite score should have been 111, not a score of 112, as it appeared in the assessment report.

words aloud. Neither pseudoword decoding nor spelling alone are areas to be used to determine severe discrepancy under the eligibility criteria. Additionally, based on Student's most recent academic records presented at hearing from Athena Academy during the 2014-2015 school year, by the second semester Student met all language arts standards and excelled in student led reading and discussion. Her overall total reading and basic reading composite scores, of which pseudoword decoding is included in the standard score, are average with a standard score of 92. Ms. Viera was not concerned with Student's pseudoword decoding score, because this is not an area specifically reviewed for special education eligibility. While Student scored low average in spelling, her overall written expression composite score was high average with a standard score of 111. Her academic records from Athena Academy for the 2014-2015 school year indicate that she was making progress towards or meeting all writing standards.

58. The mathematics composite standard score is more concerning. That score indicates that Student falls within the low average range in mathematics on the assessment. However, Student did not establish whether the discrepancy between her math score of 89 and her FCI score of 107 — a difference of 18 points — was within the standard error of measurement for the specific tests used and therefore constituted a specific discrepancy. Accordingly, Student did not establish that she had any significant discrepancies between her academic achievement and her intellectual ability score of 107.

JUNE 24, 2015 EDUCATIONAL RECORDS REQUEST

59. On June 24, 2015, Student, through counsel, requested a complete copy of her educational records. The following day, Student's attorney sent a letter to San Mateo-Foster City's attorney acknowledging receipt of a set of educational records from San Mateo-Foster City's attorney. Included in the document production from the District

was the April 18, 2013 e-mail message from Ms. McMichael to Mr. Montgomery and Ms. Gomez regarding Student. Student's attorney explained in her letter to the San Mateo-Foster City's attorney that she had not received "all the print-outs of e-mails pertaining to" Student. Student's attorney requested "print-outs of all e-mails in the district's possession pertaining to" Student within five days from the date of the original records request on June 24, 2015. On July 1, 2015, San Mateo-Foster City responded by letter, through counsel, that all e-mails that were part of Student's file were provided to Student.

60. John Bartfield has been the Director of Special Education for San Mateo-Foster City since March 2012. Mr. Bartfield testified that he was advised that e-mails are not part of a student's education record unless they are printed and maintained in "any" file. Mr. Bartfield did not know specifically where e-mails regarding Student would be maintained. He recalled that a file for Student was maintained at the District office, but he was unsure whether all documents contained in the file were produced to Student. Student, however, did not provide any evidence that other education records, in the form of e-mails, pertaining to Student existed other than the e-mail provided to Student.⁹

INITIAL IEP MEETING ON OCTOBER 26, 2015

61. An initial IEP meeting for Student was convened on October 26, 2015. The IEP meeting was attended by Parents, Ms. Foley, Ms. Melgoza (paralegal for Ms. Foley), Ms. Lau, Ms. Barrett, Ms. Viera, Mr. Bartfield, and Melanie Seymour (attorney for San

⁹ While Student's evidence did establish that there was e-mail correspondence between Parents and San Mateo-Foster City teachers during the relevant time period, those e-mails were equally accessible to Parents as the recipient or sender of the e-mail communication.

Mateo-Foster City). Parents were given a copy of their rights and procedural safeguards. Ms. Barrett reviewed her psychoeducational assessment results, Ms. Viera reviewed Student's academic assessment results, Ms. Lau discussed Student's present levels of performance, and Parents provided input about their concerns relating to Student's educational progress. The IEP team found that Student did not meet eligibility for special education under OHI or SLD. The IEP meeting notes indicate that "though there are prior concerns related to attention problems, hyperactivity, and private diagnoses of dyslexia and dysgraphia, at the present moment, all of [Student's] academic and processing and cognitive skills are within the average range, and all teacher rating scale reports are within normal range with the exception of hyperactivity." Hyperactivity is described as the tendency to be overly active, rush through work or activities, and act without thinking. Student's teacher scored Student in the at-risk range for hyperactivity and Father scored Student in the clinically significant range. Parents were not in agreement with the IEP team's findings.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. As the petitioning party, Student has the burden of proof by a preponderance of the evidence on all issues in this case. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [163 L.Ed.2d 387].)

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA.¹⁰

2. Jurisdiction over this matter arises under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to

¹⁰ Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

implement it. (20 U.S.C. § 1400 et seq.¹¹; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000, et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; (2) to ensure that the rights of children with disabilities and their parents are protected; and (3) to assist States, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities. (20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. 300.1, et seq.; Ed. Code, § 56000, subd. (a).)

3. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meets state educational standards, and conforms to the child's IEP. (20 U.S.C. § 1401(9)(A-D); 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, subd. (a).) 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* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Rowley*, supra, 458 U.S. at pp. 203-204.)

4. A student is eligible for special education and related services if she is a "child with a disability" such as SLD or OHI, and, as a result thereof, needs special

¹¹All references to the Code of Federal Regulations are to the 2006 version.

education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).) Students whose educational needs are due primarily to limited English proficiency; lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors, are not individuals with exceptional needs. (20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b); Ed. Code, §§56026, subd. (e), 56329, subd. (a)(2).)

SPECIAL EDUCATION ELIGIBILITY UNDER SPECIFIC LEARNING DISABILITY

5. Student contends San Mateo-Foster City denied her a FAPE by failing to find her eligible for special education as a Student with SLD, and offer her an IEP from April 30, 2013, through November 3, 2015. The District maintains that Student was not eligible for special education under an SLD classification at any relevant time.

6. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as dyslexia. (20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) A specific learning disability does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, intellectual disabilities, emotional disturbance, or environmental, cultural, or economic disadvantage. (20 U.S.C. §1401(30)(C); 34 C.F.R. §§ 300.8(c)(10)(ii), 300.309(a)(3); Ed. Code, § 56337, subd. (a).)

7. A student who is assessed as being dyslexic and who meets the eligibility criteria under the category of SLD is entitled to special education and related services.

(Ed. Code § 56337.5, subd. (a).) If a student who exhibits the characteristics of dyslexia or another related reading dysfunction is not found eligible for special education, then the student's instructional program shall be provided in a regular education program. (Ed. Code § 56337.5, subd. (b).)

8. ADHD may be an underlying condition for specific learning disability eligibility also. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder" and who meets the eligibility criteria for specific learning disability under Education Code section 56377 and California Code of Regulations, tit. 5, section 3030, subdivision (j), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

9. A school district shall determine that a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method.¹² (20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.307; Ed Code, § 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).) A severe discrepancy is defined as 1.5 standard deviations (22.5 points), adjusted for the standard error of measurement between intellectual ability test score and academic achievement test score. (*Ibid.*) When faced with discrepant testing data, "a

¹² Neither the parties nor the evidence suggested that response to intervention was at issue in this case; therefore, RTI will not be addressed in this Decision.

school district, considering all relevant material available on a pupil, must make a reasonable choice between valid but conflicting test results in determining whether a 'severe discrepancy' exists." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F. 3d 999, 1004.)

2013 Assessment Report

NO SEVERE DISCREPANCY

10. In 2012, Ms. Maheras gave the WISC-IV to Student to test Student's cognitive ability and the WIAT III to test Student's academic achievement. Student did not establish, the standard error of measurement, if any, for the tests given. Therefore, in this matter, a 22.5 point discrepancy is required in order to find a severe discrepancy. Student did not have a difference of more than 22.5 points between her cognitive ability GAI score and scores on any of the relevant academic areas. Thus, no severe discrepancy existed at that time.

11. Student relies on *Michael P. v. Department of Education* (9th Cir. 2011) 656 F.3d 1057 to support her argument that San Mateo-Foster City violated the IDEA and prevailing case law by requiring a finding of severe discrepancy for Student to be eligible for special education under the SLD classification. Student's reliance on *Michael P.*, is misplaced. In that case, Hawaii regulations in effect at the time of the student's eligibility determination conditioned special education eligibility on the existence of a severe discrepancy between academic achievement and intellectual ability without permitting use of the RTI model. (*Id.* at 1067.) The appellate court found that the Hawaii Department of Education procedurally violated IDEA by requiring use of the severe discrepancy model to determine whether a child is eligible for special education under the SLD classification. (*Ibid.*) The court held that the Hawaii Department of Education failed to fulfill its obligation under the IDEA by operating under state regulations that required the use of the severe discrepancy model and not permitting the use of the RTI

model. (*Id.* at 1067-1068.) Unlike the law in Hawaii at the time the eligibility determination was made for the student in *Michael P.*, California law permits local educational agencies to use the severe discrepancy model or the RTI model to determine whether a student has a specific learning disability. (Ed. Code, § 56337, subd. (a).) San Mateo-Foster City's reliance on the severe discrepancy model to determine whether Student has a specific learning disability is permitted under applicable state law.

12. Student relies on Ms. Maheras' conclusion that Student exhibited statistically significant differences between her predicted and actual achievement scores using the predicted difference method to argue that a discrepancy exists. However, Ms. Maheras did not independently analyze whether any discrepancy existed between Student's intellectual ability and academic achievement under the predicted difference method. Rather, Ms. Maheras relied on a computer program to analyze the data for a discrepancy between Student's predicted and actual achievement scores. Importantly, Student did not provide any authority to support her assertion that the difference found between Student's predicted and actual achievement scores by the computer program was sufficient to demonstrate a severe discrepancy under applicable state regulations. Therefore, Ms. Maheras' opinion that statistically significant differences existed between Student's predicted and actual achievement scores was given little weight in determining whether a severe discrepancy existed in 2012 when Student was assessed.

13. Student asserts that a severe discrepancy was demonstrated when Student was assessed by staff at Charles Armstrong School during the application process when she cried during a writing test. No one from Charles Armstrong testified about the writing tests given to Student or her behavior during those tests. Moreover, Student provides no authority that her act of crying during a portion of a writing test is sufficient to demonstrate a severe discrepancy existed during the relevant period.

No Basic Psychological Processing Disorder

14. Even if a severe discrepancy did exist, based on Ms. Maheras' assessment of Student in 2012, Student did not establish she had a basic psychological processing disorder during the relevant period. Ms. Maheras' assessment data does not show Student had a processing disorder at the time she was assessed. While Ms. Maheras did opine that Student demonstrated weaknesses in visual spatial reasoning ability, orthographic processing, and her capacity to process phonemic information in her assessment report, the evidence did not establish that these weaknesses amounted to a basic psychological processing disorder involved in understanding or in using language, that manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Ms. Maheras' testimony at hearing that Student had a basic psychological processing disorder was given little weight for purposes of this Decision, as this was not a conclusion she made at the time she drafted her detailed assessment report nearly three years ago. And while Student's teachers did express concerns about Student's attention in class, Student did not establish that her attention issues rose to the level of a processing disorder.

Student Did Not Need Special Education

15. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine if the student can receive educational benefit with modifications to a 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 a student did not need special education, as she was able to benefit from her general education classes.

16. Even if Student met the other eligibility criteria for SLD, Student must also

establish she needs special education. From kindergarten through fourth grade, Student attended Highlands, and was in a general education classroom. At the end of each school year, from kindergarten through fourth grade, Student was approaching, meeting, or exceeding all grade level standards in language arts, listening/speaking, and math; in February of Student's fourth grade year, her teacher reported Student was performing at grade level in math, spelling, reading, and writing; and she performed at proficient or advanced levels in English-language arts and mathematics on all STAR tests beginning in second grade. Additionally, Student's spring 2013 STAR narrative writing score, indicated that she addressed most of the writing task; maintained a mostly consistent point of view, focus, and organizational structure; presented a central idea with mostly relevant facts, details, and/or explanation; included some sentence variety; and provided an adequately developed sequence of significant events to relate ideas, observations, and/or memories. Student's overall performance demonstrated that she was progressing in a general education setting at Highlands.

17. Moreover, Ms. Gomez credibly testified that nearly all of the accommodations and strategies provided in Ms. Maheras' assessment report are available to general education students. Therefore, if any severe discrepancy between Student's ability and achievement existed, it was correctable in the general education setting. Student has not provided sufficient evidence to establish that she needed special education to access her education at the time she was assessed in 2012. Student contended that Ms. Maheras' report supported a finding of eligibility under SLD; however, it did not. Therefore, Student was not eligible for special education under the category of SLD from the time she was assessed by Ms. Maheras through the time San Mateo-Foster City assessed her in 2015.

2015 Assessment by San Mateo-Foster City

SEVERE DISCREPANCY

18. In October 2015, Ms. Barrett administered the KABC-II to assess Student's general intellectual functioning. Student earned a FCI score of 107, which falls within the average range of intellectual ability for her age. According to Ms. Barrett's credible testimony, this score is commensurate with the GAI score of 99 obtained by Student during Ms. Maheras' assessment of Student. Ms. Barrett administered the WIAT III to test Student's academic achievement. Student did not have a difference of 22.5 or more points between her intellectual ability FCI score and any of her scores in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning.

NO BASIC PSYCHOLOGICAL PROCESSING DISORDER

19. In addition to demonstrating a severe discrepancy between intellectual ability and academic achievement, Student must also show she has a basic psychological processing disorder. (20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) Similar to her 2013 assessment results, Student exhibited some processing weaknesses, but the lower scores were not considered to be significantly outside of the normal range. Ms. Barrett unequivocally opined that Student's assessment showed no evidence of a processing disorder. The evidence did not establish that Student had a basic psychological processing disorder at the time of her October 2015 assessment.

NO NEED FOR SPECIAL EDUCATION

20. While at Athena Academy, Student has not had a special education teacher and has not provided sufficient evidence to show she has been receiving specialized instruction. Although there was evidence that Student attended a

social/emotional class to help her learn to express herself, communicate, and solve issues with her peers, it was clear that the skills she was learning were appropriate for all students, not just students with learning disabilities. The social/emotional class was not specially designed to meet Student's needs alone. And while class sizes are smaller at Athena in comparison to Highlands, the evidence did not show that she was unable to access her education while in a larger general education class at Highlands. During all times relevant to the issues in this case, Student received educational benefit in a general education setting. The totality of the evidence shows that Student did not meet her burden in establishing that she is eligible for special education under the SLD classification, or that she needs special education to access her education.

SPECIAL EDUCATION ELIGIBILITY UNDER OTHER HEALTH IMPAIRED

21. Student contends San Mateo-Foster City denied her a FAPE by failing to find her eligible for special education as a Student with OHI, and offer her an IEP, from April 30, 2013, through November 3, 2015. The District maintains that Student was not eligible for special education under OHI at any relevant time.

22. A student meets eligibility criteria under the category of OHI if she has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems that adversely affects her educational performance. (Cal.Code Regs., tit. 5, § 3030, subd. (b)(9).) ADHD may be a qualifying health condition for OHI, but all the requirements of the definition above still must be met. (*Ibid*; Ed. Code, § 56339, subds. (a), (b).) Special education eligibility criteria also require that the student is unable to access the curriculum without special education instruction and related services. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code § 56026, subd. (b).)

23. Parents testified that Student had been diagnosed with ADHD by the Children's Health Council sometime between 2010 and 2012. The ADHD diagnosis was

not disputed by San Mateo-Foster City. However, Student has not met her burden of establishing that ADHD caused her to have limited strength, vitality, or alertness that adversely affected her educational performance. Although Parents provided credible information regarding Student's behavior at home, their testimony alone is not sufficient to establish that Student had limited strength, vitality or alertness caused by ADHD with respect to the educational environment. Parents' testimonies regarding Student's homework struggles were limited to her fourth grade school year. The evidence did not show that such struggles were manifested in the classroom. Throughout Student's educational history, she has had attention and focus issues, but those issues have not adversely impacted her educational performance. Student's ADHD did not limit strength, vitality, or alertness, as evidenced by her continued educational progress during the relevant time period.

24. Even if Student's exhibited limited strength, vitality, or alertness caused by ADHD that adversely affected her educational performance, she did not prove she needed special education or related services to access the curriculum or make educational progress, as discussed above. Student, therefore, was unable to establish eligibility in the category of OHI.

PROCEDURAL VIOLATION – CHILD FIND

25. Student contends that San Mateo-Foster City failed to meet its child find obligations when it failed to offer Student an assessment plan once the District was on notice of Student's deficits and disabilities. San Mateo-Foster City argues that it met its child find obligations when Ms. McMichael mailed Parents an assessment plan on or about May 13, 2013.

26. 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, not just to the children ultimately determined to be disabled. (34 C.F.R. §§ 300.8, 300.111(c)(1); *N.G. v. Dist. of Columbia* (D.D.C. 2008) 556 F.Supp.2d 11, 25 (N.G.)) FAPE must be available to any child with a disability who needs special education and related services, even if the child “has not failed or been retained in a course or grade, and is advancing from grade to grade.” (34 C.F.R. § 300.101(c).) That a student is advancing from grade to grade 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); *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197 (Cari Rae).)

27. A district’s child find duty is not dependent on any request by the parent for special education testing or services. (Ed. Code, § 56300; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) A school district’s child find duty is triggered when it has reason to suspect a child has a disability, and reason to suspect the child may need special education services to address that disability. (*Cari Rae*, supra, 158 F.Supp.2d at p. 1194.) 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 at p. 6.) Determining whether a school district had reason to suspect a child may have a disability “must be evaluated in light of the information the district knew or had reason to know, at the time relevant time, not in

hindsight.” (*Ibid.*) The district court in *N.G.*, noted that it had “[r]epeatedly found that when a district is aware that a student *may* have a disability, including ADHD, it has an obligation to evaluate the student,” even if the student is unenrolled. (*N.G.*, *supra*, 556 F.Supp.2d at p. 27.) The child find obligation extends to students in private school. (*Ibid.*)

28. 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.) Either a parent or school district may initiate an initial evaluation. (34 C.F.R. § 300.301(b).) 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.) A school district shall make *reasonable efforts* to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1) (emphasis added).)

29. When a school district’s duty to assess a student is triggered, the assessment process begins with a written referral for assessment by the student’s parent, teacher, school personnel, or other appropriate agency or person. (Ed. Code §§ 56302, 56321, subd. (a); Cal. Code Regs., tit. 5, § 3021.)¹³ Within 15 calendar days of referral, subject to certain exceptions, the school district must give the parent a written assessment plan which explains, in language easily understood, the types of assessments to be conducted. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed.

¹³ In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5.)

Code, §§ 56043, subd. (b), 56321, subd. (c).) The school district then has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f), 56302.1.)

30. When a school district violates its child find duties and its obligation to refer a child for assessment, those violations constitute procedural violations of the IDEA. (*Cari Rae S.*, supra, 158 F.Supp. 2d 1190 at pp.1196-1197; *Park v. Anaheim Union High School Dist.*, et.al. (9th Cir. 2006) 464 F.3d 1025, 1031.) A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decisionmaking 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)(2); Ed. Code, § 56505, subd. (f)(2) & (j).)

31. San Mateo-Foster City has an affirmative duty to identify, locate, and evaluate all children with disabilities residing within its boundaries. By at least April 30, 2013, the date alleged in Student's Amended Complaint, San Mateo-Foster City had many reasons to suspect Student might be a child with a disability and special education services may be needed to address Student's diagnosed disabilities. Beginning in first grade, Student's teachers made comments about Student's focus issues. In December 2012, and January 2013, Father emailed Ms. Hauseur, Student's fourth grade teacher, informing her Student was being assessed for latent learning disabilities. On April 19, 2013, Ms. Gomez, Ms. Hauseur, and Mr. Montgomery were aware that Parents wanted to understand what services were available from the public school system for children like Student "with diagnosed material learning differences[,] wanted to investigate specialty schools and programs that focused on children with learning disabilities, and

were considering enrolling Student in school for students with language based learning disabilities. By April 19, 2013, Ms. Gomez, Ms. Hauseur, and Mr. Montgomery were aware that Ms. Maheras conducted a psychoeducational assessment of Student in December 2013. By that same date, Ms. Gomez, Ms. Hauseur, and Mr. Montgomery were aware of Student's diagnosis of ADHD as well as Ms. Maheras' December 2013 diagnoses of dyslexia and dysgraphia. By at least May 1, 2013, San Mateo-Foster City school psychologist, Ms. McMichael, was also aware Student had received a psychological assessment by a private assessor, and was aware of Student's diagnoses of ADHD, dyslexia, and dysgraphia. Taken as a whole, San Mateo-Foster City's child find duty was triggered by April 30, 2013, when San Mateo-Foster City had a reason to suspect Student had qualifying disabilities and had reason to suspect that special education services may be needed to address Student's disabilities. Therefore, San Mateo-Foster City committed a procedural violation when the District failed to present Parents with an assessment plan by April 30, 2015.

32. San Mateo-Foster City argues that it met its child find obligation on May 17, 2013, when Ms. McMichael claims to have sent a letter to Parents enclosing an assessment plan, Notice of Procedural Safeguards, and other enclosures.

33. However, Student met her burden of establishing that the letter and enclosures, including assessment plan, were not received by Parents. Ms. McMichael had no independent recollection of mailing the letter and enclosures to Parents and never followed up with Parents to confirm receipt or inquire as to the reason the assessment plan was not returned, even though she had ample opportunity to do so. Parents credibly testified they did not receive the letter or enclosures.

34. The fact that Student did not return to Highlands the following year did not relieve San Mateo-Foster City of its child find obligations. The District still had an obligation to evaluate Student, even if she was no longer enrolled at Highlands. (See

N.G., supra, 556 F.Supp.2d at p. 27.) Student met her burden of proving San Mateo-Foster City failed to meet its child find obligations from April 30, 2013, through June 30, 2015, once the District was on notice of Student's suspected deficits and disabilities and was aware of Parents concerns about Student's needs not being met by the District

PROCEDURAL VIOLATION – COPY OF PARENTS' RIGHTS AND PROCEDURAL SAFEGUARDS

35. Student contends San Mateo-Foster City committed a procedural violation resulting in a denial of FAPE by failing to provide Parents with a copy of their rights and procedural safeguards on May 13, 2013, when Parents provided Ms. Maheras' assessment report to the District and asked for information regarding services and supports. San Mateo-Foster City asserts that Parents were provided with this information as an enclosure in Ms. McMichael's May 15, 2013 letter.

36. The IDEA requires school districts establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE by such agencies. (20 U.S.C. § 1415(a).) A copy of the notice of a parent's or guardian's rights shall be attached to the assessment plan. A written explanation of all the procedural safeguards under the IDEA shall be included in the notice of a parent's or guardian's rights. (Ed. Code § 56321, subd. (a).) A copy of the procedural safeguards must be given by a school district to a parent of a child with a disability a minimum of once a year, except that a copy shall be given to the parents: 1) upon initial referral for assessment or parent request for evaluator; 2) upon filing a request for a due process hearing; 3) in accordance with certain discipline procedures; or 4) upon parent request. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a); Ed. Code, § 56301 subd. (d)(2).)

37. As discussed above, Parents did not receive Ms. McMichael's letter enclosing the assessment plan and notice of Parents' rights and procedural safeguards.

As discussed above, San Mateo-Foster City should have provided Parents with an assessment plan by at least April 30, 2013, and were required to include the notice of procedural safeguards with the assessment plan. Parent's request for information regarding services and supports began in an e-mail from Father on April 17, 2013, to Ms. Hauseur and Ms. Gomez. At the SST meeting on May 13, 2013, Parents' continued to seek information about supports available to Student. Parents are not required to use special language under the IDEA to request an assessment of their child and Parents' intent in communicating with San Mateo-Foster City about services and supports available for Student was clear. Therefore, San Mateo should have provided a copy of Parents' rights and procedural safeguards by at least May 13, 2013, as alleged in the Amended Complaint. This is a procedural violation by San Mateo-Foster City.

PROCEDURAL VIOLATION – EDUCATION RECORDS (E-MAILS)

38. Student asserts that San Mateo-Foster City denied Student a FAPE by failing to release all of her education records in the form of e-mails pursuant to Student's request on June 24, 2015. San Mateo-Foster City refutes this claim by arguing that all education records maintained by the District were provided to Student.

39. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all education records of the child with respect to the identification, evaluation, educational placement of the child, and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) Each participating agency must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency. (34 C.F.R. §300.613(a).) The agency must comply with a request without unnecessary delay. (*Ibid.*) Federal regulations require that education records be provided within 45 days of the request, while California law affords parents the right to receive copies of all school records within five

business days of the request. (*Ibid*; Ed. Code, § 56504.)

40. Pursuant to Parents' June 24, 2015 records request, San Mateo-Foster City produced Student's education records, including one e-mail message between Ms. McMichael and other San Mateo-Foster City employees regarding Student. The evidence did not establish that any other e-mails pertaining to Student existed at the time of the request with the exception of e-mails that were already in Parent's possession.

PROCEDURAL VIOLATIONS FOR NON-ELIGIBLE STUDENTS DO NOT RESULT IN A DENIAL OF FAPE

41. A procedural violation does not constitute a denial of a FAPE if the violation fails to result in a loss of educational opportunity. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 942 (citing *M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 651 (Gould, J., concurring).) In *R.B.*, the Ninth Circuit held that a procedural violation did not result in a denial of a FAPE because the student was no longer eligible for special education. (*Id.* at 947.) The appellate court upheld the hearing officer's determination that the student no longer qualified for special education, despite her behavioral deficits. (*Id.* at 946-947.) While the court recognized that procedural violations in other cases often result in a denial of a FAPE, the court distinguished those cases based on eligibility. (*Id.* at 940-941.) The court went on to say that if a child is ineligible for IDEA opportunities in the first instance, she cannot lose those opportunities merely because a school district has committed a procedural violation. (*Id.* at 942 ("[A] procedural violation cannot qualify an otherwise ineligible student for IDEA relief.")) Where a school district commits a procedural violation, such a violation constitutes harmless error if the student was substantively ineligible for IDEA relief. (*Id.* at 947.)

42. In this case, Student did not establish that she was eligible for special

education at any relevant time through November 3, 2015. Therefore, although San Mateo-Foster City committed the procedural violations of not referring Student for assessment and not providing Parent's a copy of the procedural safeguards, the violations were harmless error and did not deprive Student of FAPE because Student was not eligible for special education.

ORDER

Student's 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. Here, San Mateo-Foster City prevailed on all issues.

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: December 28, 2015

_____/s/_____

DENA COGGINS

Administrative Law Judge

Office of Administrative Hearings