

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017010619

DECISION

Parents on behalf of Student field a request for due process hearing with the Office of Administrative Hearings on January 11, 2017, naming Riverside Unified School District.¹ On February 22, 2017, and again on April 5, 2017, OAH granted the parties' joint request to continue the due process hearing.

Administrative Law Judge Judith L. Pasewark heard this matter in Riverside, California on May 23, 24, 25, 30, and 31, 2017.

Andrea Smith, Anna Rivera, and Elizabeth Eubanks, Attorneys at Law, represented Student, and were assisted by intern, Calypso Rees. Mother attended the hearing each day, and was assisted by Spanish language interpreters Yania Ricce and Irland Fernandez. The hearing was open to the public. Student appeared at hearing for an in camera interview, but did not stay for the hearing.

¹District filed its response to Student's complaint on January 23, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) __ F.3d __, 2017 WL 2330615, **5-6. (*M.C.*.)

Jack B. Clarke, Jr., Attorney at Law, represented District. Charity Plaxton-Hennings, District's Director of Psychological Services, and Robert Diaz, District program specialist, attended the hearing.

At the parties' request, OAH continued the hearing for the parties to file written closing arguments. The record closed on June 26, 2017, upon receipt of closing briefs from the parties. On July 5, 2017, District submitted a reply brief.

ISSUES²

1. Did District deny Student a free appropriate public education by failing to assess in all areas of suspected disability when it failed to conduct an assessment for educationally related mental health services?

2. Did District deny Student a FAPE by failing to conduct an appropriate central auditory processing disorder assessment in that (a) the assessor was not an appropriately qualified audiologist, and (b) the assessment was not conducted using a variety of assessment tools?

3. Did District deny Student a FAPE by failing to provide Parents with prior written notice in their native Spanish language when it changed Student's placement in his April 28, 2015 individualized education program, thereby denying Parents the opportunity to meaningfully participate in the IEP development process?

4. Did District deny Student a FAPE by failing to provide Parents with prior written notice in their native Spanish language when it refused to change Student's educational placement in its IEP's dated April 26, 2016, thereby denying Parents the opportunity to meaningfully participate in the IEP development process?

²The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issue so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir 2010) 626 F.3d 431, 442-443.)

5. Did District deny Student a FAPE by failing to make an offer in its IEPs commenced on September 9, 2014, and completed on April 28 2015, that was reasonably calculated to enable Student to make progress in light of his circumstances?

6. Did District deny Student a FAPE by failing to make an offer in its IEP dated December 16, 2015, and completed April 26, 2016, that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances?

SUMMARY OF DECISION

Student's basis for contending District failed to assess Student in all areas of suspected disability was insufficient to meet the low threshold needed to establish a reasonable suspicion of educationally related depression and anxiety, thereby triggering a need to conduct an educationally related mental health service assessment. Student did not exhibit significant symptoms of depression at school to create a suspicion of mental health needs. Nevertheless, District assessed Student's social/emotional needs, conducted screenings, and offered Student school-based counseling to address the behaviors related by Mother.

Student's contention that the central auditory processing disorder assessor was unqualified to assess Student, or that the assessor utilized insufficient assessment tools, was without merit.

Student's contentions that Parents were not provided prior written notices in their native Spanish language, which constituted a procedural violation did not rise to the level of a denial of FAPE. Student was unable to establish that these procedural violations impaired Parents' ability to participate in the IEP decision making process in any manner.

Finally, Student failed to prove that District denied him a FAPE, by failing to provide meaningful educational benefits in his April 28, 2015, and April 26, 2016 IEPs.

The IEPs met Student's unique needs, and provided sufficient specialized academic instruction and related services to allow Student to make meaningful educational progress benefit in his least restrictive environment. No evidence was presented to establish that either IEP was insufficiently ambitious or failed to challenge Student. Further, in determining Student's "unique circumstances" the evidence presented by Student's primary witness was soundly rebutted by more credible witnesses which negated Student's contention that he received no educational benefit in District programs and could not receive educational benefit unless the independent assessors' recommendations were implemented by District.

FACTUAL FINDINGS

BACKGROUND

1. Student was a 16-year-old, 11th grade student, who resided with his parents within the boundaries of District. Student was eligible for special education and related services under the category of specific learning disability.

2. Student presented three witnesses during hearing, Mother and independent evaluators Susan Hollar and Christine Majors. Mother's testimony presented an overview of Student's contentions.

RELEVANT PRE-STATUTE OF LIMITATIONS INFORMATION, WHAT DISTRICT KNEW

3. Student's November 8, 2011 annual IEP reported the results of the Woodcock Johnson-III academic assessments, which scored Student's reading skills in the low-average to average ranges; writing skills in the borderline to low-average ranges; math skills in the borderline to average ranges. Student's academic skills were scored in the average range, and academic fluency in the low-average range. The IEP team determined Student required goals in the areas of communication, reading,

writing and math and crafted goals in these areas. Student was placed in a mild/moderate special day class for academics.

4. Student's November 16, 2012 annual IEP reported Student's reading fluency at a 4.7 grade level; reading comprehension at a 4.5 grade level, and reading speed of 132 words per minute. Student was in the seventh grade at that time. Although Student could write simple sentences, using a limited, simple vocabulary, he was not writing at grade level. His writing had misspellings and errors in basic grammar. Student knew basic addition and subtraction and had mastered his multiplication skills. Word problems needed to be broken down into small chunks because his process skills required this type of learning. Pictures as a way of multimodal learning worked best with word problems to help Student completely understand them. While Student had partially met his goals, he did not meet any of them.³ Student's placement remained in a mild/moderate special day class for academics.

5. Student's November 13, 2013 annual IEP reported Student was reading about the fifth grade level, and his fluency was 148 words per minute. Student knew some of his basic multiplication facts, and could multiply and divide with about 50 percent accuracy, utilizing the calculator for computations. Student continued to write simple sentences with spelling errors and basic grammar. Student failed to meet his any of academic goals, only partially meeting his pre-academic reading, math and writing goals. District repeated Goal Two, identical to the same goal in 2011 and 2012,

³A met goal was defined as 100 percent completed. Substantial progress on a goal required a student to meet two of three benchmarks or 66 percent towards meeting the goal. A partially met goal required a student to meet one of three benchmarks, or 33 percent towards meeting the goal. No progress indicated no growth shown in that area.

indicating “progress has been made...” Student’s placement remained in a mild/moderate special day class.

6. On May 16, 2014, District held a supplemental IEP team meeting to discuss Student’s transition to high school. The speech/language pathologist noted Student had difficulty with recall, and required moderate to maximum assistance with recalling auditory information. At that time, District reported Student was reading on a third grade level, with a fluency speed of 145 words per minute. In spite of these present levels of performance, District reported that, as of this IEP team meeting, Student was on target to meet all of his 2014 goals. District did not change Student’s special education program, and he continued to receive five periods of special education services for reading intervention, math, science, history and speech. District reported Student was successful in his current program and with his current services. Mother expressed concern regarding Student’s anxiety and depression. District agreed to contact the school psychologist with her concerns.

2014-2015 ASSESSMENTS

7. District conducted a speech and language assessment in May and June 2014. The assessment report, dated June 14, 2014, was prepared by a District speech and language pathologist. The assessor noted Student spoke both English and Spanish in the home, and reportedly thought in both languages. At school, Student spoke English with friends, and was comfortable being tested in English. Student received his entire education in English. The assessor found Student’s articulation, verbal fluency and quality of voice age appropriate. He used grammar correctly, provided details and responded appropriately to conversational comments and questions. Based upon the results of multiple standardized testing, the assessor determined Student’s overall language ability fell in the low-average range. Difficulties were noted when language memory was required, especially when not provided with visuals, when semantic

knowledge of word parts was required without context, and when asked to provide multiple meanings of provided words. Student's receptive and expressive vocabulary knowledge was in the borderline and low-average range respectively.

8. The assessor determined Student continued to meet the eligibility criteria for special education in the area of language and speech deficit, due to a significant delay in semantics (word meaning and word relationships), which can significantly affect his academic growth. Limited word knowledge can impair understanding or expression of both oral and written messages. Deficits in semantics may be seen in an inability to determine appropriate words when answering questions or in an inability to demonstrate abstract reasoning. The assessor offered a series of accommodation recommendations: (1) keep directions simple; (2) provide visual cues and examples or demonstration to supplement oral directions; (3) check for understanding of directions before proceeding; (4) ensure complete attention and limit distractions when directions are being given; (5) encourage questions; and (6) provide sufficient opportunities for "hands on" experience with difficult concepts.

9. District conducted Student's triennial psycho educational assessment in September 2014. Jan Smith, District school psychologist, prepared the assessment report dated September 10, 2014. Of initial note in the written report, Student, then age 14, and in the ninth grade, complained to Ms. Smith that his four special education classes were not challenging enough for him.

10. District administered the Wechsler Intelligence Scale for Children-Fourth Edition, which scored Student's full scale intelligence quotient in the high, low-average range. While Student's scores in the four components of the Wechsler might have varied up or down by a few points, when compared to his 2011 scores on this test, he still remained within the same standard score percentiles as in 2011. Student's scores on the

Test of Nonverbal Intelligence-4 were reported in the average range, similar to his nonverbal scores on the Wechsler.

11. District administered the Woodcock-Johnson Tests of Achievement-III, which measured Student in the areas of broad reading, broad mathematics, and broad written language. In each of the three areas of assessment, Student scored at the age equivalent of 10 years; grade equivalent of fifth grade; with standard scores all below average.

12. Interviews with Student's eighth grade teachers reflected a consensus regarding Student. He was quiet, shy and well-mannered. His sentence structure needed improvement; he rarely asked for help, so at times, he was doing the assignment wrong. He read and re-read his notes for understanding.

13. District administered the Behavior Assessment for Children-2, designed to facilitate the diagnosis and educational classification of a variety of emotional and behavioral disorders. The assessment, a rating scale, was completed by Student, four of Student's teachers, and Parents. Student's rating scale covered the areas of (1) school problems; (2) internalizing problems; (3) inattention/hyperactivity; (4) emotional symptoms; and (5) personal adjustment. In each of the areas, Student rated himself in the average range. Parents and teachers rated Student in the areas of (1) externalizing problems; (2) internalizing problems; (3) school problems; (4) behavioral symptoms; and (5) adaptive skills. Parents rated Student in the average range, except for Student internalizing problems, which they rated clinically significant. Each of Student's four teachers scored Student in the average range for externalizing problems; three scored Student as average, and one clinically significant in internalizing problems; three scored Student as average, and one as at risk in school problems; two scored Student as average, one at risk and one clinically significant in behavioral symptoms; and three scored Student at risk and one scored as clinically significant in adaptive skills. While at

risk scores identified a problem or potential problems which needed careful monitoring, clinically significant scores suggested a high level of maladjustment, which were severe enough to require formal treatment.

14. Behavior Assessment for Children-2, ratings scales in additional behavior areas, found Student at-risk in areas of self-reliance; adaptability; anger control; functional communication; leadership; resiliency; depression; developmental social disorders; functional communication; and learning problems. The same raters scored Student as clinically significant in areas of withdrawal; social skills; somatization; negative emotionality; anxiety; and interpersonal relationships.

15. The psycho educational assessment concluded that Student's cognitive and achievement profile was more consistent with a child who had low-average to average cognitive functioning, with a significant discrepancy in audio processing. Academic testing was in the low-average range, which was commiserate with his verbal ability, but was significantly lower than his nonverbal abilities.⁴

2014-2015 IEPs

16. District held six IEP team meetings for Student during the 2014-2015 school year, to complete his annual IEP. Student's IEP was dated September 9, 2014; however the IEP team meeting was adjourned until September 19, 2014, to complete observations for Student's psycho educational assessment. On September 19, 2014, the IEP team reviewed the psycho educational assessment at length, and walked Parents through the testing information, page by page with a Spanish interpreter. The IEP team meeting was again adjourned until November 14, 2014, at which time it was again

⁴A correction to the last page of the psycho educational assessment was made on January 12, 2017, to reflect that Student continued to qualify for speech and language services.

adjourned, as Mother requested a certified Spanish translator and also requested that the Notice of Meeting be provided in Spanish. The IEP team meeting was continued several more times due to parental cancellations, and reconvened again on January 12, 2015. District provided a Spanish language interpreter at each of the scheduled IEP team meetings. Parents also brought family friends to each of the IEP team meetings, who also assisted Parents with translations.

17. Student spoke to the IEP team on January 12, 2015. He shared that his special education program was not that good, and nothing had changed all the years he had been in special education. Student reiterated that he was not learning and the teachers were not teaching him anything. Parents questioned whether all required members of the IEP team were present, and requested to review the psycho educational assessment again. Parents also requested the IEP team review the testing protocols and compare them with Student's prior testing results. District had all necessary IEP team members present. The school psychologist complied with Parents' requests, answered their questions, and used a colored graph to assist in explaining test scoring.

18. The IEP team also reviewed and discussed Student's speech and language assessment from May 2014, which was presented by District's speech and language pathologist. As with the psycho educational assessment, Parents requested a comparison of Student's current scores with his 2011 assessment results. Distinctions of standard scores and percentiles were explained to Parents. The IEP team determined Student still qualified for speech and language services. The IEP team meeting needed additional time to complete the IEP, and the meeting was adjourned for the day. At their request, Parents were given a copy of the draft IEP. Parents also requested that District

have the assessment reports translated into Spanish. The speech and language assessment was provided to Parents in Spanish prior to the next IEP team meeting.⁵

19. After additional cancelations by Parents, the IEP team meeting reconvened on March 5, 2015. The IEP team again discussed Student's speech and language assessment. The speech and language assessor provided the IEP team, including Parents, with a color coded assessment and data point chart. The speech and language pathologist shared that the teachers use language based strategies in the classroom to focus on vocabulary development. Student was receiving vocabulary development in his content area classes. The speech and language pathologist also collaborated with Student's teachers throughout the week to give them strategies and observe Student. Parents requested additional speech and language services for Student. This request was tabled until the next IEP team meeting, to be considered with other discussions of Student's supports, services and placement. Although the IEP team intended to discuss Student's eligibility for special education at this IEP team meeting, they were unable to proceed as the school psychologist had a personal emergency and was unavailable to review the psycho educational assessment with Parents again, clarify and answer additional questions. Parent requested a copy of the draft IEP translated into Spanish at least five days prior to the next IEP team meeting.

20. The IEP team meeting reconvened on April 28, 2015. District provided two Spanish language translators to assist due to a three-hour time frame for this IEP team meeting. Mother objected, and requested only one interpreter. District consented; however, it reserved the right to use two interpreters in future meetings. The IEP team again discussed the speech and language assessment and the psycho educational

⁵ District provided Parents a Spanish translation copy of the psycho educational assessment on February 11, 2015, and a second copy on March 5, 2015.

assessment. The IEP team discussed Student's audio processing difficulties, and his slower processing speed in class. The IEP team discussed specific learning disability and determined it to be Student's primary area of eligibility. The IEP team also discussed continuing eligibility under speech and language disorder, however, it was determined that Student maintained a weakness in this area which did not rise to the level of secondary eligibility.

21. The IEP team updated Student's present levels from 2014. Student had only partially completed his eight goals from last year. The IEP team drafted new goals and expressed the caveat that goals were written with a year in mind; therefore, Student might make very little progress on his goals by the time they were reviewed at his next annual IEP team meeting in fall 2015. Goal One addressed reading. Goal Two addressed written expression. Goal Three addressed math skills. Goal Four addressed English language development. Goal Five addressed vocational skills. Goal Six addressed study skills, and Goal Seven addressed communication and vocabulary.

22. On April 28, 2015, District made its offer of FAPE as follows:

- a. Four periods of special academic instruction in his current special day class placement until the end of the school year on June 12, 2015;
- b. Four periods of special academic instruction in a resource services placement on the comprehensive high school campus, commencing August 24, 2015, through September 9, 2015;
- c. Speech and language services 25 minutes per week, in either an individual or small group setting, through September 9, 2015, with undefined speech and language pathologist consultations with teachers as needed.

District determined Student did not require extended school year services to access his education. District further discussed Parent's request to increase Student's speech and

language services, and its reasons for denying the increase in hours. Mother indicated she was requesting independent education evaluations, and refused consent to the IEP.

23. At the end of the 2014-2015 school year, Student had passed all of his classes with a grade point average of 2.5. Student's grades still reflected difficulties in math, earning a solid D both semesters. Student remained on graduation track, but had not yet met his algebra I requirement for graduation.

24. Prior to the beginning of the 2015-2016 school year, Mother provided District with a one paragraph letter from Richard T. Kolomori, Jr., M.D., which indicated Student had been under his psychiatric care from June 2, 2015, through July 20, 2015. Student had two visits to Dr. Kolomori during the summer. Dr. Kolomori diagnosed Student with attention deficit hyperactivity disorder, anxiety, and depression. Mother testified that District did nothing with this information. The IEP notes for the December 16, 2015 IEP team meeting indicates that, in October 2015, District offered some interventions, entitled Student Assistant Plan, to address the mental health concerns. The plan included counseling, to address some of the issues Mother reported which were keeping Student from coming to school, as well as getting information regarding recommendations from Student's therapist. Mother was informed about the Student Assistant Plan, but indicated she was not interested. The IEP team prepared another Student Assistant Plan referral on December 7, 2015. No other information or recommendations were provided by Dr. Kolomori.

ADDITIONAL ASSESSMENTS

25. Pursuant to Mother's request on May 6, 2015, District agreed to independent educational evaluations and sent Parents an assessment plan on May 17, 2015. The assessment plan offered independent speech and language and neuro-psychoeducational assessments.

Speech and Language

26. Susan Hollar administered an independent education evaluation of Student in the area of speech and language disorders. Ms. Hollar operated a private pediatric speech and language practice, which treated children with communication disorders associated with developmental delays, autism and Down syndrome. Ms. Hollar held a master's degree in communicative disorders and sciences, and was a licensed speech and language pathologist. Ms. Hollar had extensive experience in speech and language development in children, and completed a post-graduate fellowship at University of Southern California in neurodevelopmental disorders in children. She also taught classes in language development in children and language disorders on the university level for six years.

27. The assessment was intended to address concerns regarding Student's ability to receptively understand and expressively communicate both verbally and nonverbally. The assessments took place between August and September 2015, with a written report generated September 24, 2015. The purpose of the assessments and report was to assist in determining special education eligibility, identify Student's current needs, and provide strategies to support Student's communication.

28. In her interview with Ms. Hollar, Mother succinctly reported her concerns regarding Student's communication deficits: "Something is wrong. Student cannot tell us [parents] what has happened. He seems to forget what happened. We have to ask a lot of questions to understand what happened. He seems to forget oral directions that are simple. He often misunderstands what you are saying. For example, he often believes you have said a different word i.e., look for book. He has lots of anxiety issues. Student does not start up conversations with others. He will talk with us sometime, but mostly he stays in his room at home. He has no friends."

29. In her review of prior District assessments, Ms. Hollar noted several patterns. When Student did not recall an answer, he would delay response without asking for assistance; he demonstrated long delays before answering unknown words, or sat silently. He often required repetition. In her observations of Student, Ms. Hollar reported Student did not initiate any conversation, but would answer direct questions. His processing time for orally presented information was very slow. He requested multiple repetitions of instructions (commonly six to twelve repetitions) and his response time was very slow.

30. Ms. Hollar administered a series of standardized assessments. The Receptive One-Word Picture Vocabulary Test-4 assessed Student in the area of semantics, which referred to the meaning aspects of language, such as vocabulary knowledge, category skills, and word classes. Student's percentile score was below 95 percent of students his age. On the Expressive One-Word Picture Vocabulary Test-4, which assessed Student's expressive vocabulary, Student scored below 97 percent of students his age.

31. The Clinical Evaluation of Language Fundamentals-5, which included multiple subtests, was utilized to assess Student's strengths and weaknesses in the areas of core, receptive, expressive, content, structure, and pragmatic language skills. The Core Language Index, which consisted of several subtests, was used to make decisions about the presence or absence of a language disorder. Student's scored in the low range, which was indicative of the presence of a language disorder. Ms. Hollar noted Student demonstrated slow response time and requested a high number of repetitions within subtests. The Word Classes addressed Student's ability to understand relationships between words based on semantic class features. Student's score on this test was below average, and he demonstrated difficulty with word opposites and synonyms. The Formulated Sentences subtest required Student to formulate complete, semantically and

grammatically correct spoken sentences of increasing length and complexity. Student scored in the below average range in relation to his peers.

32. The Receptive Language Index was a composite of subtests which measured Student's listening and auditory comprehension. Student demonstrated abilities in the low range relative to age appropriate peers. Ms. Hollar again noted that Student demonstrated difficulties in audio comprehension, as directions to the subtests needed to be repeated and Student's response times were slow relative to others his age.

33. The Understanding Spoken Paragraphs subtest was used to evaluate Student's ability to sustain attention and focus, understand oral narrative and text, and answer questions about the content of the information given. Student scored in the below average range, however, when provided visual supports, Student's ability to answer correctly increased.

34. The Expressive Language Index was a composite of subtests which was a measure of expressive language. Overall, Student scored in the average range.

35. The Language Content Index was a composite of subtests which measured various aspects of vocabulary, concept and category development, comprehension of associations and relationships among words, interpretations of factual and inferential information presented orally, and the ability to create meaningful semantically and syntactically correct sentences. Student scored in the average range; however, Ms. Hollar noted his scores should be viewed with caution, as there was a large discrepancy between subtest scores on this index. Student's score on Word Classes placed Student in the second percentile, and score on Understanding Spoken Paragraphs, which placed in in the fifth percentile, contrasted sharply with his Sentence Assembly score, which placed him in the 91st percentile. Further, Student's ability in Word Definitions, to analyze words for their meanings, fell in the below average range.

36. Ms. Hollar recommended Student receive intensive language remediation consisting of three, 45-minute individual therapy sessions per week. Ms. Hollar acknowledged that Student made some progress and growth in District's speech and language program. In District's program, Student made one year's progress within one year, but did not attain grade level skills. This might be sufficient to succeed in post-secondary vocational training, but not in college. Instead, Ms. Hollar based her recommendations on an expectation of achieving grade level skills in one year through intensive pull-out therapy. Ms. Hollar did not define one year's growth as educational benefit. She termed one year's progress as "he did not get any worse; but he remained on a special education level." To obtain educational benefit based upon his circumstances, Student had the ability or expectation of two years' growth.

37. Ms. Hollar had not worked as a school speech and language pathologist, nor had she provided school-based speech services. In making her recommendations, Ms. Hollar did not consider the ramifications of extensive pull-out services versus Student's need for classroom academic time, or any need for exposure to typical peers. Further, although she believed Student exhibited an audio processing abnormality, Ms. Hollar could not state whether Student's audio processing difficulties were due to neurological factors or a lack of educational support. She identified symptoms, not causes.

38. Jared Baptist, District speech and language pathologist, testified to dispute Ms. Hollar's findings and recommendations. Mr. Baptist held a bachelor's degree in speech-language pathology and audiology, and a master's degree in speech-language pathology. He had been a speech and language pathologist since 1999, and held a clinical rehabilitative services teaching credential, and was experienced in assessing students in both English and Spanish. Mr. Baptist provided Student's speech and language services since 2015.

39. Mr. Baptist opined that Ms. Hollar ignored several factors in assessing Student. First, she did not address cultural factors, such as body language in assessing pragmatics. She did not give sufficient consideration to Student as an English language learner, nor did she consult Student's teachers. Ms. Hollar did not administer all of the Social Language Test. The questions asked had a vocabulary load, which was unfair to an English language learner student. Mr. Baptist acknowledged that Student had difficulty processing language. Student did not, however, exhibit a deficit in social interaction; he was only slower to process.

40. In comparison to Ms. Hollar, Mr. Baptist related more to the educational setting, and addressed Student's deficits in relation to providing accommodations to learning. Ms. Hollar's opinions were expressed in a more clinical or "fix it" mode. Mr. Baptist did not support the philosophy that if "I see Student enough, I can fix his disability." Further, Mr. Baptist does not believe the intensive programs recommended by Ms. Hollar, such as Fast 4 Words or Visualizing /Verbalizing, had shown demonstrative benefit in older children; their progress had not been significant after those intensive programs.

Central Auditory Processing

41. In response to Ms. Hollar's recommendation to assess Student's central audio processing skills, Pattie Pollock conducted Student's audiological evaluation for District. Ms. Pollock was an educational audiologist for Riverside County, whose duties included administration of comprehensive diagnostic audiological evaluations; counseling parents and students regarding hearing loss; consultation with educational and health professionals regarding hearing loss and the educational implications of hearing loss; participation in educational planning for hearing-impaired students; and management of school amplification systems. Ms. Pollock held a bachelor's degree in communicative disorders and a multiple subject teaching credential. She held a master's

degree in audiology and speech pathology, and had received training in the diagnosis and treatment of auditory processing disorders, pediatric audiology, and the use of digital FM amplification in educational programs. She held a certificate of clinical competence with the American Speech, Language and Hearing Association, was a member of the Educational Audiological Association, and held a state audiology license and rehabilitative services credential. Although the State of California now requires a doctorate degree to obtain an audiology license, Ms. Pollock's licenses and credentials were grandfathered under the statute, and Ms. Pollock remained a highly experienced audiologist.

42. Ms. Pollock's audiological evaluation was conducted in December 2015 and January 2016. She conducted the SCAN-3, a test for auditory process in adolescents and adults, and Ear Advantage tests for each ear, which provided information about the neuro maturational development of the neurological condition of Student's auditory system. The results of these tests indicated Student's hearing levels were within normal limits bilaterally across the entire frequency range.

43. Ms. Pollock conducted the Central Auditory Processing Disorder test battery, including the phonemic synthesis test, which addressed Student's ability to decode phonemically. Decoding skills underlie speech and language development and is closely associated with reading and spelling. Student's score was normal for his age. The dichotic digits, double pairs test were administered to look at Student's ability to process binaural integrations. Student's score in both ears was in the normal range.

44. Student was assessed in eight additional subtests of the SCAN-3, and his composite scores were in the normal range. Abnormalities were noted in Student's competing words subtests. Student's abilities under the free recall subtest were significantly better than his abilities under the directed ear subtest. The free recall mode of responding involved simpler directions, which removed a layer of cognitive demands,

i.e. Student did not need to remember which word to repeat first. The instructions on the directed ear test were more complex. When comparing these tests, auditory processing problems were more likely when the performance on both tests was equivalent. When directed ear subtests scores were significantly poorer, there might be a higher order cognitive component, i.e., attention, memory or motivation, added to the auditory difficulties.

45. Student's directed left ear subtest on the ear advantage for competing words was abnormal; however, the scaled scores for that subtest were normal. The ear advantage scores for all other dichotic tests were also normal. Ms. Pollock concluded those findings might indicate that Student's auditory system was continuing to develop and mature.

46. Ms. Pollock administered the Staggered Spondaic Word Test, which assessed Student's ability to process information being presented to both ears simultaneously, with the information being presented to each ear being different. This test also required directed listening; Student's scores were average for his age. The test also identified "qualifiers," which indicate patterns of test behavior or indicate what Student is doing to compensate for his auditory processing deficit. Qualifiers may include delayed responses, quick responses, or perseverations (repeating a word). Student exhibited four preservation errors, which was abnormal for his age. Student exhibited five reversal errors, repeating the second word first, and the first word second. Reversals were related to deficits in organization and sequencing. Additionally, Student had an abnormal order affect that was associated with limited short-term memory.

47. Ms. Pollock defined a central auditory process deficit as a deficit in the neural processing of auditory stimuli that is not due to higher order language, cognitive

or related factors.⁶ She also considered additional factors: (1) Student's history as an English language learner; (2) Student's speech and language assessments which indicated his receptive and expressive vocabulary knowledge was in the borderline and low average range respectively, and he had a significant delay in semantics; and (3) Student's intellectual functioning, measured by District assessments, placed Student in the high low-average range. As a result of her consideration of these factors, along with her standardized testing results from Student, Ms. Pollock concluded Student exhibited weakness in tolerance-fading memory and auditory decoding.

48. The most common problems associated with fading memory were in reading comprehension, auditory figure-ground, short-term memory, expressive language and distractibility. Students in this category could be unusually forgetful of information previously memorized and of routines and responsibilities, both at home and at school, despite frequent reminders. Ms. Pollock suggested that approaches for management of listening in noise problems could include noise desensitization or speech-in-noise therapy. Appropriate management of auditory figure-ground problems was directed toward classroom management to enhance listening opportunities or making accommodations in the classroom, such as preferential seating and the use of an FM system. Approaches appropriate for management of Student's short-term memory included cognitive training to help Student learn memory techniques such as acronyms, memory drills, verbal rehearsal, reverbilization, and reaudioization. Repeating directions, instructions, and conversations would not only help Student with his memory, but would also allow the teacher or Parents to monitor Student's

⁶ Definition provided in the *Working Group on Central Auditory Processing Disorder*, the American Speech-Language-Hearing Association, published in the ASHA Technical Report (2005).

comprehension. Chunking, or recoding information into pictorial form, could be used as a reinforcement strategy, along with visual aids. Training Student to observe gestures and visual cues could result in better comprehension.

49. Ms. Pollock defined the major component of an auditory decoding deficit as poor discrimination of the fine acoustic difference in speech. The most common problems associated with an auditory decoding deficit were in reading accuracy and poor phonics skills that also contributed to spelling and writing difficulties. Behavioral characteristics of students who did poorly in auditory decoding included difficulty in class with understanding what is said, making verbal associations, verbal recall, and following directions. Ms. Pollock reported that students with auditory decoding deficits may act like or say that they cannot "hear." They may "mis-hear" information which can lead to misunderstandings. They tend to be slow or inaccurate in their responses. She opined that frequent repetition of key messages would improve Student's access to auditory information. She viewed repetition better than rephrasing, since it allowed for the ear and brain to fill in the missed information, whereas, rephrasing presented a whole new message with new holes to be filled in. A student with an auditory decoding deficit often had deficits in receptive language, including vocabulary, syntax, and semantics. Auditory fatigue or overload was common due to the extra energy required for listening. Therefore, Ms. Pollock recommended that Student's school day should be organized with regularly planned "listening breaks" or period of time during which listening is kept to a minimum to avoid auditory fatigue. More difficult classes should not be back-to-back. Again, visual cues and pictorial information was suggested as a reinforcement strategy. Pre-teaching new vocabulary and concepts would be helpful to Student. Provision of a note-taker was considered beneficial, since note taking required a division of attention and writing.

Neuropsychological Evaluation

50. Christine Majors performed an independent neuropsychological evaluation of Student in August and September 2015, and prepared a written report dated December 7, 2015. Dr. Majors was a licensed clinical psychologist in private practice since 1998. Dr. Majors possessed a bachelor's degree in psychology, and held a degree as a registered nurse. She also held a master's degree in psychology and a doctorate degree in psychology. Dr. Majors held a post-doctoral fellowship at UCLA Neuropsychiatric Institute and Hospital/UCLA School of Medicine, Department of Psychiatry and Bio behavioral Sciences, Neuropsychology Assessment Laboratory. Dr. Majors had extensive clinical experience, but reported no training in education. Dr. Major's assessment results, opinions, and recommendations were interpreted with caution, due to concerns regarding validity and bias.

51. Dr. Majors' assessment procedures included interviews with Student and his Parents, a review of his medical records, prior assessments and IEPs, Parent's correspondence, and Student's academic records. All background information was obtained from Parents and available records. All examples of Student's current behaviors were provided by Mother. The only information purportedly attributed to teachers was contained under a subheading of "Per parental report, teachers have related the following behaviors as problematic:" Several of the tests administered by Dr. Majors involved ratings scales designed to be completed by parents and teachers. Yet, no ratings scales were presented to teachers, and all scoring was based upon parental input alone. The social/emotional testing was provided to Parents in English, and was not completed in the presence of the examiner [Dr. Majors]; she did not know who translated the testing materials for Parents. Therefore, it was unknown if the translator had sufficient expertise to accurately translate mental health terms which could render the assessment invalid, or verify that Parents completed the assessments themselves.

Parents' responses were reported as very inconsistent. Dr. Majors did not assess Student's social/emotional behavior in the school setting, as she did not contact his teachers. Dr. Majors' only information regarding Student's school environment was based upon her one-hour observation of Student in his music class and at lunch, in December 2015, three-to-four months after completing her assessments.

52. Dr. Majors administered a series of neuropsychological evaluations. Her observations of Student during testing were similar to those of other assessors. He did not engage in reciprocal interactions and did not initiate interactions. He constantly required repetition of directions and questions and also exhibited a delay in response time when answering. Dr. Majors concluded that Student's performance during the testing was impacted by his depressive behavior, and it was probable that his scores on some cognitive tasks were adversely affected.

53. Dr. Majors administered the Leiter International Performance Scale-Third Edition (Leiter-3), to measure Student's intellectual functioning. The results indicated that Student's current level of intellectual functioning was in the 75th percentile, or high average range. Cognitively, his profile was variable within and across domains. Student's scores fell within expectation on some measures relating to language functioning, attention/executive functioning and visual/motor integration. He exhibited relative weakness in phonological awareness, audio processing, and visual attention. Student scored significantly below expectation and/or within the impaired range in receptive and expressive vocabulary, phonological memory, auditory recall, comprehension and reasoning, learning and recall of visual information in various forms.⁷

⁷ Dr. Majors also included Ms. Hollar's conclusions, diagnoses and recommendations as part of her own cognitive assessments and conclusions, even though she was not a licensed speech and language pathologist.

54. Dr. Charity Plaxton-Hennings, District's coordinator of student services held a bachelor's degree in speech communication and psychology, a master's degree in psychology, as well as a master's degree in public health. Dr. Plaxton-Hennings also held a doctorate of psychology with emphasis on health and school psychology. She had completed a post-doctoral fellowship in pediatric neuropsychology and neurodevelopmental psychology with emphasis on early developmental interventions and neuropsychological assessment. Dr. Plaxton-Hennings was licensed as a clinical psychologist, and held credentials in pupil personnel services-school psychology, and administrative services. She was also certified as a behavior intervention case manager. Dr. Plaxton-Hennings was highly qualified as a school psychologist and neuropsychologist.

55. Dr. Plaxton-Hennings took exception to Dr. Majors' determination of Student's IQ and the use of the Leiter-3. The Leiter-3 was a non-verbal assessment which was seldom used to determine cognitive ability. Further, Dr. Majors only used four of the ten subtests on the Leiter-3, which presented an incomplete and skewed view. Dr. Plaxton-Hennings contended that in determining cognitive abilities, one must look at memory and processing speed, which Dr. Majors did not do. Had she done so, Student's cognitive scores would be lower and more in line with all of Student's prior cognitive scores. At hearing, Dr. Majors emphasized that, nevertheless, each standardized test measure could present a valid test result.

56. Dr. Majors administered the Wechsler Individual Achievement Test-III and the Nelson Denny Reading Test to measure Student's academic achievement. Dr. Majors considered the Wechsler-III to be the gold standard of academic assessments, and superior to the Woodcock-Johnson, utilized by District. On the Wechsler-III, Student's reading scores fell significantly below expectation and/or grade level in single word recognition (standard score of 89; grade equivalent 6.6); and reading comprehension

(standard score of 78; grade equivalent 2.2). The Nelson-Denney scored Student's reading comprehension significantly below expectation (standard score in first percentile; grade equivalent 4.1). It was noted that Student did not finish the Nelson-Denny within the time limit, completing only one of seven passages. Nor did the Nelson-Denny require Student to read aloud.

57. Dr. Majors administered the Wechsler-III for written expression. Student's scores fell significantly below expectation in sentence building (standard score of 67) and essay composition (standard score of 52), including word count (standard score of 52), theme development and text organization (standard score of 66) and grammar and mechanics (standard score of 69; grade equivalent less than 3.0).

58. Dr. Majors administered the Wechsler-III for mathematics. Student's scores fell significantly below expectation and/or grade level in mechanical arithmetic (standard score of 80; grade equivalent 5.0), applied mathematics (standard score of 79; grade equivalent 4.9), and math fluency in addition (standard score of 83; grade equivalent of 5.8) and subtraction (standard score of 8.6; grade equivalent of 5.5).

59. In comparing Student's Leiter-3 scores to his academic achievement scores, Dr. Majors concluded Student demonstrated a specific learning disorder with severe impairment in reading word accuracy and comprehension; severe impairment in written expression grammar and punctuation accuracy, and clarity of organization of written expression; and severe impairment in math accuracy or fluent calculation and accurate math reasoning.⁸

⁸In making her recommendations for interventions, Dr. Majors relied heavily on Student's Leiter-3 scores. However, the Leiter-3 assessment manual indicated not to use Leiter scores as the basis for interventions.

60. Dr. Majors concluded that Student's deficits in academic performance in all areas were long standing and significant, despite provision of school based remediation programs. She supported her conclusion with a comparison of Student's prior testing results on the Woodcock-Johnson-III, utilized by District assessors in 2008, 2011, and 2014. A difference of professional opinion existed between Dr. Majors and District experts regarding the validity of grade equivalence versus standard scores. Dr. Majors relied more heavily on grade equivalency. She opined that Student's high average cognitive score did not match his grade level scores, and he had the potential to work at a higher level. Based upon his grade equivalency scores, she concluded Student had received no educational benefit, and actually suffered educational loss. As Student had learning disorders which limited his ability to read, it limited his comprehension of grade level curriculum and therefore limited his access to education. She expressed that Student needed immediate remediation to give him the skills he lacked, which was not the same as classroom or core education. Dr. Majors opined at hearing that school districts should attempt to get all students with IEPs to grade level; however, she was unaware of the average academic levels of typical peers in high school, in making any comparisons. As pointed out in the discussion of standardized scoring at hearing, not all typical peers or same age students score or academically perform at grade level.

61. Dr. Plaxton-Hennings disagreed. Student had a significant memory impairment which impacted all areas of his academics. His auditory processing and memory deficits were most likely the result of neurological impairments, such as brain injury, which were supported in his medical history. A short-term, intensive program would not effectively remediate Student's reading skills, as Student's ability to retain information was significantly impaired. Further, Student's auditory processing deficit could not be fixed; but it could be accommodated.

62. Additionally, Dr. Majors acknowledged Student was an English language learner, but she did not consider his progress on the California English Language Development Testing over the years. Student was now scoring in the upper range and was almost ready to be reclassified as fluent in English. Upon review of Student's scores at hearing, Dr. Majors acknowledged Student made marked improvement over the years, and she agreed his advancement was evidence of educational progress.

64. Behaviorally, Dr. Majors determined that Student exhibited symptoms of depression and those symptoms were most probably the result of his awareness of his academic, language, and social communication deficits, as well as his frustration that he was making so little positive progress despite having been placed in special education classes. Student's depression, however, was not the primary cause of his difficulties accessing the curriculum in his educational placement. Dr. Majors concluded that Student's educational program had not provided him with basic tools and intensive remediation designed to obtain results. Dr. Majors acknowledged that Student was holding on to what he learned, but was not advancing. This, she surmised, was due to Student's inappropriate placement in classes which were not multi-sensory and not designed to remediate using evidence based strategies. Student required intensive remediation primarily in a one-to-one setting or in small groups of two-to-three students.

65. Dr. Majors felt Student exhibited these symptoms of depression based upon information provided by Mother. She, however, failed to further explore Student's social/emotional behaviors in the educational setting by including Student's teachers in the rating scales assessments or interviewing any District personnel regarding Student's behaviors at school. When asked by the ALJ why she did not utilize teacher rating scales, Dr. Majors responded she did not feel it necessary. Thusly, she made no

recommendations for an educationally related mental health assessment until May 2017, by which time District had already sought assessment.⁹

66. Dr. Majors recommended Student immediately participates in an intensive reading program through Lindamood Bell to advance Student's reading comprehension. Student would benefit from the provision of evidence based remediation programs in math. Further, Dr. Majors opined that Student's auditory processing disorder could receive appropriate intervention in the school program offered at the Johnson Academy in San Juan Capistrano.¹⁰

67. Dr. Majors' description of Student's educational program was not persuasive. Dr. Majors did not possess a teaching credential or have any educational experience. She did not interview any of Student's teachers nor did she solicit their input through teacher rating scales as part of her assessments. She did not know if District was utilizing evidence based strategies in Student's educational program. She was not trained in Lindamood Bell strategies. District witnesses disagreed with the recommendation for intensive Lindamood Bell interventions, and reported that even by Lindamood Bell's own research, its program had not been highly successful with older children, and were not designed for high school students. Further, a 10-week program

⁹Dr. Majors also completed a supplemental assessment of Student in May 2017, a year after the IEPs at issue for hearing. The supplemental report was discussed at hearing and admitted into evidence for the limited purpose of consideration of remedies. As there has been no denial of FAPE, the supplemental assessment will not be further discussed.

¹⁰The Johnson Academy is a private school consisting of 36 students. Student was ineligible to attend this school, as it served only grades one through eight. Further, the Johnson Academy was located 62 miles from Student's home.

at Lindamood Bell would entail four hours per day of intensive instruction, at a location requiring at least two hours of travel each day.¹¹ The time factor alone would prevent Student from attending school during this period, which was not an option.

68. At hearing, Dr. Majors was unable to provide foundations for her education-related opinions other than “what she read.” She confessed to receiving no training to evaluate educational programs and admitted picking up antidotal information from other professionals.¹²

69. Carol Bartz, an educational consultant, testified on behalf of District to further explain how scores on standardized testing were interpreted and compared. Dr. Bartz had a bachelor’s degree in speech correction, a master’s degree in special education and supervision, and a doctorate in education. She had extensive experience as a speech and language pathologist, school administrator, resource specialist, and educational diagnostician. In preparation for her testimony, Dr. Bartz prepared a standardized assessment profile of Student’s academic assessments scores comparing prior District assessments with the independent assessment results. The purpose of the comparison was to analyze and measure Student’s academic growth. Dr. Bartz concluded Student had made growth in many areas.

70. In reviewing the assessments, Dr. Bartz chided Dr. Majors for many missteps. Rating scales were only given to Parents; therefore there was no way to accurately determine Student’s skills at school. Dr. Majors misused the Leiter-3. Dr.

¹¹ Lindamood Bell’s closest location was in Rancho Cucamonga, California, approximately 20 miles from Student’s home.

¹² As example, Dr. Majors opined that District’s central auditory processing deficit evaluation was invalid as the assessor did not possess a Ph.D. This assumption was solely based upon what she had been told by another evaluator, and was incorrect.

Majors consulted with Ms. Hollar and made recommendations based upon Ms. Hollar's assessments, even though she was not a speech and language pathologist or qualified to make such recommendations.

71. Dr. Bartz debated the reliance on grade equivalency versus standard scores in explaining academic growth. Dr. Bartz contended the use of grade equivalency was an inappropriate measure of progress, as the score was unreliable and deceptive. As example, if utilizing grade equivalent scores, the average college freshman enters college at a seventh grade reading level. In utilizing the standard score, on the other hand, norms were established for the entire sample group of age/grade peers. Once the norm was established, Student scores were converted to a derived score which represented Student's performance within the standardized sample. If Student's standard scores remained the same percentile range, it meant that Student retained the same level of mastery when compared to others in the normed group, not that Student had not learned anything. As the academic skills of the normed group increase each year, i.e., grade to grade, so did the complexity of the testing materials. Therefore, each time Student was tested, he was utilizing more advanced academic skills. Additionally, Student had difficulty with memory, especially auditory memory, and there were no accommodations provided on standardized testing.

72. Dr. Bartz further disagreed with Dr. Majors' interpretations of educational progress. First, she emphasized that without training and background in education, Dr. Majors did not understand educational benefit, and did not make appropriate findings and recommendations. Dr. Majors was not adequately familiar with Student's educational environment or special education program. She opined that Student's IEPs were appropriate. District had not lowered its expectations for Student. His teachers were challenging him in his classwork. Student had been making progress and learning the curriculum with supports and accommodations. Student was rated 288 in his class of

477 students. It was inaccurate to conclude Student had not met his goals, as he had not yet had a full year to meet them; still Student had made partial or substantial progress on each of them. Lindamood Bell, as recommended by Dr. Majors, was not appropriate. Student processed things slowly. He had a central auditory processing deficit. This type of disability could not be cured, but could be accommodated. Even assuming a child had high cognitive ability with a learning disability, it could not be assumed the child would reach grade level. Placing Student in an intensive 10-week reading program, would not alleviate his disability, but would remove him from his other areas of education. A non-public school did not represent Student's least restrictive environment. Student was making progress in his current educational setting.

73. Dr. Bartz's comments on Ms. Hollar's assessment were limited. Dr. Bartz opined that Ms. Hollar's assessment was based primarily on a clinical model rather than an educational model. She was maximizing treatment but failing to consider Student's entire educational program. Dr. Bartz concluded that Student's primary need was to receive his education in class, contrary to Ms. Hollar's recommendation that Student be pulled-out of class for three hours per week.

2015-2016 IEPs

74. Student's annual IEP was initially scheduled to occur on September 9, 2015. On September 9, 2015, Mother cancelled the IEP team meeting, and requested it be rescheduled. Mother would not agree to convene Student's annual IEP team meeting until the independent educational evaluations were completed. An additional IEP team meeting was scheduled for October 19, 2015, to discuss the need for the central auditory processing deficit evaluation, which was also cancelled by Mother. On November 12, 2015, District sent an IEP team meeting notice to Parents, along with a Spanish language copy of Parental Safeguards. The IEP team meeting was scheduled for two hours on December 16, 2015. Mother signed the conference notice, and notified

District that Parents were bringing friends and family to the meeting, and they intended to record the meeting.

75. On December 16, 2015, District convened an IEP team meeting to review the independent education evaluations. All required parties were present, including Ms. Hollar and Dr. Majors. Parents were present with three friends. District provided a school-based translator as well as a District translator. The IEP team confirmed Student was eligible for special education and related services as a student with a specific learning disability due to difficulties with short-term auditory memory and its impact on his educational progress. District provided Parents with a Spanish translation of transition sources, which included information on accessing Student's assignments and grades online.

76. Ms. Hollar shared the results of her assessments with the IEP team. She suspected Student had an auditory processing disorder; however, she was not qualified to diagnose it. District shared that it had already referred Student for a central auditory processing disorder assessment. Ms. Hollar diagnosed Student with a receptive/expressive language disorder, social communications disorder, auditory processing abnormalities and anomia, although she did not test Student for anomia.

77. Ms. Hollar recommended increasing Student's speech and language services to 90 minutes per week of intensive individual speech and language therapy. She shared her recommendations for strategies and accommodations, which were addressed in her report.

78. Dr. Majors reviewed her assessments with the IEP team and was met with significant resistance from District team members. Dr. Plaxton-Hennings, a neuropsychologist herself, did not believe Dr. Majors' assessment was an educational evaluation, as it did not contain any educational components, such as teacher interviews. Dr. Majors completed her assessments of Student in August and September

2015, but did not complete her observation of Student or her written report until December 2015. The validity of her observations was questioned as skewed, due to the impact of multiple observers i.e. District staff, during the observations. Dr. Majors shared that her observations were “as valid as she could get,” and were not representative of the true behavior of either Student or his teacher. She also questioned why Ms. Hollar’s observations were considered valid under similar conditions.

79. The school psychologist reviewed Student’s seventh and eighth grade grades, which indicated no grade lower than a C. She explained to Parents that Student’s grade reflected he had been accessing the grade level curriculum. District team members explained that the discrepancy between classroom grades and standardized scores could be contributed to the accommodations provided to Student at school, which were not allowed during testing. Dr. Plaxton-Hennings reiterated this opinion at hearing, indicating Student’s grades were a valid measure of his progress. Student’s curriculum was not significantly modified; Student had thus far met all graduation requirements, and had appropriate skills to graduate on schedule. Parents equated failure to meet IEP goals as inability to remain on graduation track. Dr. Plaxton-Hennings further opined that Student’s placement in a special day class did not require a certificate of completion in lieu of a regular diploma. Student had skills on a variety of levels. Competency-based learning provided a variety of ways to demonstrate learning, and earn a diploma. Mother’s primary question at the December 16, 2015 IEP team meeting was how long would it take for Student to reach grade level if all of Dr. Majors’ recommendations were implemented. Even Dr. Majors was unable to answer this question.

80. Before the meeting was adjourned to be reconvened later, District indicated that it would discuss Student’s tardiness and his failure to attend school, which had significantly increased since Student moved from his school of residency at Parents’

request for transfer. To access any of the interventions already in place or suggested in the independent assessments, Student needed to be in school, on time, and attend regularly. District also shared that it had offered some mental health interventions, i.e. counseling, to address parental concerns and claimed Mother declined services in October 2015, but was given another referral on December 7, 2015. At hearing, District did not provide evidence of referral nor did it initiate an assessment plan for an educationally related mental health services assessment.

81. Parents requested the assessment reports be translated into Spanish. District agreed, but indicated it would take time as the assessment reports were lengthy and technical in nature.

82. The IEP team meeting was reconvened on January 20, 2016. All required parties were present. District again provided Parents with copies of Procedural Safeguards and transition packet in Spanish. Parents again brought several friends and family members to the IEP team meeting, and recorded the meeting. The IEP team meeting was translated into Spanish for Parents.

83. Student's present levels of performance were discussed. Student's present levels were primarily determined by his teachers and class work. In reading, Student could read short narratives at approximately the sixth grade level. His response time was one-to-two minutes, and he often referred back to text to find information to answer questions. Student demonstrated weaknesses in drawing inferences and evaluating text; he showed weakness in recalling key facts related to the text. In written expression skills, Student demonstrated poor understanding of the topic of an essay. He required assistance, and had difficulty organizing the details within the body of the essay. He displayed numerous errors that resulted in unfocused, illogical or incoherent thought. In mathematics, Student exhibited strength in basic number sense and basic geometry. He struggled with initiating strategies for breaking problems into simpler parts needed to

progress through multi-step problem solving. Student was able to solve equations with an average of 45 percent accuracy.

84. Student was progressing with his vocabulary and language skills. His vocabulary skills were increasing, however, at times, he required maximum cues to engage in a task and answer in complete sentences. Student engaged in small group discussions and offered his opinion when asked more than once. Andrea Cain, one of Student's special education teachers at Ramona High, reported Student as needing to take his time to respond. Student responded well to positive reinforcement and encouragement.

85. Student preferred to work alone, but would engage when paired with a peer partner who initiated collaborative feedback. Parents reported Student was experiencing feelings of depression and anxiety and, based upon Student's reports, his emotional concerns were caused by his school performance. Parent's reported Student was receiving private psychotherapy once a week.

86. Ms. Cain confirmed that Student was very shy, and not very social. She credited this behavior to Student being a recent transfer from another school, as Student had developed a group of friends in 2017. She also explained her responses on the Screening Instrument for Targeting Educational Risk questionnaire, which was completed on October 26, 2016. This questionnaire was completed in response to Dr. Kolomori's letter and parental concerns regarding Student's depression and anxiety. Ms. Cain's responses in October 2016 suggested the need for an evaluation by an educational audiologist, as well as further monitoring in the areas of social behavior. Ms. Cain emphasized she rated Student at the beginning of the year. He would not be rated so low later in the year after transferring to Ramona High. Student was not depressed at school. To the contrary, he was motivated and participated in class. She also explained that there was a difference between being comfortable in activities like telling a story,

and being able to tell a story. Student was not comfortable at the beginning of the 2015-2016 school year.

87. Student's work habits were inconsistent. At times, he appeared to have an understanding of the materials, and at other times, it appeared as though the information being presented was unfamiliar. Student was able to fill out a job application with assistance. He preferred to monitor his grades on the computer program rather than through weekly progress reports; he struggled with initiating proactive skills needed to self-monitor. He had numerous missing or incomplete assignments in five of his six classes. As of December 16, 2015, Student had been absent from school only two days, however, he had been tardy to first period 27 times, and had additional tardies for other class periods. District team members were concerned that Student's tardies getting to school on time were related to his transfer to Ramona High which was across town from Student's home. Mother reported that Student had difficulties sleeping which she associated as a sign of depression. Teachers, however, had not observed sleeping problems or depression at school.

88. The IEP team meeting was again adjourned and scheduled to reconvene on February 3, 2016. On February 2, 2016, Parents notified District they would not attend on February 3, 2016, and the IEP team meeting was again rescheduled for February 25, 2016. As with prior IEP team meetings, all required parties were present; Parents were given the Safeguards; several family and friends attended; and the meeting was recorded. This time, Parents brought Peter Attwood, advocate.

89. The IEP team reviewed and discussed the results of the audiological assessment. District sent a copy of the report to be translated into Spanish. Student's social/emotional behavior was discussed. Parents shared that Student was seeing an outside psychologist once a week and he had attended two sessions. Parents believed

some of Student's depression and anxiety was due to school. District indicated it had not seen a report indicating that Student's depression was school related.

90. Vocational information was discussed. Parents were given a copy of Student's grades from the prior semester. Though his grades were not stellar, Student has passed all of his high school classes.

91. Mother objected to simultaneous translations. District accommodated Mother's request, which increased the time necessary to complete the IEP team meeting. Consequently, the IEP team meeting was again adjourned, and rescheduled for March 29, 2015. Parents were given a copy of the meeting notes in English, and the translator sent the notes for translation into Spanish.

92. The IEP team meeting reconvened on March 29, 2016. All required parties were present. This time Parents appeared with advocates, Faustino Alvarez and Maria Rojas. The meeting was recorded.

93. The IEP team reviewed Student's progress on prior goals and work samples were presented. The advocates requested the school psychologist to explain an audio processing deficit and attention deficit hyperactive disorder. The school psychologist explained, and answered questions as it pertained to students with these types of disabilities accessing the curriculum. The school psychologist also explained the eligibility under which Student qualified for services. Melissa Holden, Student's general education teacher, shared that Student was doing well in her class. She informed the IEP team that she would check for understanding. Ms. Holden shared that Student appeared to have friends and would interact with them. In class, it varied from time to time if and when Student would ask questions.

94. Ms. Cain asked if Parents agreed with the goals. Mr. Baptist told Parents which goals he would monitor, and explained that some of the goals would assist

Student with his anxiety. Parents stated they agreed with the goals and their advocate stated the goals were appropriate.

95. The IEP team discussed Student's transition plan. The program specialist shared information regarding the Department of Rehabilitation and Parents were given a flyer regarding resources. The Transition Partnership Program representative assisted in the development of Student's transition plan. Graduation requirements were explained to Parents and they were given a copy of Student's transcripts. Parents were also informed about the age of majority, when Student would hold his own educational rights, unless he was conserved. Parents signed that they were informed.

96. The IEP team discussed and developed accommodations for Student. Parents shared that Student did not like his afterschool tutoring (which was a function of general education), and had not attended since the last IEP team meeting.

97. The IEP team meeting again adjourned and scheduled to be completed on April 26, 2016. Copies of the translated conference notice, along with a copy of the draft notes to dates, and copy of the Safeguards, were picked up by Parents on April 14, 2016. On April 21, 2016, a translated version of the draft IEP and notes were mailed to Parents.

98. The IEP team meeting reconvened on April 26, 2016. All required parties were present. Parents attended with their attorney, Andrea Smith. The meeting was recorded. Parents' attorney spoke on behalf of Parents. She did not believe Student would be ready to graduate at age 18, and they wanted him to stay until age 21. Dr. Plaxton-Hennings explained that Student would graduate once he met graduation requirements. The IEP team discussed the difference between a certificate of completion and a regular diploma. Parents were not seeking a certificate of completion. The attorney expressed concern regarding the completion percentages contained in the goals.

99. The IEP team discussed summer school options, and agreed that extended school year services were an appropriate intervention for Student. The attorney inquired about Lindamood Bell. The IEP team discussed how District language interventions utilize many similar strategies which are not a Lindamood Bell program. The FM system was discussed and the team agreed to provide FM services in all of Student's core classes. The attorney requested that Student's speech and language services be increased to three, 45-minute sessions per week. District agreed to increase Student's speech and language services to two, 30-minute sessions per week, but Ms. Holden indicated increasing pull-out services further would cause Student to fall further behind academically, if he missed more classroom instruction. Mr. Baptist indicated that Student's speech and language goals would also be worked on in the classroom setting.

100. At the end of the meeting, District made its offer of special education and services. Based upon Student's present levels, District determined his areas of need to be addressed in goals were (1) reading; (2) English language development; (3) writing; (4) math; (5) social emotional; and (6) communication and transition.

101. Student had partially or substantially met his existing goals. None of the goals had been met; however, the goals had only been in place since April 28, 2015. On April 26, 2016, six redrafted goals were presented.

- a. Goal One addressed social emotional needs, and determined Student demonstrated difficulties with auditory comprehension, sentence formation/initiation and responding to conversation. Therefore, the goal sought to have Student orally respond in English using brief sentences with no more than two prompts when given a task or assignment in an ask/tell format.
- b. Goal Two addressed reading comprehension, and determined Student could explain what others said when given an oral reading passage by answering

- only two of ten comprehension questions. Goal Two sought to have Student increase his ability to retell and explain what others have said when presented an oral reading passage at independent reading level and answer questions related to key facts and key vocabulary.
- c. Goal Three addressed writing, and determined Student could write a five paragraph argument about a substantive topic with a claim as the first sentence, and two reasons to support that, achieving at least two points out of six points. Goal Three sought to have Student, when given an organizer with a writing frame, word bank and a prompt requiring Student to take a position, to write a three-to-five paragraph argument that used words, phrases, or clauses to link paragraph transitions, create cohesion, and clarify between reasons and evidence to support his position.
 - d. Goal Four addressed math, and determined Student could solve fractions with 30 percent accuracy and solve problems involving decimals with 20 percent accuracy. Goal Four sought that, when given real world situations or numerical representations, Student would solve problems involving multiplication and division of fractions and decimals with 75 percent accuracy.
 - e. Goal Five addressed transition/work competency, and determined Student had difficulty turning in assignments, and required an average of four verbal prompts to self-monitor his task completion of classroom assignments. Goal Five sought to have Student utilize a graphic organizer to self-monitor task completion with no more than two prompts from adults.
 - f. Goal Six addressed communication, and determined that when presented with a scenario or problem between individuals, Student could accurately provide one solution to a given problem in one of five opportunities. Goal Six sought to have Student explain the position of each person in the scenario, and

provide at least one solution to compromise or resolve the problem in four out of five attempts.

102. To support the goals, District offered Student 56 percent of the school day in a mild/moderate special day class setting for specialized academic instruction of core curriculum. The placement was discussed as part of a continuum of placements, and District considered the mix of general education and special day class to constitute the least restrictive environment for Student. Speech and language services were increased to 60 minutes per week. Hearing assisted technology, consisting of an FM system, was offered for Student's core content classes to support his receptive communication. A significant number of accommodations were offered which addressed Student's needs in his classroom environment, schedule, needs for directions, instructions and visual cues, increased response time, and his organization and study skills. Additionally, Student was offered extended school year services.

103. District also created a post-secondary transition plan for Student. Student remained on graduation track for successful completion of the 12th grade in the 2017-2018 school year. Student participated in the transition plan, and indicated he wanted to attend a local college and obtain a part-time job. Student was offered monthly vocational guidance in this special day class.

104. On May 16, 2016, pursuant to a letter from Parents' attorney, Parents consented to the implementation of the April 26, 2016 IEP, with the exception of Student remaining on graduation track for a regular diploma at age 18. Although Parents consented to implementation, they did not agree that District's offer constituted a FAPE for Student.

105. On May 23, 2016, District sent Parent's attorney a letter of prior written notice regarding its offer of FAPE. With regard to Student's contentions regarding mental health, District stated "The IEP team has repeatedly attempted to address

concerns with both attendance and potential mental health issues as they relate to their impact on Student's educational functioning." The IEP team did not indicate Student suffered from depression, but was responding to Parents' concerns. District indicated that if there was a possibility that Student's mental health and attendance were related, then those concerns should be addressed with counseling or other mental health services. On multiple occasions, Ramona High offered the services of on-site licensed mental health therapists to Student. Parents repeatedly declined services. Further, when District attempted to collaborate with Student's private provider, Mother indicated Student had only been seen twice. District indicated it was willing to provide an educationally related mental health service assessment, and enclosed an assessment plan for Parents' consideration.

MOTHER'S TESTIMONY¹³

106. Mother believed that Student was not learning at school; he struggled in all areas, including reading, writing, and math. Student exhibited difficulties with reading comprehension, did not understand punctuation or grammar, and could not multiply two-digit numbers or understand fractions.

107. Based upon his prior assessments and IEPs, it was evident that Student could not read at grade level. His reading decreased from a fifth grade level in 2013, to a third grade level in 2014. At his annual IEP team meeting in September 2014, the beginning of ninth grade, Student was reading at the fourth grade level. Student attended that IEP team meeting, where he told the team that his special education program was inappropriate.

¹³ Mother was a Spanish speaker, and the due process hearing was translated English to Spanish and Spanish to English.

108. At the December 16, 2015 IEP team meeting, Student still could not read at grade level. The teachers recommended the Read 180 program. Mother expressed concern because Student had already done the Read 180 program, and it did not work. Student did not progress with Read 180, and he was frustrated when he got stuck or could not answer questions in Read 180.

109. After the audio logical assessment, District agreed to provide Student with an FM system, but they did not do so. No further testimony was offered to support this claim.¹⁴

110. During the April 16, 2016 IEP team meeting, Mother asked the team to implement all of the recommendations of Ms. Hollar and Dr. Majors. They refused to do so. Mother requested that the April 16, 2016 IEP be translated into Spanish, but did not receive a Spanish version until February 2017. Mother requested the IEP several times before 2017, but District did not respond.

111. Mother testified that she never received a prior written notice in Spanish or English from District, and never received Procedural Safeguards in Spanish.

112. Mother had significant concerns regarding Student's depression and anxiety. Student became frustrated when he did not understand things. He did not want to get up in the morning to go to school. At the May 16, 2014 IEP team meeting, Mother expressed her concern that Student was not making progress and was frustrated and depressed. She asked for a counseling referral, which was referenced in the IEP document. Nothing was done. District did not provide her an assessment plan for mental health testing.

¹⁴ Additionally, implementation of Student's IEP was not an issue in this hearing.

113. Mother sought private therapy services for Student during the summer of 2015. When school recommenced in September 2015; she gave District the letter from Dr. Komori. District did not provide an assessment plan.

114. Mother believed that Student's depression contributed to his tardiness to school. She also believed that Saturday school, District's intervention for tardies, similar to detention, was emotionally harmful to Student.

115. Mother did not refuse District counseling services. She wanted them. Kathleen Sarimento, District's counselor, told her Student did not qualify for school counseling because he was receiving private therapy. In any case, she never received an assessment plan from District.

116. Mother also felt Student was not ready to graduate from high school. He was not prepared to be independent and go to college. He had potential, but did not have skills. He did not have the functional academic skills which translate into real life. She wanted Student to participate in the Lindamood Bell program because Dr. Majors recommended it. She believed Student should read at grade level, and was upset because District rejected the opinions and recommendations of the independent assessors at the IEP team meetings.

117. Mother expressed her desire to remediate Student to grade level so he can go to college, get a job, and live independently.

STUDENT'S INPUT AT HEARING

118. At the ALJ's request, Student was interviewed in an in camera chat to obtain his opinions regarding his future and education options. Student was very quiet, reserved and uncomfortable speaking with the ALJ. Unfortunately, Student's responses to questions appeared coached, almost in rote, using technical special education vocabulary and phrases. Student specifically asked for Lindamood Bell intensive teaching, but did not appear to understand what the program entailed. He indicated he

would like to go to another school, i.e. Frostig, and would like another year of school before graduating. He did not like pull-out services and he did not like afterschool tutoring.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq; 34 C.F.R. §300.1 (2006)¹⁶ et seq.; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to ineligible 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"

¹⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided herein.

¹⁶ All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

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 is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. In *Endrew F. v. Douglas County School District* (2017) 580 U.S. ___ [137 S.Ct. 988], the Supreme Court reconsidered the meaning of the phrase “some educational benefit” for a child not being educated in a general education classroom. The court rejected the contention by the school district that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress, as well as parents’ contention that school district’s must provide an education that is substantially equal to one afforded to children without disabilities. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 580 U.S. ___, 137 S. Ct. at p. 1001.) The Court retained its earlier holding in *Rowley* that any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. While *Endrew F.* does not require an IEP to maximize educational benefit, it does require

that “a student’s educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” (*Id.*, 580 U.S. ___, 137 S. Ct. at p. 1000.)

5. In so clarifying “some educational benefit,” however, the Court stated that it would not attempt to elaborate on what appropriate progress will look like from case to case. “It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Id.*, 580 U.S. ___, 137 S. Ct. at p. 1001.) *Endrew* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807, **16-18.)

6. The Ninth Circuit further refined the standard delineated in *Endrew F. in M.C.*, as the court stated that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities to enable progress to commensurate with non-disabled peers, taking into account the child’s potential. (*M.C.*, *supra*, *7.)

7. To assist court and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir 2010) 592 F.3d 938, 947 (*Mercer Island*)). “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Acts procedures reasonably calculated to enable the child to receive educational benefits? (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

8. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not hindsight. "An IEP must take account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1142 (*Adams*), citing *Fuhrman, v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

9. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on the issues presented.

ISSUE 1: DISTRICT'S FAILURE TO CONDUCT AN EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT

10. Student contends District denied Student a FAPE by failing to assess in all areas of suspected disability when it failed to conduct an assessment for educationally related mental health services.

Applicable Law

11. A school district must assess the child in all areas of suspected disability. (20 U.S.C § 1414(a), (b); Ed. Code, §§ 56320, 56321.) The school district must assess a student in all areas, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocation abilities and interests, and social and emotional status. (20 U.S.C § 1414(b)(3)(B); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56320, subd. (f).)

Analysis

12. Student failed to sustain his burden of proof that District had an obligation to offer Student an educationally related mental health service assessment during the 2014-2015 school year. Mother initially reported her concerns regarding Student's depression and anxiety to District in 2014. Based upon this information alone, District did not refer Student for an educationally related mental health evaluation, however, District did administer social/emotional behavior assessments as part of Student's triennial assessments, which were designed to assist District in diagnosing emotional and behavioral disorders. Parents and Student's teachers completed rating scales which addressed the areas of Mother's concern. Student scores were rated clinically significant in areas of withdrawal, social skills somatization, negative emotionality, anxiety and interpersonal relationships by several of the raters. Although these scores might have

raised a red flag regarding Mother's concerns, District did not believe these results were areas of concern at school, as there was no correlation that depression or anxiety impacted Student's education. Student passed all of his classes with a 2.50 grade point average and his teachers did not see Student's educational performance impacted by depression and anxiety at school. Student was unable to establish that depression made any impact on Student's access to education.

13. At the beginning of the 2015-2016 school year, Mother provided District with a letter which indicated Student had received psychiatric care during the summer of 2015, and Student was medically diagnosed with depression and anxiety. The letter provided no further information or recommendations. However, as follow up, in October 2015, District conducted a screening for educational risk related to mental health concerns. The results of the screening suggested a need to monitor Student's social/emotional behaviors. District also conducted social/emotional and behavioral assessments. Later, after transferring to a different school, further away from his residence, Student began being tardy to school. Mother reported the tardies were a result of Student's depression and related sleeping difficulties.

14. Mother's concerns were further mitigated by District's offer to refer and provide Student with school-based counseling, which Parent did not accept. Ms. Sarimento did not testify to refute Mother's testimony. While Mother stated she never received a counseling referral from District, it is apparent that she did meet with Ms. Sarimento to discuss counseling. Regardless of whether Mother was offered counseling in October 2015, the record reflects Mother was presented with a Student Assistant Plan for counseling on December 7, 2015, which she failed to pursue. Further, District was provided no further information regarding Student's private therapy, as Student had only attended two sessions during the summer of 2015, which by itself is not indicative that Student needed an educationally related mental health assessment.

15. District also provided Student with an independent neuro-psychoeducational assessment to further address Student's suspected mental health needs. Student's primary evidence of depression was presented by Dr. Majors. Dr. Majors determined Student exhibited symptoms of depression. Dr. Majors is provided no credibility on her findings and assumptions. Her information regarding depression was gleaned only from Mother. She completely ignored the issue in the educational setting by failing to include Student's teachers in the rating scales or dialog on social/emotional behaviors. Further, Dr. Majors did not consider Student's depression to be a primary cause of his difficulties accessing the curriculum in his educational placement. Instead, she assumed Student's frustration and depression was the result of his awareness that his educational program was not providing him with the basic tools to make academic progress. Oddly, were this true, Student's depression would have been a primary cause of an inability to access the curriculum. Further, Dr. Majors demonstrated no educational basis or expertise for her conclusions. While the threshold for assessing a student is low, it nevertheless requires a rational basis for even suspecting a disability which impacts a student's education. Regardless of whether Parent's agreed with Dr. Majors' assessment, she provided no valid information or basis to support a need for an educationally related mental health evaluation at this time. Further, Student, *vis-à-vis*, Dr. Majors, was unable to establish any educational harm from District's failure to provide Student an educationally related mental health service evaluation.

ISSUE 2: THE AUDITORY PROCESSING ASSESSMENT

16. Student contends District denied him a FAPE by failing to conduct an appropriate central auditory processing disorder assessment because the assessor was not an appropriately qualified audiologist, and the assessment was not conducted using a variety of assessment tools.

Applicable Law

17. In conducting an assessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The school district must select and administer assessment materials in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320(b)(3), 56322.) In performing an assessment an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e). Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. (Ed. Code, § 56327.)

18. In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(2)(B); Ed. Code, § 56381, subd. (b)(2).) The school district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

19. A school districts failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et. al.* (9th Cir. 2006) 464 F. 3d 1025, 1031-1933.) A procedural violation 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 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); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Analysis

20. Student failed to present any valid testimonial or documentary evidence in support of his contention that Ms. Pollock was an unqualified assessor. Student's entire contention was based upon Dr. Majors' claim that the central auditory processing deficit evaluation could only be performed by a person in possession of a doctorate degree in audiology. Dr. Major's claim was unsubstantiated and based upon hearsay information. As Dr. Majors stated at hearing, she was told the audiology assessment required a doctorate degree.

21. Ms. Pollock's testimony and documented credentials showed she was a qualified educational audiologist who was experienced with the administration of comprehensive diagnostic audio logical evaluations. She held numerous degrees and credentials and was trained in the diagnosis and treatment of auditory processing disorders and pediatric audiology. Although the State of California now requires a doctorate degree to obtain an audiology license, Ms. Pollock possessed valid licenses and credentials which were grandfathered under the statute. Ms. Pollock remained a highly experienced audiologist, qualified to administer Student's central auditory processing deficit evaluation.

22. Student also failed to sustain his burden of proof to establish that the central auditory processing deficit evaluation was not conducted using a variety of assessments. Ms. Pollock conducted a series of assessments which provided information about the neuromaturational development of the neurological condition of Student's auditory system. She conducted the Central Auditory Processing Disorder test battery, including the phonemic synthesis test which addressed Student's ability to decode phonemically. Ms. Pollock assessed Student's ability to process information being presented to both ears simultaneously, with the information being presented to each ear being different. This test also required tested directed listening. Based upon all of these assessments, Ms. Pollock concluded Student exhibited an auditory processing deficit, which was not disputed by Parents, District, or the independent assessors.

23. Based upon the foregoing, Student failed to meet his burden of proving that District denied him a FAPE by providing an unqualified auditory processing assessor, or incomplete auditory processing assessment.

ISSUES 3 AND 4: REQUIREMENTS FOR PROVIDING DOCUMENTS IN THE SPANISH LANGUAGE

24. Student contends District denied Student a FAPE by (a) failing to provide Parents with prior written notice in their native Spanish language, when it changed Student's placement in the April 28, 2015 IEP, and (b) failing to provide Parents with prior written notice in their native Spanish language, when it refused to change Student's educational placement in the April 26, 2016 IEP, thereby denying Parents the opportunity to meaningfully participate in the IEP development process.

Applicable Law

25. 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 FAPE to such child.” (20 U.S. C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 [“Parental participation...is critical to the organization of the IDEA.”].) The informed involvement of parents is central to the IEP process. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994] Protection of parental participation is “among the most important procedural safeguards in the Act.” (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d, 977, 882.)

26. To ensure that parents understand the IEP proceedings, a school district is required to “take any action necessary.” (Ed. Code, § 56341.5, subd. (l).) Federal regulations also require a school district to ensure parental participation in the IEP process. (34 C.F.R. § 300.322.) Local educational agencies “shall take any action necessary to ensure that the parent or guardian understands the proceedings at a meeting, including arranging for an interpreter for parents...whose native language is other than English.” (Ed. Code, § 56341.5, subd. (i); see also 34 C.F.R. § 300.322.(e).)

27. Prior written notice provisions of the law were created to assist parents in being able to meaningfully participate in their child’s education. (See, *J.W. ex. Rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626, F.3d 431.) A school district must provide parents with a prior written notice whenever it proposes or refuses to “initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. 300.503(a).) A prior written notice must include: (1) a description of the action proposed or refused by the school district; (2) an explanation of why the school district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the school district used as a basis for the proposed or refused action; (4) a statement that the parents have protection under procedural safeguards, and the means by which

a copy of a description of the procedural safeguards can be obtained; (5) sources for parents to contact to obtain assistance in understanding the provision of Part B; (6) a description of other options that the IEP team considered and the reasons why those options were rejected; and (7) a description of other factors relevant to the school district's proposal or refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code § 56500.4.) Prior written notice must be provided in a language that is understandable to the general public, and also in the native language of the parent, unless it is clearly not feasible to do so. (34 C.F.R § 300.503(c).)

28. Providing parents with verbal notice as a substitute for written notice does not fulfill the prior written notice requirements of the IDEA, regardless of whether the verbal notice is substantively proper. (*Union Sch. Dist. v. Smith*, (9th Cir. 1994) *cert. denied*, 513 U.S. 965 (1994).)

Analysis

29. Student failed to establish that any procedural violation for failure to provide Parents with prior written notice in their native Spanish language resulted in any harm or impacted Parents ability to meaningfully participate in the IEP decision making process.

30. It remains unclear as to specifically what change in placement Student contends was subject to prior written notice in the April 28, 2015. The April 25, 2015 offer of FAPE provided that Student would remain in his existing placement of four periods of special academic instruction, in his current special day class placement, until the end of the school year on June 12, 2015. Student would advance to the 10th grade for the 2015-2016 school year, and would receive a similar four periods of special academic instruction in a resource services placement on the comprehensive high school campus, commencing August 24, 2015, through September 9, 2015. Student's

change in placement constituted the normal matriculation from middle school to high school.

31. District did not provide Parents with prior written notice in English or in Spanish. However, Student did not provide any evidence to establish a dispute regarding Student's placement. Student informed the IEP team that their program was no good. Parent's questioned Student's progress in the special day class. There was no indication, at that time, that Parents did not want Student to transition to high school and continue in his special education placement. Hypothetically, assuming District's failure to provide Parents with a prior written notice in Spanish constituted a procedural violation, Student failed to establish that Parents were denied the opportunity to participate in the decision making process, or that Student's right to a FAPE was impeded, or that failure caused him a deprivation of educational benefit. Mother's testimony regarding District's failure to provide documents, including Procedural Safeguards, was unpersuasive. The documents submitted into evidence showed that Parents were provided Spanish versions of all documents Mother requested translated. Further, the evidence reflects Parents were highly involved at every step of the IEP process, including meticulously reviewing and comparing assessment protocols. Spanish versions of Procedural Safeguards were presented to Parents at each IEP team meeting. Parents recorded the IEP team meetings, and received Spanish translations of assessment reports and IEP notes. Parents' rights to participate in the IEP process with respect to the identification, evaluation, and educational placement of Student were not affected by any failure to provide prior written notice in the Spanish language.

32. Parents disagreed with the services and methodologies offered by District, and consented to implementation of the IEP only. If Student's intention was to expand the definition of Student's placement to include Student's services and programs, District's failure to provide prior written notice may have constituted a procedural

violation, however, it did not rise to a denial of a FAPE. As will be subsequently analyzed, the April 28, 2015 IEP constituted a FAPE in the least restrictive environment.

33. District considered but refused Student's request to implement Ms. Hollar's and Dr. Majors' recommendations in the April 26, 2016 IEP. Dr. Majors' recommendations included possible placement at the Johnson Academy, or a non-public school such as Frostig. Both Ms. Hollar and Dr. Majors recommended Student participate in the intensive Lindamood Bell reading program. Ms. Hollar also recommended increasing significantly Student's speech language services. On May 23, 2016, District sent Parent's attorney a prior written notice letter in English, which addressed Parents' concerns presented in their attorney's letter of May 16, 2016. On a technical basis, District failed to provide Parents prior written notice in Spanish. As such, it constitutes a procedural violation of the federal code. For the same reasons explained above in Legal Conclusions 26 and 27, Student failed to establish the failure to provide Parents directly with a Spanish version of the prior written notice, rose to the level of a denial of a FAPE, especially since Parents were represented by legal counsel.

ISSUE 5: CREATION OF IEPs REASONABLY CALCULATED TO ENABLE STUDENT TO MAKE PROGRESS IN LIGHT OF HIS CIRCUMSTANCES.

34. Student contends that neither the April 28, 2015 IEP, nor the April 26, 2016 IEP, was calculated to allow Student to make progress in light of his circumstance. Student contends Student had cognitive abilities in the high average range which will allow him to attain grade level academic performance, with immediate intensive remediation programs.

Applicable Law

35. The recent clarification of *Rowley* bears repeating. While *Endrew F.* does not require an IEP to maximize educational benefit, it does require that "a student's

educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." (*Endrew F., supra.*)

36. This is emphasized by the Ninth Circuit decision in *M.C. v. Antelope Valley Unified School Dist.*, in which the court determined that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities to enable progress to commensurate with non-disabled peers, taking into account the child's potential. (*M.C., supra.*)

Analysis

37. The crux of the argument for each of these IEPs is the determination of what constituted Student's unique circumstances. Student primarily relies on Dr. Majors' determination that Student possesses cognitive abilities in the high average range, therefore his learning deficits can be remediated through intensive remediation programs, which will allow Student to progress to grade level academic achievement. Further, utilizing grade level equivalency scores on standardized testing, Dr. Majors concluded Student has not been provided the tools he needs to succeed, and has made no progress in District special education programs. Dr. Majors equated Student's below average grade level scores with a failure to make educational progress. As indicated herein, Dr. Majors lacks credibility on her findings and opinions. When compared to the well-reasoned opinions of Dr. Plaxton-Hennings, Dr. Bartz, and Ms. Pollock, Dr. Major's determination of Student's cognitive abilities cannot be supported.

38. As described by Dr. Plaxton-Hennings, Student exhibited a significant memory impairment, which, along with his audio processing deficit, was most likely a neurological impairment. These are not necessarily disabilities which will respond to intensive, short-term remediation. Ms. Pollock, the most credible witness presented,

confirmed Student's auditory processing deficit, and made realistic recommendations to accommodate a disorder which cannot be cured.

39. Dr. Bartz presented convincing information which delineated the opposing philosophies regarding standardized assessment scoring. While Student's reporting of grade level equivalencies were accurate, they were also misleading when determining educational progress. Grade equivalency failed to take into consideration the skills of the normed group to which Student's scores were compared. Although Student may have remained in the same percentile each year, his skills were being measured against others in the group. Year to year progression demonstrated educational progress, but in a range limited by Student's abilities. As indicated in *Andrew F.*, advancement from grade to grade is appropriately ambitious for most children in the regular classroom. Such should hold true for comparisons within normed groups of same age/grade peers across all domains.

40. Dr. Bartz sufficiently rebutted Dr. Majors' interpretations of what constituted educational progress. Without training in education or familiarity with Student's educational environment or special education program, Dr. Majors did not clearly understand educational benefit. Dr. Majors' claim that District had lowered its expectations for Student and that the District programs did not challenge Student were unfounded. Student had successfully completed the required curriculum with supports and accommodations. He was rated 288 in his class of 477. These accomplishments suggest educational progress.

41. With Dr. Majors discredited, Student was unable to support a finding that District's considerations and determination of Student's "circumstances" were incorrect.

42. For the foregoing reasons, Student failed to prove by a preponderance of evidence that District denied him a FAPE by failing to provide an offer in its IEPs of

September 9, 2014, and April 28 2015, that was reasonably calculated to enable Student to make progress in light of his circumstances.

ISSUE 6: THE APRIL 28, 2015 AND APRIL 26, 2016 IEP OFFERS

43. Student contends both the April 28, 2015 IEP, and the April 26, 2016 IEP, denied Student a FAPE because they each failed to provide Student with educational benefit.

44. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with on-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d);Ed. Code, § 56345, subd. (a).)

45. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b);Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

46. Special education classes, separate schooling, or other removal of individuals with exceptional needs from the regular educational environment occurs

only if the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Ed. Code, § 56040.1, subd. (b).) Therefore, in addition to providing a FAPE, a school district must ensure that “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.” (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist.v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*))

April 28, 2015 IEP

47. Student failed in his burden of proof to establish that the April 28, 2015 IEP denied Student a FAPE. Student presented little evidence regarding the April 28, 2015 IEP, other than the document itself. District’s offer of FAPE was based upon the triennial assessment results as well as teacher and parental input. The IEP team determined Student demonstrated a significant discrepancy between his low average to average cognitive functioning and his academic abilities due to his difficulties with audio processing and his slower processing speed in class. As a result, Student’s eligibility changed to specific learning disability. Student continued to qualify for speech and language services.

48. The IEP team discussed Student’s present levels of performance, and noted that Student had not yet met any of his prior goals, although he had partially or substantially met each of them. Goals were redrafted in the following areas: reading, written expression, mathematics, English language development, vocational skills, study skills and communication and vocabulary. The goals comported to Student’s unique needs as indicated in his triennial assessments, and continued goals in areas not yet completed by Student. Other than an assumption that if a goal was not met, repeating a

similar goal was inappropriate, Student provided no significant facts to suggest the goals were not suitable for Student. Further, as indicated in the above analysis of appropriate progress in light of Student's circumstances, Student did not establish that Student did not make appropriate progress, based upon grade level equivalencies.

49. To support the goals, District offered Student four periods of specialized academic instruction in his current special day class, with the remainder of time in the general education setting. Upon Student's transition to the high school in August 2015, District offered four hours of specialized academic instruction in a resource placement, with the remainder of time in the general education setting. To support Student's communication goal, Student was offered 25 minutes per week of speech and language services. Parents requested additional speech and language services, but did not establish what was specifically requested or why it was necessary.

50. Placement consisting of four period of specialized academic instruction with the remainder of time in general education provided Student with the support required for him to access the curriculum. As such, it represented the least restrictive environment for Student. Student presented no evidence to the contrary.

April 26, 2016 IEP

51. Considerably more evidence was presented regarding the April 26, 2016 IEP. Dr. Majors' findings and recommendations were received, considered, and rejected. Student's present levels of performance were primarily determined by his teachers and his class work.

52. Again, Dr. Majors' findings and recommendations lack credibility and are rejected in whole. Based upon Student's reliance on Dr. Major's findings, Student has not met his burden of proof to establish a higher cognitive level for Student or rebutted District's determination of Student's present levels.

53. The IEP team determined Student had unique needs in the areas of reading, English language development, writing, math, social emotional, and communication and transitions. To address these needs, District proposed six goals, which were acceptable to Parents. Although Parent's attorney subsequently objected to the goals, Parents based their objections on their desire to have Dr. Majors' recommendations adopted in their entirety.

54. Ms. Hollar presented her assessment findings and recommendations which were generally valid. Ms. Hollar presented as a qualified assessor for a clinical evaluation. She was not an educator nor had she worked in an educational setting. Although she agreed that Student made one-year's progress each year, she equated educational benefit with attaining grade level skills. Ms. Hollar suspected Student had an auditory processing disorder, but was unqualified to diagnose, or make recommendations, on the subject. Her suspicions were confirmed by Ms. Pollock's audio logical assessment. Ms. Hollar did not know if Student's auditory processing disorder and memory deficits were neurological or were due to lack of educational support. Her recommendation of increasing Student's speech and language services to three, 45-minute sessions per week, was based more upon a "fix it" philosophy to bring Student to grade level. Ms. Hollar's rationale for increasing Student's speech and language service was not persuasive. She did not take into account Student's other educational needs, including the need to remain in the classroom to obtain instruction in core subjects.

55. Ms. Pollock's findings regarding Student's auditory processing deficit, were far superior in addressing Student's auditory and communication needs from an educational standpoint. It was appropriate to increase Student's accommodations, rather than provide him with more pull-out speech services.

56. In consideration of both the recommendations of Ms. Hollar and Ms. Pollock, District offered to increase Student's speech and language services to two, 30-

minute sessions per week. District rejected any further increase in speech and language services, as additional pull-out would jeopardize Student's academic instruction. Substantial accommodations were crafted to support Student's auditory processing deficit, including increasing Student's use of FM equipment. Student did not establish that additional speech and language services were needed for Student to make educational progress.

57. District offered Student specialized academic instruction in a mild/moderate special day class for core curriculum. Dr. Majors' recommendation of placement in a Lindamood Bell program and/or non-public school was rejected as unnecessary and violated the least restrictive environment requirements. Other than Dr. Majors' unsubstantiated determination that Student could not learn in a District program, Student provided no further evidence to suggest that his proposed placement was inappropriate, or did not conform to his least restrictive environment.

58. In conclusion, an educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, at p. 197, fn. 21.) Instead, "[T]he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge." The law simply requires that "a student's educational program be appropriately ambitious in light of his circumstances." (*Endrew F. supra.*, at p. 1001). Student did not fulfill his burden of proof to establish otherwise. Therefore, Student's requested relief is denied.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d) the hearing

