

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TRACY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017010024

DECISION

On December 27, 2016, Tracy Unified School District filed a request for due process hearing with the Office of Administrative Hearings naming Parents on behalf of Student. On January 6, 2017, OAH granted Student's request to continue the hearing date.

Administrative Law Judge Theresa Ravandi heard this matter in Tracy, California on April 11, 12, 13, 17, and 25, 2017.

Rodney L. Levin, Attorney at Law, represented Tracy. Tracy's Director of Special Education, Katharine Alaniz, and its Program Administrator, Kristine Gornto, attended each day of hearing.

Nicole Hodge Amey, Attorney at Law, represented Parents and Student, with the assistance of Paralegal Marie Fajardo. Mother attended hearing on April 17, 2017.¹ Student did not attend.

At the conclusion of the hearing, the matter was continued at the parties' request to May 9, 2017, to afford them an opportunity to file written closing briefs. The record

¹ Mother is hereinafter referred to as Parent throughout this Decision.

closed with the parties' timely submission of closing briefs and the matter was submitted.

PROCEDURAL MATTER – STUDENT'S MOTION TO DISMISS

At the start of the hearing, Student made a verbal motion to dismiss Tracy's complaint on the grounds that it had failed to produce Student's report cards pursuant to a written request for education records, and had destroyed past assessment protocols. Tracy opposed the motion.

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction, special education law does not provide for a summary judgment procedure, which would require a ruling on the merits of the complaint, prior to an evidentiary hearing. Student did not move to dismiss Tracy's complaint on the basis that it raised an issue outside of OAH jurisdiction.

The record shows that on January 20, 2017, Student requested in writing that Tracy provide a complete copy of her education records. On January 26, 2017, Tracy provided records in response to Student's request. Upon review, Student determined that specific records were missing, such as her 2010-2011 report card and past assessment protocols. Student filed a motion to dismiss Tracy's complaint on March 24, 2017, based on the failure to produce student records. OAH denied this motion on March 30, 2017.

At the prehearing conference on April 4, 2017, Student acknowledged receiving copies of Student's 2016 test protocols from Tracy on March 25 and 27, 2017, but represented that past protocols and other records had not been received. Tracy represented that it did not maintain past protocols once a new triennial assessment was completed. Tracy was ordered to provide Student with all requested education records by April 7, 2017. At Student's request, the hearing was continued again to April 11, 2017.

Student filed a motion for sanctions on April 10, 2017, the day prior to hearing. Student alleged, for the first time, that she had not received any report cards in response to her records request.² Student argued that she was missing all her report cards from her 2010-2011 kindergarten year through the time of hearing.³ Tracy responded that it had timely provided Student with all of her report cards in January 2017 as requested, and explained that it does not issue kindergarten report cards so there was no 2010-2011 grade report.

Student did not establish that Tracy failed to provide her with all report cards. Rather, the evidence showed Student had carefully delineated those records that she alleged were missing. Student's list of allegedly missing records specifically identified the non-existent kindergarten report card, but did not identify that her other report cards were missing. It was not until the afternoon prior to hearing that Student claimed Tracy failed to produce any of her report cards. Nevertheless, at the start of the hearing, the undersigned ALJ ordered Tracy to provide these to Student. Tracy did so within 30 minutes, prior to the parties making their opening statements.

Student did not provide any legal support for her contention that failure to produce records and/or destroying past assessment protocols constituted grounds to dismiss Tracy's request for a due process hearing. Having provided no authority that

² Student's motion for sanctions is addressed in a separate order issued concurrently with this Decision. Tracy made a verbal motion for sanctions against Student at the start of the hearing which is also addressed in a separate order issued concurrently.

³ Student also initially claimed that she had not received other documents such as attendance records. After a quick review, Student acknowledged receipt of attendance and other records.

would require OAH to hear and determine the equivalent of a motion for summary judgment without allowing Tracy the opportunity to develop a factual record, Student's motion was denied and the hearing proceeded.

ISSUE

Is Tracy's psycho-educational assessment of Student, conducted in the fall of 2016, legally compliant?

SUMMARY OF DECISION

This Decision finds that Tracy's psycho-educational assessment of Student did not meet all legal requirements. The assessors made multiple errors in administering and scoring several test instruments rendering various test scores invalid and the assessment results unreliable. The written assessment report failed to include all required components including an analysis of whether Student may continue to qualify for special education as a student with a specific learning disability. In addition, the report did not explain the testing results; adequately or accurately identify Student's individual strengths and weaknesses; or address the impact of her deficits on her ability to access her educational program. Finally, Tracy did not establish that it provided Parent a copy of the final assessment report. Based on these deficiencies, Student is entitled to an independent psycho-educational assessment at public expense.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 10-year-old girl who lived with Parents within Tracy's jurisdictional boundaries at all relevant times. At the time of hearing, she was a fifth grade student and attending a special day class.

2. In November 2010, Tracy initially found Student eligible for special education and related services under the eligibility category of speech and language impairment. Three years later, in November 2013, Student's individualized education program documented her eligibility category as that of specific learning disability. At the time of hearing, Student continued to be eligible for special education as a student with a specific learning disability. The legal sufficiency of Tracy's October 2016 triennial psycho-educational assessment of Student is at issue in this hearing.

SEPTEMBER 2016 ASSESSMENT PLAN

3. Student was due for a triennial assessment in the fall of 2016. Tracy prepared an assessment plan for Student that proposed the following assessments: language/speech/communication development by the language, speech and hearing specialist; health development (no notation of responsible staff); academic/pre-academic achievement by the special education teacher; psycho-motor development by the school psychologist, adapted physical education specialist, and occupational therapist; intellectual development by the school psychologist; and social/emotional/behavior status by the school psychologist and special education teacher. The assessment plan was written in Parent's native English language and understandable. It explained that the assessments would consist of observations and testing as well as a review of Student's cumulative file and consideration of previous assessments. The assessment plan described what the tests for each specified area were designed to measure. For example, it noted that the academic achievement assessment tests measure basic reading, reading comprehension and fluency, written expression, math calculation and reasoning, oral expression and/or listening comprehension.

4. Tracy provided Parent a copy of the proposed assessment plan, and Notice of Procedural Safeguards, as revised January 2009. Although the San Joaquin County Special Education Local Plan Area updated the notice of safeguards in 2016, the

updated notice was not made available for Tracy's use until March 2017. There was no substantive change in the 2016 update. The only difference was the listing of an additional resource and reference to a parent organization and website.

5. On September 6, 2016, Tracy completed a notice of meeting for Student's annual IEP team meeting informing Parent that the meeting would be convened on November 2, 2016. On September 7, 2016, Parent signed the notice of meeting indicating her intent to attend. Parent also signed the assessment plan on September 7, 2016, and returned it to Ms. Amanda Bailey, Student's special education teacher, that same day. Parent checked the box indicating that she understood the assessment plan, her enclosed parental rights, and that a special education placement would not result without her further consent. On the consent page, Parent handwrote a request that she be provided a copy of all testing results prior to the IEP team meeting for her review.

TIMELY COMPLETION AND PRESENTATION OF STUDENT'S PSYCHO-EDUCATIONAL ASSESSMENT

6. Tracy timely completed Student's psycho-educational assessment and report and reviewed the results with Student's IEP team at the November 2, 2016 team meeting within 60 days of receiving Parent's consent to assess. The IEP team agreed that Student continued to qualify for special education under the category of specific learning disability. During this meeting, Tracy also reviewed the results of its speech and language assessment and concluded that Student no longer required speech and language services; Parent did not agree.

PARENT REQUEST FOR INDEPENDENT EVALUATIONS

7. On November 14, 2016, Parent informed Tracy in writing of her disagreement with its psycho-educational assessment. She found this assessment to be inadequate as it did not, in her opinion, identify Student's learning strengths or needs,

or relevant instructional strategies. Parent requested what she called “a comprehensive evaluation” of Student, including psycho-educational, neuropsychological, educational, reading, and central auditory processing evaluations.⁴

8. On November 18, 2016, Student’s IEP team met for a follow-up meeting to address Parent concerns about eligibility, Student’s low math abilities, the speech and language assessment and recommendation to end speech services, and the psycho-educational report. On November 28, 2016, Parent consented to the IEP offer with exception to the termination of speech services and reiterated her request for a comprehensive independent educational evaluation in all suspected areas of disability. Parent detailed her specific concerns in a November 28, 2016 Parent Addendum to the IEP. The Parent Addendum outlines Parent’s position that the psycho-educational assessment testing was inadequate to identify an auditory processing disorder, and did not sufficiently address Student’s auditory processing, visual-motor, or non-verbal reasoning needs. Parent again requested a comprehensive evaluation to specifically assess cognitive impairment, executive functioning deficits, auditory and verbal processing deficits, and possible learning anxiety. On November 29, 2016, Tracy’s program administrator spoke with Parent to better understand her evaluation request.

9. On December 5, 2016, Tracy provided Parent a prior written notice denying her requests for independent psycho-educational, neuropsychological, educational, reading, and central auditory processing evaluations. Tracy explained that it believed its psycho-educational evaluation was appropriate and assessed Student in all

⁴ In this letter, Parent also requested an assessment of Student’s language and assistive technology needs. Tracy agreed to fund an independent speech assessment, and the parties agreed that Tracy would conduct an assistive technology assessment. Those two assessments were not at issue in this hearing.

suspected areas of disability including auditory processing. Tracy informed Parent it would need to initiate litigation unless she withdrew her requests for independent evaluations, and asked Parent to inform Tracy within seven days if she changed her mind.⁵ Tracy again provided Parent with a copy of the January 2009 revised notice of procedural safeguards. On December 9, 2016, Parent sent Tracy an email withdrawing her request for independent educational evaluations in the areas of psycho-educational, neuropsychological, and reading needs but maintained her request for an independent central auditory processing evaluation. On December 14, 2016, Tracy sent Parent a further prior written notice acknowledging withdrawal of her request for several independent evaluations and continuing to deny her request for an independent auditory processing evaluation.

10. On further consideration, Parent renewed her request for an independent psycho-educational evaluation of Student on December 14, 2016, as she continued to believe Tracy's assessment failed to properly identify Student's processing deficits which adversely affect her ability to learn. Tracy again provided Parent a prior written notice dated December 15, 2016, asserting its psycho-educational assessment was appropriate, denying her request for an independent assessment, and proposing to refer Student to the California Diagnostic Center in Fresno for an assessment, in lieu of a request for an independent evaluation. Between December 16-21, 2016, in subsequent telephone and email communications with Parent, Tracy clarified that it did not believe additional assessment was warranted, but given Parent's request for additional testing, it believed

⁵ No findings are made as to the appropriateness of asking Parent to respond within seven days if she reconsidered her request.

a referral to the Diagnostic Center was a reasonable compromise.⁶

11. On December 21, 2016, Parent informed Tracy that she was interested in the Diagnostic Center referral, but was not willing to forego her right to request an independent evaluation. On December 22, 2016, Tracy provided Parent a prior written notice that it was withdrawing its offer of a Diagnostic Center referral as this had been proposed as a compromise offer in lieu of an independent evaluation. Tracy informed Parent that it would be filing for a due process hearing to defend its psycho-educational assessment. On December 27, 2016, six weeks after Parent's original request for an independent comprehensive evaluation, Tracy filed its request for a due process hearing. This hearing ensued.

TRACY'S PSYCHO-EDUCATIONAL ASSESSMENT OF STUDENT

12. Flaws in the administration of the chosen standardized testing instruments, combined with calculation errors in determining Student's scores, rendered Tracy's psycho-educational assessment of Student unreliable. The testing errors made by both assessors called into question whether the results could even be interpreted, let alone how they were interpreted. In addition, the assessment was not sufficiently comprehensive as it failed to consider the results of Student's past assessments.

13. School psychologist Lilia Magdaleno and Ms. Bailey completed the psycho-educational assessment of Student on October 31, 2016, pursuant to the September 7, 2016 assessment plan. Ms. Magdaleno has completed approximately 70 psycho-educational assessments of students each year since she received her credential

⁶ No findings are made as to the appropriateness of Tracy's offer to refer Student to the Diagnostic Center in exchange for Parent withdrawing her request for an independent evaluation.

in 2010.⁷This was a triennial re-evaluation of Student, the purpose of which was to determine whether she continued to qualify for special education and related services, and to determine her individual strengths and weaknesses and identify her educational needs. Ms. Magdaleno's assessment included a review of Student's records; observations of Student; collection of data from Ms. Bailey through a written teacher questionnaire, and from Parent by means of a written developmental history form; and administration of standardized test instruments. Ms. Bailey's portion of the assessment consisted of administering a standardized test instrument, namely, the Woodcock Johnson-IV Tests of Achievement and Oral Language Battery.⁸Ms. Bailey has completed approximately 100 standardized academic assessments of students using the Woodcock Johnson. Ms. Magdaleno prepared a written assessment report that incorporated Ms. Bailey's testing results and her brief academic summary.

Observations of Student

14. Ms. Magdaleno conducted two, 20-minute observations of Student, one in class and the other at recess. She could not recall what day she observed Student nor if the observations were on the same day. During the classroom observation, Student was

⁷ Ms. Magdaleno has a master's in counseling and a pupil personnel services credential, both of which she obtained in 2010. She has worked as a school psychologist for seven years, and been employed by Tracy in this capacity since the 2014-2015 school year.

⁸ Ms. Bailey obtained an education specialist intern teaching credential in 2013 for students with mild to moderate disabilities, and completed all requirements to clear her credential in 2016. She has taught the same special day class at Student's school since the 2013-2014 school year.

working independently at her desk on worksheets of unknown content. Student appeared to read directions, cross out information, and color boxes with different colors. In terms of her general class behaviors, Student was able to attend to task, work quietly and independently, wait for and follow directions, interact with and assist a peer, and transition. Ms. Magdaleno did not observe Student participating in an academic session and could not report on Student's academic functioning, such as her ability to attend to instruction, based on her observations.

15. During an afternoon lunch recess, Student played with four girls, taking the lead in directing the group in an activity and instructing them on the rules. She appeared to be enjoying herself as she laughed and talked, though she showed disagreement when a boy made a comment. Student followed a peer's suggestion to play on the monkey bars. She followed the playground rules, waited in line for her turn, and smiled as she easily navigated the bars.

16. Ms. Magdaleno also noted Student's testing behavior during her two to three, 40-minute testing sessions. Though Ms. Magdaleno had not worked with Student previously, Student was willing to participate, able to transition, demonstrated good effort, followed directions, and used appropriate eye contact. She remained quiet when she was unsure of an answer. Once prompted, Student would provide the answer or was comfortable answering that she did not know.

Administration of Psychological Test Instruments

17. Ms. Magdaleno utilized technically sound, standardized assessment tools which she was qualified to use and had experience using. These instruments were selected and administered so as not to be racially, sexually, or culturally discriminatory; validated for the purpose for which they were used; and were designed to provide relevant information that would assist in determining Student's educational needs. She administered all tests in Student's native language of English. Each instrument included

specific test protocols and detailed instructions from the test publisher for correct administration and scoring. All test protocols were introduced into evidence at hearing. Ms. Magdaleno was knowledgeable in the area of specific learning disabilities, and her testing assessed Student in all areas related to this disability.

INTELLECTUAL ASSESSMENT

18. Ms. Magdaleno chose to administer the Differential Abilities Scales, Second Edition, to measure Student's cognitive functioning because this test was used in Student's 2010 initial assessments and again in 2013. This instrument is a standardized assessment that measures a student's verbal, nonverbal, and spatial abilities and yields a General Conceptual Ability score. The General Conceptual Ability score is derived from three cluster tests: the Verbal Ability Cluster which measures verbal reasoning and concept formation; the Nonverbal Reasoning Ability Cluster which measures fluid reasoning in the perceptual domain with tasks that assess non-verbal concept formation; and the Spatial Ability Cluster which measures visual perception and organization, simultaneous processing, and visual-motor coordination. Ms. Magdaleno did not administer two optional clusters, the Working Memory and the Processing Speed Clusters although these were administered to Student as part of her 2013 triennial assessment. The average range of performance for this test is a standard score of 90 to 109; below average is 80-89; and well below average ranges from 70 to 79.

19. On April 10, 2017, two days prior to her testimony at hearing, Ms. Magdaleno reviewed her score reports for the Differential Abilities Scales. During that review, she noted that she made a scoring error on the verbal similarities subtest which is part of the Verbal Cluster. At hearing, Ms. Magdaleno testified as to this error. In order to correctly calculate Student's Verbal Cluster score, the publisher's instruction manual required Ms. Magdaleno to enter the correct item set that she administered for the subtest. Ms. Magdaleno administered the correct item set for Student's age, but entered

the wrong item set on the scoring sheet. This error resulted in the incorrect T-Score calculation of 44 on the verbal similarities subtest; Student's correct T-Score was a 42. This error further resulted in the incorrect calculation of Student's Verbal Cluster standard score of 86. Student's corrected Verbal Cluster standard score was an 85. This error further resulted in the incorrect calculation of Student's overall General Conceptual Ability standard score of 78, which should have been a 77. Upon discovering this error, Ms. Magdaleno did not generate a corrected scoring sheet or issue an amended assessment report.

20. It was Ms. Magdaleno's opinion that this was a "minor error" because the difference of only one number on the various measures did not change the identification of Student's overall performance range. Student's corrected standard score of 85 on the Verbal Cluster still fell in the below average range of functioning, and her corrected General Conceptual Ability standard score of 77 still placed her in the well below average range of functioning. Ms. Magdaleno's testimony in this regard was given little weight as she did not account for the fact that Student's eligibility for special education was due to a specific learning disability. This eligibility category depends, in part, on a determination that there is a severe discrepancy between Student's academic achievement scores and cognitive ability, based on a mathematically precise formula which relies on her General Conceptual Ability score. One point up or down can make a difference.

21. Student retained clinical psychologist Sara Rice Schiff to conduct a records review and analyze the underlying assessment protocols and computer generated score reports from the 2016 psycho-educational assessment.⁹Dr. Schiff testified at hearing and

⁹ Dr. Schiff received a doctorate in clinical psychology with an emphasis in neuropsychology in 2004. In 2005, she became a licensed psychologist in the state of California. She has been in private practice since 2006 and also conducts evaluations for

was qualified as an expert in the administration of neuropsychological and psycho-educational evaluations. Dr. Schiff established that the Differential Abilities Scales is not designed to measure Student's intelligence quotient (I.Q.). Therefore, she would have used an alternate I.Q. test. However, there was no evidence that Student's General Conceptual Ability score could not be used to determine whether she had a severe discrepancy between her achievement scores and her intellectual ability.

22. Dr. Schiff also questioned the use of the Differential Abilities Scales based on her opinion that it tends to overestimate the cognitive ability of students with autism. As discussed below, the evidence did not establish that autism was a suspected area of disability at the time of Student's 2016 assessment. Lastly, Dr. Schiff criticized Tracy's use of this tool because it includes visual-motor tasks like copying, and Student's visual-motor difficulties may have artificially deflated her overall scores. However, Dr. Schiff did not establish that the Differential Abilities Scales was invalid for the purpose of determining a severe discrepancy or that its use was otherwise improper for identifying Student's areas of need as part of Tracy's chosen test battery.

PROCESSING ASSESSMENTS

23. On September 16, 2016, Ms. Magdaleno also administered the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition, to Student. This standardized test measures Student's ability to accurately copy a series of increasingly complex geometric forms and the extent to which she can integrate eye-hand coordination skills. Student received a standard score of 77 placing her in the well below

the North Bay Regional Center and Regional Center of the East Bay. Each year, Dr. Schiff conducts approximately 70 assessments for special education purposes, and has administered the Tests of Achievement-IV approximately 200 times and the third edition about 500 times.

average range as compared to her same-aged peers. The Visual Motor Integration tool measures the same skill set as that measured by the recall of designs subtest that was administered as part of the Spatial Cluster on the Differential Abilities Scales. Student's T-Score of 34 on the recall of designs subtest converts to a standard score of 76 which was consistent with her standard score on the Visual Motor Integration test.

24. Dr. Schiff criticized Tracy for not administering additional measures targeting Student's visual-motor difficulties. It was her opinion that given Student's well below average score on the Visual Motor Integration test, Ms. Magdaleno did not have sufficient data to support her written conclusion that Student did not have a visual processing disorder. Dr. Schiff further concluded that additional testing was warranted because Student's score on the Visual Motor Integration test had dropped 11 points since the 2013 assessment when she received a standard score of 88 (below average). The evidence showed that Tracy's testing in this area was sufficiently comprehensive. However, Tracy's assessment report failed to adequately explain the significance of Student's visual-motor scores and impact on her educational needs as discussed below.

25. On October 26, 2016, Ms. Magdaleno administered the Test of Auditory Processing Skills, Third Edition. This standardized test measures Student's auditory skills, including the ability to perceive and process stimuli by discriminating, understanding, interpreting, remembering, and expressing what is heard. This instrument consists of three indexes: the Auditory Phonological Index, the Auditory Memory Index, and the Auditory Cohesion Index. Each index is comprised of multiple subtests. The Test of Auditory Processing also yields an Overall Auditory Perceptual score. The average range of functioning on this tool ranges from a standard score of 85 through a standard score of 115.

26. Once again, in preparing for her testimony, Ms. Magdaleno discovered that she had made an error in administering the word memory subtest (subtest 6) within

the Auditory Memory Index. The publisher instructions direct all examiners to read the scoring manual thoroughly for detailed instructions on administration and scoring. It further cautions that the examiner must, "record the responses exactly as instructed so that the scoring will be accurate; this is especially important for Subtests 4, 5, 6 and 7 that use multi-point scoring (underscore and bold in original)." Ms. Magdaleno did not check the responses she recorded for accuracy, prior to writing her assessment report.

27. On the word memory subtest, Ms. Magdaleno entered a raw score of 18 correct for Student which yielded a scaled score of 10. This score, when combined with the scaled scores from the three other memory subtests, yielded a standard score of 85 on the Auditory Memory Index. However, Ms. Magdaleno did not follow the instructions for administering this subtest. Student had received zero points for items 11 and 12. The instructions required Ms. Magdaleno to continue with the test until Student gave three consecutive zero-point responses. Ms. Magdaleno failed to enter any score for item number 13. Based on the score sheet, item 13 was not administered. Ms. Magdaleno's testimony, that she recalled administering item 13 and that Student received zero points for her response, was not convincing in light of the fact that she conducts approximately seven psycho-educational assessments each academic month. From the time of administering this subtest until the time of her testimony, she would have assessed more than 30 different students based on her estimate of 70 assessments each year. Her testimony in this regard was afforded little weight as there was no persuasive evidence as to how she could reliably recall this specific data from this one tool she administered to Student six months prior.

28. Ms. Magdaleno's error on the processing measure was in failing to properly administer the word memory subtest and note that a ceiling (the correct end point) had been reached. Upon discovering her error, she attempted to minimize its significance by re-calculating a hypothetical score for Student. Prior to her testimony,

Ms. Magdaleno re-calculated Student's score by giving her the maximum number of two points each for the three final subtest items (six additional points). This would have resulted in a standard score of 91, rather than 85, on the Auditory Memory Index. In her opinion, such a change in score was insignificant as Student would still be functioning in the average range. Her focus on Student's functioning level as the most important determination was not persuasive as it failed to account for the purpose of her assessment. As stated in her assessment report under "Reason for Referral," the purpose of the assessment was "to assist in describing [Student's] strengths and weaknesses." Ms. Magdaleno's action of recalculating what Student's score could have been, and her testimony, implicitly acknowledged that the missing entry on this score sheet rendered the reported scores invalid.

29. Had the test instructions for administration and scoring been followed, Student may well have performed better on the word memory subtest than originally assumed. If she earned a raw score of 24 on this subtest as opposed to 18 as entered by Ms. Magdaleno, this area would have been considered a relative strength for Student. Additionally, there would have been a greater scatter between the scaled scores for the four subtests that make up the Auditory Memory Index, the significance of which was not addressed at hearing. Based on the administration and scoring error described above, Student's actual Auditory Memory Index and Overall Auditory Perceptual standard scores are unknown. Her Auditory Phonological Index standard score of 85 fell in the average performance level while her standard score of 65 on the Auditory Cohesion Index fell in the well below average range. Based on her score on the Auditory Cohesion Index, Ms. Magdaleno reasonably concluded that Student demonstrated an auditory processing deficit.

SOCIAL-EMOTIONAL AND BEHAVIORAL TESTING

30. On October 26, 2016, Ms. Magdaleno provided Ms. Bailey a questionnaire to complete regarding Student's class performance, behaviors, and interactions, as well as the Teacher Rating Scales from the Behavior Assessment System for Children, Second Edition. Ms. Bailey completed and returned the questionnaire and rating scales that same day. Ms. Bailey was Student's fourth grade teacher for the 2015-2016 school years, as well as her current teacher. Based on her experience, Student was a role model and exemplary student in her class who worked hard, completed requested tasks, and followed the rules. She was able to request help and admit when she did not understand something. Student had a few close friends but was shy especially around unfamiliar people.

31. Ms. Magdaleno noted in an October 26, 2016 cover letter to Parent that "Parent sources of information are a very important part of the evaluation." On this date, she provided the Parent Rating Scales from the Behavior Assessment System, and also asked Parent to complete the Behavior System's Structured Developmental History Form. This History Form is a detailed packet of 12 pages of questions regarding Student's family, health, medical history, development, friendships, behavior, and educational history. These efforts to obtain Parent's input came seven weeks after Tracy received Parent consent to assess, and less than one week prior to the IEP team meeting scheduled to review the final results of the evaluation. There was no explanation for the lengthy delay in soliciting Parent's input. Parent completed and returned the History Form and rating scales the next day, on October 27, 2016. Parent described Student as easy-going, shy, and slow to make new friends, and a loyal friend with known peers, even when peers were mean. Student enjoyed participating in gymnastics, soccer, Girl Scouts, church, and school. Parent observed Student preferred to play with younger

children, struggled to integrate with her peer group, and was uncomfortable meeting new people and fearful of change.

32. The Behavior System is a comprehensive set of rating scales and forms designed to assist in identifying a variety of emotional and behavioral disorders based on the frequency of observed behaviors and emotions in the home and school setting. The rater determines if a behavior happens never, sometimes, often, or always. As the instrument is a system to facilitate differential diagnosis and classification of emotional and behavior disorders of children and aid in the design of treatment plans, the rater is asked to consider the child's functioning over the past several months. Scores in the at-risk range may indicate a significant problem not requiring formal treatment or the potential of developing a problem that needs careful monitoring. A clinically significant score suggests a high level of maladjustment.

33. Ms. Bailey rated Student's functioning in the average range across all domains except anxiety, which she rated in the at-risk range. Parent rated Student as average in most areas with four at-risk ratings in a typicality (odd or disconnected behaviors), adaptability, functional communication, and adaptive skills; and two clinically significant ratings in withdrawal and leadership. It is not unusual to see different ratings across different environments. Areas that Parent noted to be of concern were not concerns noted in the school setting by Ms. Bailey, nor observed by Ms. Magdaleno. Ms. Magdaleno did not utilize the student observation system nor did she have Student complete the self-report scale, two optional tools from the Behavior Assessment System. She explained that there was no need to administer these tools to obtain information directly from Student because there were no social-emotional or behavioral red flags as school personnel did not observe the concerning behaviors or characteristics noted by Parent. Ms. Magdaleno's rationale was not persuasive; discrepant reports would weigh in favor of seeking additional information.

34. The Behavior System also groups responses into secondary content scales. Parent's content scale rating in the area of developmental social disorders was in the clinically significant range. This was at odds with both Parent and Teacher scores that rated Student as average in the area of social skills. Parent informed the team at the November 2, 2016 IEP meeting, that she answered all questions regarding peer interactions based on Student's functioning during a one-week summer camp experience, three months earlier. Parent wanted to ensure that Student's difficulty in novel social settings with unfamiliar peers was captured. Parent's approach to the social interaction questions, by rating Student based on her functioning during a one-week camp, was not in keeping with the publisher instructions to "mark the response that describes how the child has behaved recently (in the last several months)." While this instruction is written on the rating scales, Ms. Magdaleno did not otherwise alert Parent to this key instruction. Ms. Magdaleno did not learn of Parent's concern about Student's interactions at summer camp or how Parent approached the rating scales until after she completed her assessment and written report. Once Ms. Magdaleno learned that Parent did not complete the rating scales as intended, she did not seek further assessment in this area by asking Father to complete the rating scales, or asking Mother to complete them again in conformance with the instructions, or recommending that any further measures be administered to obtain valid information on Student's social, emotional, and behavioral functioning outside of school.

35. In August 2015, the publisher released the Third Edition of the Behavior Assessment System. Dr. Schiff opined it was not best practices to use a prior edition more than one year following the issuance of an updated version. However, Tracy established that as of the time of hearing, the publisher had not specified a date after which the Second Edition may no longer be used. At the time of Student's assessment,

the Second Edition remained an appropriate assessment tool capable of providing valid results.

Academic Testing

36. Ms. Bailey tested Student's academic and oral language abilities. She is knowledgeable in the area of specific learning disabilities. On September 22, 2016, she administered the Woodcock Johnson-IV Tests of Achievement, a standardized instrument that measures academic achievement. She used the Standard Battery which is comprised of the first 11 subtests to determine Student's strengths and weaknesses in the areas of reading, mathematics, written language, and academic knowledge. Three of the subtests (sentence reading fluency, math fluency, and sentence writing fluency) are timed and provided additional information on Student's processing skills.

37. On October 31, 2016, Ms. Bailey administered the Woodcock Johnson-IV Oral Language Battery to Student which measured her strengths and weaknesses in oral language and listening comprehension without any written component. The Oral Language Battery consists of nine subtests. Ms. Bailey started using the updated Fourth Edition of the Woodcock Johnson Tests of Achievement and the Oral Language Battery at the start of the 2016-2017 school year.¹⁰ By the time of Student's assessment, she had administered this version approximately 10 times.

38. Ms. Bailey was trained and qualified to use the Oral Language and Standard Battery from the Woodcock Johnson-IV. Each includes specific test protocols and detailed instructions from the producer for correct administration and scoring. The test protocols were introduced into evidence. She administered these instruments in Student's native language of English. Ms. Bailey selected and administered the tests in a

¹⁰ The prior Third Edition did not include an Oral Language Battery.

manner that was not discriminatory, and utilized the measures for the purposes for which they were validated.

39. Of the 20 subtests that Ms. Bailey administered to Student, she failed to follow the publisher's instructions as to the administration and scoring of five subtests, one from the Oral Language Battery and four from the Standard Battery, resulting in a total of eight identified errors. Evidence of these errors refuted her testimony that she administered the instruments in accordance with the test manufacturer's instructions to the best of her knowledge. Although Ms. Bailey testified that she normally double checks her score reports, she did not discover her errors. It was not her practice to have a colleague review her entries. During cross-examination, Student's counsel directed Ms. Bailey's attention to the multiple errors. Upon follow-up questioning by the undersigned ALJ, Ms. Bailey acknowledged the existence of two additional errors during the second day of her testimony.

40. Ms. Bailey failed to properly administer the sentence repetition subtest on the Oral Language Battery. She started the test administration with item number 16 per the instructions. However, she was required to determine the basal or point at which all prior, easier items, are presumed correct. For this subtest, the publisher notes that the basal corresponds to the four lowest correct. Student responded correctly on items 16, 17, and 18 but responded incorrectly to item number 19. At that point, the instruction manual required Ms. Bailey to go back and administer item number 15, and so on, until the four lowest correct was established. Ms. Bailey did not do so. Rather, she incorrectly gave Student credit for items 1 through 15. There was no reliable evidence that Student would have responded correctly to item number 15 had it been administered. Therefore, Ms. Bailey's failure to follow the publisher's instructions for the correct administration of this test invalidated the result and the Oral Expression Cluster Score which includes this subtest.

41. On the calculations subtest of the Standard Battery, Ms. Bailey miscounted Student's correct answers and gave credit for 14 items rather than the 13 that Student answered correctly. Ms. Bailey recalculated Student's score after her first day of testimony. She testified the next day that based on that recalculation, this change of one number would not make a difference in Student's overall functioning level which remained in the very low range. Ms. Bailey chose not to print out the results of her recalculation and did not save it. There was no extrinsic corroboration of her testimony that the impact of the change in scoring was *de minimis*. During her second day of testimony, upon questioning by the ALJ, Ms. Bailey testified that she also failed to establish Student's basal for the calculations subtest which the publisher noted was the six lowest correct. With proper administration of this test, Student would have received a higher score of 15 correct. Ms. Bailey's testimony that she simply made a calculation error, not an administration error, was not supported by the evidence. While she may have made a mistake in counting, she also failed to follow the instruction manual.

42. On the word attack subtest, Ms. Bailey again miscalculated Student's raw score, noting it to be 20 when it should have been 19 based on the way she administered this test. More concerning, Ms. Bailey failed to administer the word attack subtest in accord with the instruction manual. She started the administration of this test at item number seven as instructed. However, because Student did not respond correctly to item seven, Ms. Bailey was required to administer items one through six. Instead, she "used her professional judgment" that Student would have answered these first six items correctly. There was no evidence to support her claim so her testimony was given little weight. Standardized tests are designed to eliminate guess work when administered properly. The results of the word attack subtest were not valid nor any cluster score which relied upon that subtest such as the Basic Reading Skills Cluster.

43. Similarly, on both the sentence reading fluency and the sentence writing fluency subtests, Ms. Bailey erroneously marked a response as correct when it was incorrect. Student's counsel pointed out these two additional errors during cross-examination on the first day of Ms. Bailey's testimony. That evening Ms. Bailey re-entered Student's corrected results into the computer scoring program. She testified the next day that for each subtest, a one point change made no difference to Student's overall performance as her corrected standard scores still placed her in the low average range (reading fluency) and the average range (writing fluency). During her second day of testimony, the undersigned ALJ asked Ms. Bailey about a second incorrect response by Student on the sentence writing fluency subtest which Ms. Bailey marked as correct. Ms. Bailey acknowledged that Student's raw score of items correct should have been two points lower. Based on Ms. Bailey's errors, Student's computer generated score report wrongly attributed Student's age and grade equivalent functioning to be more than one full year higher. Specifically, the publisher's scoring table estimated a grade equivalency of 6.3 with an estimated age equivalency of 11 years, 8 months based on Student's incorrectly recorded score of 16 items correct. In contrast, Student's corrected score of 14 items correct resulted in an estimated grade equivalency of 5.0 and an estimated age equivalency of 10 years, 6 months.

44. Ms. Bailey testified that as to the errors pointed out to her on her first day of testimony, the small one to two point calculation errors resulted in a one to two point change up or down in Student's corrected standard scores and anywhere from a .1 to a .3 difference in age and grade equivalent functioning. Ms. Bailey considered these changes insignificant. It was her opinion that because none of these errors changed Student's performance range, the scores remained valid. Ms. Bailey further maintained that the corrected scores did not change Student's identified needs or present levels of performance, such that Ms. Bailey's input to Student's IEP team regarding Student's

goals would not have changed had she discovered these errors prior to finalizing her report. Ms. Bailey's testimony in this regard was troubling. Her focus on Student's overall functioning level whether from average to very low, disregarded one of the key purposes of her assessment, namely, to determine Student's individual strengths and weaknesses and identify her present levels of performance. The combination of her failure to accurately administer multiple subtests, and to precisely score Student's results, renders it impossible to determine Student's specific, relative strengths and weaknesses.

45. One or two calculation errors on a subtest that was otherwise administered correctly may not have invalidated the results of that particular subtest. Here, Ms. Bailey failed to properly administer at least three subtests, which rendered the results invalid. In addition, given the multiple errors in scoring across numerous subtests, Ms. Bailey's failure to carefully enter Student's scores, and double check for accuracy, renders the assessment results unreliable. Ms. Bailey's testimony that the margin of error built into this standardized instrument accounts for these human errors, was refuted by evidence that the reliability of the test results rests on fidelity to the administration instructions. Ms. Bailey's failure to acknowledge the significance of not administering the subtests properly, calls into question the overall trustworthiness of her assessment.

46. Dr. Schiff testified that Ms. Bailey also made errors in scoring the writing samples subtest. On this subtest, the assessor must award Student no points, one point, or two points for her responses. Although the manual provides examples for how to rate responses, the evidence showed this is one of the more subjective tests. Although Dr. Schiff would have awarded Student fewer points on two of her responses, this did not demonstrate that Ms. Bailey made any scoring errors on this particular subtest.

47. Ms. Bailey demonstrated a lack of familiarity with the correct administration of the letter-word identification subtest. This instrument requires that the ceiling be reached at the sixth highest incorrect response. Ms. Bailey initially indicated that she should have stopped the administration of this test at item number 60, which was the sixth incorrect item answered. She considered her failure to stop when instructed to be an administration error. Subsequently, Ms. Bailey re-read the publisher's manual and testified that it is possible to have a double ceiling, and that is what happened on this subtest. Because item number 61 was on the same page as the prior six items, and because Student answered item 61 correctly, the manual allows the administrator to continue with the testing. Dr. Schiff agreed that continuing beyond the initial ceiling in this circumstance was not an error per se, though it did reflect an unusual administration.

48. On September 22, 2016, Ms. Bailey generated a computer score report for Student's results on the Tests of Achievement which noted the grade equivalency data. This score report did not contain the results of the Oral Language Battery which was administered a month later. There was no explanation for the lengthy delay in administering this second battery. On October 31, 2016, Ms. Bailey generated two final Woodcock Johnson-IV score reports, both of which included the results of the Standard Battery and the Oral Language Battery.

49. Ms. Bailey presented as unfamiliar with the computer generated score reports and provided confusing and inconsistent testimony. For instance, she did not know what the notation "W" or "RPI" stood for or the significance of the numbers listed in these columns on the score reports. In addition, she initially testified that there was no difference in the two separate score reports that included the Oral Language Battery and that these two documents were duplicate copies. Later, on cross-examination, she acknowledged that there were differences in the standard scores listed on the two final

score reports. When asked to account for these differences, Ms. Bailey first testified that she must have adjusted and re-run the scores and printed both versions, but was not certain which one she relied upon as the final report. After careful review, Ms. Bailey noted that one score report used age equivalency in calculating standard scores and the other used grade equivalency. This resulted in differences in the standard score data based on the different norming groups. Ms. Bailey provided further contradictory testimony about the score reports when she stated she relied on and used the results from the grade equivalent scores, while her portion of the final written assessment report listed only the age equivalent results.

Comprehensiveness of the Assessment

NO COMPARISON OF PAST ASSESSMENT DATA

50. It was Ms. Magdaleno's opinion that Student's past testing data had no impact on her current psycho-educational assessment. Therefore, she did not compare the results of Student's initial preschool assessment completed by Tracy in November of 2010, or her triennial assessment completed in October 2013, with her current scores. Despite her testimony that changes in standard scores due to errors would be important if the corrected scores placed Student in a different performance range, Ms. Magdaleno did not see any need to compare Student's declining performance over time. For instance, Student's Verbal Cluster score on the Differential Abilities Scales declined from the average range in 2013 (standard score of 92), to the below average range in 2016 (corrected standard score of 85). Her Nonverbal Reasoning Cluster and General Conceptual Ability scores also declined from the below average range to well below average. Ms. Magdaleno considered this decline "normal." She did not persuasively explain her opinion that Student's decline over time was expected and that there was no need to explore the reason for Student's drop in scores. Ms. Magdaleno similarly failed to compare, let alone explain the significance of Student's 11 point decline on the Visual

Motor Integration test from a standard score of 88 (below average) in 2013, to a standard score of 77 (well below average) in 2016. A comparison of Student's scores over time provides insight into Student's functioning; whether she may need more or different special education services; the appropriateness of her programming; and, ultimately, whether she was making appropriate progress in light of her circumstances.

51. Similarly, Ms. Bailey did not compare Student's results on the Woodcock Johnson III Tests of Achievement which was administered in 2013 with her current results. She agreed that it would be important to do so, and that she would be able to make this cross-comparison despite two different test versions, but she did not.¹¹ Any past comparison would have been limited to the assessment reports as Tracy assessors did not retain past test protocols once a new triennial assessment was completed. Ms. Bailey did compare Student's grade equivalent results from her 2015 Tests of Achievement scores with her 2016 results. However, at the November 2016 IEP team meetings, both assessors focused exclusively on the current assessment results.

NO INTERVIEWS

52. Ms. Magdaleno testified that she spoke with both Parent and Ms. Bailey as part of her assessment. Her testimony was given little weight as she could not recall any details of these conversations, and her testimony was not corroborated by her written report. The assessment report does not list interviews as a part of the assessment process; does not describe information obtained during any interview; and does not contain any information from either Parent or Ms. Bailey other than that obtained from their completed questionnaires. Parent clearly recalled details of the one conversation she had with Ms. Magdaleno about the assessment, specifically Student's percentile

¹¹ Ms. Bailey established that she would not need to access the past test protocols to make this comparison.

scores on the Test of Auditory Processing. This conversation occurred in December 2016 after the assessment was completed. Parent's testimony established that Ms. Magdaleno did not interview her as part of the assessment.

53. At hearing, Ms. Magdaleno was questioned as to the purpose of a parent interview. Her answer that "we have to get parent input" was troubling in that it evinced an adherence to form over function. Her testimony that she transcribes all the information provided by the parent on the History Form into her report, and then reads this section verbatim at the IEP team meeting because she is required to do so, was equally troubling as it seemed to espouse this practice as a means of ensuring meaningful participation. Given the delay in administering the Behavior Assessment System, the evidence showed that Ms. Magdaleno did not utilize the results of the behavior rating scales, Parent History Form, or Teacher Questionnaire to inform her assessment process in terms of guiding her observations, selecting testing instruments, or determining the need for formal interviews. Had Ms. Magdaleno interviewed Parent, she could have highlighted the publisher's instructions on the rating scales, or may have determined earlier that the validity of the Parent Rating Scales was compromised. An interview would have provided Parent a forum in which she could have directly shared her perspective on Student's social deficits at summer camp.

STUDENT'S CLAIM OF MISSING ASSESSMENTS FOR AUTISM AND LANGUAGE

54. Dr. Schiff criticized Tracy's psycho-educational assessment as it did not assess Student in multiple areas of suspected disability. Her critiques were not supported by the evidence and, therefore, not credited. Based on teacher reports that Student followed the rules, and was shy around unfamiliar adults; and Parent reports that Student was loyal even when peers were mean to her; slow to make friends; had trouble integrating with peers; and preferred interacting with younger children, Dr. Schiff concluded that autism was a suspected area of disability that should have been

assessed. Dr. Schiff's conclusory description of Student as "rule-bound," based on Ms. Bailey's report that she followed class rules, undermined her objectivity in this regard. Dr. Schiff further opined that since auditory processing deficits negatively impact pragmatic language, Student should have been assessed in the area of pragmatics. However, Dr. Schiff did not interview Parent and had never met Student, and her opinions were not supported by the evidence.

55. Student's speech and language pathologist, Michelle Edache, persuasively established that Student did not display any characteristics commonly associated with autism nor did she display any pragmatic language deficits.¹² Ms. Edache has experience working with students with autism and has worked directly with Student for the past six years beginning with her kindergarten year. She assessed Student in the past as well as for her fall 2016 triennial assessment. Ms. Bailey and Ms. Magdaleno also did not observe any signs of autism in Student such as problems with communication or social interactions. All three professionals described Student as verbal, communicative, appropriately interactive with peers and adults, and able to transition well, follow directions, maintain appropriate eye contact, and discern facial expressions. Parent never alerted Tracy to any behaviors or characteristics of Student that may point to a need for testing in the area of autism. Tracy had no reason to suspect that autism or pragmatic language was a suspected area of disability.

56. Dr. Schiff also pointed to the results from the Parent Rating Scales on the Behavior Assessment System to support her opinion that Student should have been tested for autism. Dr. Schiff noted that the withdrawal scale is the scale most highly correlated with autism spectrum disorders. Parent rated Student's behavior as clinically

¹² Ms. Edache is a licensed speech language pathologist and has worked for Tracy in this capacity for the past 10 years.

significant in the areas of withdrawal and leadership, while Ms. Bailey rated Student as average in these same areas. Dr. Schiff agreed that the behavior rating scales are to be completed based on a review of several months of functioning pursuant to the publisher's instruction. Because Parent rated Student's social interactions based on her functioning at a one-week summer camp, the results from the Parent Rating Scale were not reliable. Parent admitted that Student's interactions at this camp were different from her peer interactions at home, school, and in the neighborhood. Dr. Schiff also agreed that social skill deficits correlate with autism. Here, the Teacher Rating Scales showed no concerns with Student's social skills which were rated as average.¹³ There was no reliable evidence indicating a need for additional testing in the area of autism.

57. Dr. Schiff questioned the comprehensiveness of Tracy's psycho-educational assessment because Ms. Magdaleno did not collaborate with Ms. Edache. Further, it was Dr. Schiff's opinion that the assessment did not explore Student's language needs and any impact that might have on her cognitive functioning. However, the Oral Language Battery tested Student's speech and language abilities, and Tracy arranged for Ms. Edache to separately and concurrently assess Student's speech and language needs. While it may have been a better practice for Ms. Magdaleno to collaborate with Ms. Edache in terms of understanding Student's speech needs and any impact on the psycho-educational testing, Dr. Schiff did not establish that Tracy's psycho-educational assessment was not sufficiently comprehensive because it did not incorporate Ms. Edache's separately reported findings.

¹³ Parent ratings also showed Student as average in the area of social skills.

STUDENT'S CLAIM OF INADEQUATE TESTING

58. Initially, Dr. Schiff testified that Tracy failed to assess Student in the areas of attention and executive functioning. However, she acknowledged on cross-examination that the Behavior Assessment System gathers information in each of these areas. Ms. Bailey's ratings of Student showed no concerns in the areas of attention problems or executive functioning.¹⁴ Dr. Schiff's testimony that Student's standard score of 63 (very low) on the retrieval fluency subtest of the Oral Language Battery indicated a need for additional executive functioning testing, did not establish that Tracy's psycho-educational assessment was deficient for failing to administer an additional measure in this area.

59. Ms. Magdaleno did not administer the optional Working Memory Cluster of the Differential Abilities Scales. Dr. Schiff pointed to Student's below average standard score of 80 on this cluster in 2013 as evidence that Tracy should have conducted additional memory testing. However, Ms. Magdaleno did administer tests that measured Student's memory abilities including the Spatial Cluster and the Auditory Memory Index on the Test of Auditory Processing Skills. The evidence showed that Tracy's chosen instruments adequately measured Student's memory abilities. Dr. Schiff opined that Student's average score on the Auditory Memory Index was deceptive because Student scored in the below average range on the two more difficult subtests

¹⁴ The Behavior Symptoms Index on the Parent Rating Scale includes an attention scale. Parent's responses placed Student in the average range, indicating that Student maintained an attention level similar to her peers. The Behavior System also reports on empirically developed content scales including an executive functioning scale; Parent rated Student as average. However, Tracy did not establish that the results of the Parent Rating Scale were valid.

within this index: number memory reversed (subscale score of 5) and sentence memory (subscale score of 5). Dr. Schiff would have used additional measures to gain a broader understanding of Student's memory strengths and weaknesses. This, however, did not show that Tracy's assessment was deficient for failing to utilize additional memory tests.

60. It was also Dr. Schiff's opinion that Tracy's psycho-educational assessment was not sufficiently comprehensive as it did not include adequate testing of Student's processing needs. Because Student's Visual Motor Integration score dropped 11 points from 2013, Dr. Schiff would have administered additional testing to obtain a better understanding of Student's visual processing needs. Tracy's psycho-educational testing, including use of the Visual Motor tool and the Spatial Cluster on the Differential Abilities Scales, was sufficiently comprehensive to determine whether or not Student had a visual processing deficit. However, Tracy's assessment report, as discussed below, did not provide support for the conclusion that Student did not demonstrate a visual processing deficit, and did not adequately explain the impact of Student's low visual processing scores on her ability to access her education.

61. Dr. Schiff disagreed with Tracy's use of the Test of Auditory Processing claiming it was not a sufficient measure for determining that Student had an auditory processing deficit because this tool did not control for hearing acuity or ability to attend. It was Dr. Schiff's opinion that Tracy had not obtained sufficient data to determine that Student demonstrated an auditory processing deficit, and that the best way to diagnosis a central auditory processing disorder was with an audio logical assessment by an audiologist. There was no evidence that Tracy used this tool for other than its intended purpose, or that Tracy was required to refer Student to an audiologist in order to determine her eligibility for special education and her specific educational needs. Tracy's assessment was sufficiently comprehensive to establish that Student had an auditory processing deficit that would meet the specific learning disability criteria of

having a disorder in one of the basic psychological processes involved in understanding or using language. However, Tracy's psycho-educational assessment report failed to adequately explain the impact of Student's auditory processing disorder on her learning, as discussed in a separate section below.

TRACY'S PSYCHO-EDUCATIONAL ASSESSMENT REPORT

62. In addition to the testing administration errors which rendered the results of several subtests invalid, and the many scoring errors which called into question the reliability of the assessment data, Tracy's psycho-educational report was legally deficient. The assessment report failed to contain all required components; did not adequately nor accurately identify Student's individual strengths and weaknesses; and did not address the impact of her deficits on her ability to access her educational program. Ms. Bailey's testimony that the assessment report is an integral part of Student's IEP, such that you cannot separate the two or understand one without the other, established the importance of the assessment report.

63. Tracy's 2016 psycho-educational report was finalized on October 31, 2016, and incorporated all the testing results obtained by Ms. Magdaleno and Ms. Bailey. As such, this report includes and relies upon all the incorrect scores resulting from the assessors' administration and calculation errors detailed above. Tracy did not issue a corrected report as these errors were not uncovered prior to Ms. Magdaleno's preparation for hearing or Ms. Bailey's examination as a witness at hearing. Testimony correcting the scores, and accounting for possible alternate outcomes if the assessors had followed the publisher's instructions during the administration and scoring of the tests, did not cure the flaws in the data as documented in the report and reviewed with the IEP team in November 2016. The assessment report also analyzes the results of the Parent Rating Scales without any caution as to the validity of the responses as this concern was not discovered until after the completion of the report.

64. The report includes a chart of Student's 2010 and 2013 psycho-educational assessment results. Ms. Magdaleno testified that she included this chart as a "reference only." The report does not indicate why these past scores are included, or contain any comparison of Student's functioning over the years or any analysis of her progress or regression on the testing instruments over time. If, indeed, any decline in scores was of no import as testified to by Ms. Magdaleno, this should have been explained in the assessment report. Ms. Bailey did not include in her section of the report Student's 2015 scores on the Woodcock Johnson Tests of Achievement, or any past academic achievement results.

65. The report identifies that the reason for the assessment was to determine whether Student continued to qualify for special education and related services and to assist in describing her strengths and weaknesses. Tracy's psycho-educational report failed to accomplish either of these goals. The report included information that Student had an auditory processing deficit which would satisfy one of the eligibility criteria pursuant to the category of specific learning disability. It also correctly defined a severe discrepancy as a difference of one and one-half standard deviations between overall ability and academic performance. However, it failed to inform the reader of how to make this calculation. Further, the assessment report failed to provide all the criteria for specific learning disability; failed to identify whether or not any of Student's scores reflected a severe discrepancy between ability and achievement, one of the components for establishing eligibility under the category of specific learning disability; and failed to address whether any such discrepancy could not be corrected without the provision of special education services.

66. Ms. Magdaleno testified that she identified in her report the academic areas that were areas of deficit for Student in comparison to her ability. However, the written report belies her testimony as it fails to include any such reference. Tracy's

assessment report failed to make any correlations between Student's scores and the criteria for a specific learning disability. Ms. Magdaleno acknowledged that she could have written that Student meets the criteria for a specific learning disability, but she chose not to as she believed this should be an IEP team determination. Ms. Magdaleno failed to do an analysis of her test data to render an opinion as to whether Student might meet the criteria for eligibility pursuant to a specific learning disability.

67. Ms. Magdaleno testified that she informed the IEP team during the November 2, 2016 meeting that a severe discrepancy is calculated by looking at Student's incorrectly reported General Conceptual Ability standard score of 78, and the cluster scores on her academic achievement tests. If there is a difference between a cluster score and the ability score of 22.5 points (1.5 standard deviations), plus or minus the standard error of measurement (4 points), then that would be an area of significant discrepancy. Student had a severe discrepancy based on her standard score of 54 on the Broad Math Cluster. The IEP team notes do not reflect this discussion. Even so, a verbal presentation to the IEP team did not cure the failure of the written assessment report to include whether Student had a severe discrepancy that could not be corrected without special education.¹⁵ Ms. Magdaleno abdicated her duty to provide information within her written report as to whether or not Student may be eligible for special education, and the basis for that determination.

68. Because Student was suspected of having a specific learning disability, Ms. Magdaleno was required to include in her report relevant behavior related to Student's academic functioning that was noted during her class observation.

¹⁵ The November 2, 2016 IEP includes the "Specific Learning Disability Team Determination of Eligibility – Discrepancy Eligibility" form but does not attach the referenced "Specific Learning Disability Discrepancy Documentation Form."

Mathematics was Student's greatest area of struggle. Ms. Magdaleno did not observe Student in the classroom while she was receiving math instruction or any academic lesson. Rather, the day she observed, Student was working independently on worksheets of an unknown subject. The assessment report includes no information as to Student's academic performance based on Ms. Magdaleno's class observation. Ms. Bailey did not describe Student's behavior or demeanor during her academic testing sessions or class instruction.

69. The assessment report fails to identify Student's individual strengths and weaknesses. Rather, it simply lists a chart of scores and performance levels for each test measure. For example, the chart with Student's results on the Differential Abilities Scales lists her standard score on the Verbal Cluster as an 86, in the below average range, and her standard scores of 79 for the Nonverbal Reasoning Cluster and 78 for the Spatial Cluster, both in the well below average range. Ms. Magdaleno acknowledged at hearing that she should have explained in the report that Student's verbal reasoning and concept formation was an area of strength for her, even though her overall score was still below average. The report does not include this relevant information. While the report states that the Differential Abilities Scales was administered to profile Student's strengths and weaknesses in a wide range of cognitive abilities, the summaries of her performance on each cluster focus exclusively on how Student responded to the test items as opposed to identifying her strengths and weaknesses.

70. The assessment report includes a chart of Student's Tests of Achievement scores from the Standard Battery, as well as a brief summary of Student's academic functioning and grade level equivalents. Student's strengths were in reading and writing, and math was her most challenging subject. However, there is no summary and no interpretation of Student's scores on the Oral Language Battery. This is particularly troubling given the scatter of reported standard scores on subtests ranging from a high

of 120 (segmentation) to scores in the very low range of 63 (retrieval fluency) and another noted to be less than 40 (sound awareness).¹⁶ Her cluster scores on the Oral Language Battery range from an average standard score of 108 on Phonetic Coding to a low standard score of 71 on Listening Comprehension. The report fails to discuss the significance of any of these scores, leaving the reader to wonder what it means.

71. The assessment report is confusing as it includes contradictory statements without explanation. For example, the report states that Student's Visual Motor Integration performance was well below average. The report then indicates, "This result suggests that she can perform visual motor tasks [sic] such include copying information from the board, organizing information visually in a worksheet, and handwriting. Thus at this point in time, [Student] does not demonstrate a visual perception/processing deficit." The contradiction of Student obtaining a well below average score, and the assessor's conclusion that Student did not have a deficit in this area of functioning is left unexplained, leaving the reader confused.

72. Ms. Magdaleno explained at hearing that Student's visual motor performance as measured on the Visual Motor Integration test (standard score 77) and the Spatial Cluster on the Differential Abilities Scales (standard score 78) was commensurate with her General Conceptual Ability score (standard score 78). According to Ms. Magdaleno, this meant that in comparison with her own ability, Student did not have a visual processing disorder. However, in comparison with her peers, visual processing was an area of deficit and would need to be addressed through her IEP. The assessment report fails to mention the standard of measurement underlying the determination of need - whether or not Student's functioning was commensurate with

¹⁶ On the Standard and Oral Language Batteries, a standard score of 90-110 is average; 80-89 low average; 70-79 low; and 69 and below, very low.

her ability.¹⁷The report also concludes that Student demonstrates an auditory perception/processing deficit based on her standard score of 65 (well below average) on the Auditory Cohesion Index from the Test of Auditory Processing. Again, there is no mention that this deficit was determined in comparison to her ability score.

73. The report fails to acknowledge that Student's below average and well below average areas of functioning, while they may be expected weaknesses, are still areas of deficit. In failing to identify her areas of weakness based on the data, and how these impact her ability to access her education, the report also failed to include a statement as to whether or not Student may require special education and related services. Because there is no acknowledgement that Student's education is adversely impacted by her deficits, the report fails to address whether special education services may be required to assist Student to make progress in light of her specific circumstances. Although the assessment report lists 13 recommendations to reportedly "address some of [Student]'s apparent weaknesses as well as capitalize on her/his apparent strengths," the recommendations incorporate best teaching practices that benefit all students.¹⁸ For example: have student read at home for 20 minutes; ask student prediction or inferential questions about a story; have a predictable and consistent routine; teacher should always maintain continuous contact with all students; and comment on and display work.¹⁹

¹⁷ This Decision does not make any findings as to the appropriateness or impact of this comparison.

¹⁸ The reference to "her/his" is particularly telling of the universal application of these recommendations for any student.

¹⁹ One recommendation was to "always consider [Student's] own thoughts, feelings and perceptions as she is the best authority on her own feelings." The report

74. The report fails to specify how Student's auditory processing, nonverbal language, and visual-motor weaknesses impact her learning. Ms. Magdaleno correctly noted that what Student needs to access the curriculum is discussed at the IEP team meeting, and is an IEP team determination. A delineation of service recommendations is not a required component of an assessment report. However, in failing to determine whether Student may be eligible for special education; failing to interpret the significance of the test results; and failing to identify Student's individual strengths and weaknesses, the assessment report fails to provide the IEP team with necessary information. The assessment report did not inform Student's IEP team as to her possible eligibility and whether she has a severe discrepancy between her ability and achievement; her cognitive potential and the import of her overall ability score; her learning style and educationally-related strengths and weaknesses; and what she may require to make appropriate progress in light of her individual circumstances.

FAILURE TO PROVIDE FINAL ASSESSMENT REPORT TO PARENT

75. In addition to the testing errors and failure to include required components within the assessment report, Tracy did not establish by a preponderance of the evidence that it provided the final psycho-educational assessment report to Parent. Ms. Magdaleno prepared a Draft Report on or about October 27, 2016, the date she finished scoring Parent's behavior rating scales. This version of the report is not dated and identifies that it is a "DRAFT" under the title "TRIENNIAL ASSESSMENT." No Tracy witness mentioned the existence and distribution of a Draft Report until after

does not include a section on Student's perceptions as Ms. Magdaleno did not interview Student or have her complete a student rating scale.

Parent's rebuttal testimony and Student's introduction of this report as an exhibit at hearing.

76. The Draft Report included a background information section with information from Parent's History Form; all of Ms. Magdaleno's testing results and five of her recommendations; and Ms. Bailey's academic summary and the September 22, 2016 results from the Tests of Achievement Standard Battery. The Draft did not include Student's test results from the Oral Language Battery which Ms. Bailey administered on October 31, 2016. It had a signature line for both assessors but was only signed by Ms. Magdaleno.

77. The Final Report is also undated but is signed by both assessors and contains 13 recommendations, including the original 5. The background section, all of Ms. Magdaleno's test data charts and summaries, and Ms. Bailey's academic summary are identical to the Draft Report. The Final Report includes the results of the Oral Language Battery depicted in a chart that identifies and describes the clusters and subtests, lists the standard scores and age equivalencies, and provides Student's functioning level from very low to high average. The two versions are otherwise identical aside from a few minor changes in wording and description. Neither the Draft nor Final Reports list the testing date of October 31, 2016, not do they identify the Oral Language Battery in the list of assessments administered.

78. It is undisputed that Ms. Bailey sent the Draft Report to Parent through Student's communication folder as well as the computer score report from the September 22, 2016 Woodcock Johnson Tests of Achievement. Parent received these two documents a few days prior to the November 2, 2016 IEP team meeting. Because the Draft Report includes the results of the Parent Rating Scales which Parent returned on October 27, 2016, it was sent home, at the earliest, that Thursday, October 27, 2016.

Upon sending the Draft Report home, no one informed Parent that additional testing would be completed and the results incorporated into a final version.

79. Ms. Bailey testified that she also sent Parent both of the October 31, 2016 final score reports that included the Oral Language Battery as well as a copy of the final assessment report, though she could not recall when. Ms. Bailey's testimony that, "to the best of her recollection" she sent the final score sheets home to Parent, and that Parent "should have received" both the grade equivalent and age equivalent final computerized score reports, was not convincing in light of her confusion about the score reports detailed above. Parent's testimony that she never received the final score sheets or the Final Report was supported by the short timeline surrounding the distribution of the Draft Report, preparation of the Final Report, and convening of the IEP team meeting.

80. Parent's practice was to take handwritten notes on documents for her reference and, in this case, to assist her to prepare for Student's IEP team meeting. Parent wrote many notes on the Draft Report she received. Parent was clear, direct, and persuasive in her testimony that she never received the Final Report until Tracy's counsel sent her a copy of the hearing exhibit binder.²⁰ During her rebuttal testimony, Ms. Bailey presented as evasive when asked whether she provided Parent with the Final Report. She first answered, in contradiction to her initial testimony, that Parent was given the report at the November 2, 2016 IEP team meeting. Then she explained that extra copies of the assessment report were placed on the table for the team members. While Tracy may have had extra copies of the report available to the team members, there was no

²⁰ Tracy's counsel anticipated calling Parent as a witness. Student's counsel informed him that Parent would only be available by telephone and advised him to provide her with exhibit binders. OAH requires that any telephonic witness be provided a copy of each party's exhibit binders.

evidence that Tracy gave Parent a copy of the final assessment report at the November 2016 IEP team meetings. The IEP team notes do not reflect that the assessment report was distributed, or that any prior versions were collected.

81. Ms. Bailey next recalled, consistent with her initial testimony, that she sent the Final Report home through Student's communication folder, on a different day than when she sent the Draft Report home. She could not recall when, but believed it was prior to the November 2, 2016 meeting. On further questioning, she then testified, with new found clarity, that she administered the Oral Language Battery, entered the scores, generated the computer score sheets, completed the Final Report, signed it, and sent it home to Parent all on October 31, 2016. Ms. Bailey was not persuasive in this regard.

82. Tracy did not provide any corroborating evidence that it sent the Final Report home to Parent on October 31, 2016. There was no evidence as to when Ms. Magdaleno finalized and signed the Final Report which incorporated the October 31, 2016 testing. There was no evidence of a log for Student's communication folder or attendance records establishing that Student was present at school on October 31, 2016. Even if it had been sent home, there was no evidence that Ms. Bailey included any explanation that this version was the Final Report, or that it differed from the Draft Report and in what manner. Even if Parent received the Final Report through Student's communication folder the Monday after having received what looked like the same report the prior Thursday or Friday, it is unlikely that she would have understood this version was any different from the Draft Report or that she would have discontinued using the Draft Report which contained her notes. On November 28, 2016, Parent signed consent with exception to the November 2016 IEP. Although she initialed the box indicating she had received a copy of "the assessment report," there was no persuasive evidence that she received a copy of the Final Report at or prior to the November 2016 IEP team meetings, or any time prior to receipt of the evidence binders prior to hearing.

ASSESSOR INPUT TO THE IEP TEAM

83. Ms. Bailey and Ms. Magdaleno reviewed the Final Report at the November 2016 IEP team meetings. More specifically, the evidence showed Ms. Bailey reviewed her portion of the overall report, but not Student's individual scores. The November 2, 2016 IEP team notes indicate that Ms. Bailey presented the results of the academic assessment. However, there is no mention in the team notes that she also presented the results of the Oral Language Battery. The November 2016 IEP does not make any reference to this battery. The November 2, 2016 present levels of performance for academics and communication development do not reference the Oral Language Battery. Ms. Bailey proposed new goals for Student during the IEP team meeting. The baselines for the proposed goals were built on and specifically incorporated scores from the Tests of Achievement only. One goal addressed Student's need in the area of listening comprehension, an area specifically measured by the Oral Language Battery as its own cluster score wherein Student's standard score was a 71, in the low range. Even so, the baseline for this goal exclusively uses Student's scores from the Tests of Achievement. There was no persuasive evidence that the results from the Oral Language Battery were reviewed at the November 2016 IEP team meetings.

84. Ms. Magdaleno's and Ms. Bailey's input to Student's IEP team at the November 2, 2016 IEP meeting would not have changed had they identified their assessment errors prior to the meeting. Student continued to meet the criteria of having a specific learning disability. It was the opinion of both assessors that the testing errors did not result in a misidentification of her areas of need. Upon discovery of their respective errors, they continued to believe that the IEP team correctly identified Student's needs and proposed goals that would address her needs. Ms. Bailey did not have an opinion as to whether her test results showed that Student had oral language needs. Her testimony that her opinion did not count and she would defer to other

members of the IEP team was particularly troubling given the speech assessment's finding that Student did not appear to be eligible for language services, and Tracy's recommendation to terminate these services at the November 2, 2016 IEP meeting.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA ²¹

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);²² 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 to prepare them for further education, 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); 34 C.F.R. § 300.1; See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent, meet state educational standards, and conform to the student'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, subd. (a).) "Related services" are transportation and other developmental, corrective, and supportive services that are

²¹ Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

²² All subsequent references to the Code of Federal Regulations are to the 2006 edition.

required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(a); Ed. Code, § § 56032, 56345, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child within the general education class was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. Recently, in *Endrew F. v. Douglas County School Dist. RE-1* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*), the Supreme Court clarified that “for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at 999, citing *Rowley, supra*, 458 U.S. 176, 203-04.) The Court then considered the meaning of the phrase “some educational benefit” for a child not being educated in the general education classroom. For a case in which the student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances” (*Id.* at 1000.) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at 1001.) Importantly, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Ibid.*)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this matter, Tracy filed the complaint, thus it bears the burden of proof as to the sole issue for hearing.

LEGAL ADEQUACY OF TRACY'S PSYCHO-EDUCATIONAL ASSESSMENT

6. Tracy contends that its 2016 psycho-educational assessment of Student was conducted in accordance with all legal requirements such that Student is not entitled to an independent educational evaluation at public expense. Tracy argues that the minor errors made by its assessors were of no significance as all agreed Student remained eligible for special education, and the assessor's recommendations to the IEP team would not have changed if they had discovered their errors prior to the IEP meeting.

7. Student contends Tracy has not met its burden of proof regarding the legal adequacy of its assessment. Student alleges that Tracy's assessment failed to assess Student in all suspected areas of disability; did not include sufficient testing to rule out or establish various processing disorders; involved the use of inappropriate test instruments; and failed to include any Parent or Student interview. Student also argues that Tracy's assessors failed to follow the publisher's instruction manuals in administering several instruments and in scoring multiple subtests which render the results invalid and unreliable. Student maintains these procedural deficiencies significantly impeded Parent's ability to participate in the formulation of Student's IEP and also denied Student educational benefit, such that she is entitled to a publically-funded independent educational evaluation.

Tracy Complied with the Notice and Timeline Requirements

8. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess and reassess the educational needs of a student with a disability. (20 U.S.C. § 1414(a)(1)(A) & (C)&(a)(2); 34 C.F.R. § §300.301 & 300.303; Ed. Code, § §56320, 56381.) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, §

56302.5.) An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements as for an initial assessment apply to reassessments such as the three-year (triennial) assessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subds. (a)(1) & (e).)

9. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); 300Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan describing any evaluation procedures the district proposes to utilize and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); 34 C.F.R. § 300.304(a); Ed. Code, § 56321, subd. (a).) The proposed assessment plan must be written in a manner that is easily understood and in the parent's native language. (Ed. Code, § 56321, subd. (b)(1) & (2).) It shall explain the types of assessments to be conducted and state that the assessment will not result in an IEP without parental consent. (Ed. Code, 56321, subd. (b) (3) & (4).)

10. The assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c); Ed. Code, §§ 56043, subds. (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

11. Tracy's assessment plan for its fall 2016 psycho-educational assessment proposed to evaluate Student in the areas of academic achievement including reading,

writing, math, oral expression and listening comprehension; as well as psycho-motor and intellectual development, and social, emotional, and behavioral status. The plan was written in English, easily understood, explained the evaluation procedures, and indicated that any special educational placement would require additional consent. Tracy's assessment plan was legally compliant. As required, Tracy provided Parent with a copy of her procedural safeguards. That Tracy provided an outdated copy of the safeguards did not invalidate the notice provided as the 2009 copy was substantively identical to the most current 2016 update and listed all parent rights. Parent provided written consent to the assessment plan on September 7, 2016. Tracy timely completed its psycho-educational assessment and reviewed the results at an IEP team meeting within 60 days of consent, on November 2, 2016.

Timely Denial of Independent Evaluation and Request for Hearing

12. Tracy contends that it timely filed a request for due process hearing to defend its psycho-educational assessment of Student in response to Parent's request for an independent evaluation. Student alleges that Tracy's offer to refer Student to the California Diagnostic Center for assessment was an agreement to fund an independent educational evaluation, but that Tracy inappropriately restricted Student's choice of assessor. Student asserts that Tracy's actions and its delay constitute additional grounds for awarding an independent evaluation.

13. The importance of accurate, comprehensive evaluations is underscored by the IDEA's provisions that allow parents, who disagree with district evaluations, to seek an independent evaluation at public expense. The procedural safeguards of the IDEA provide that under certain conditions, a parent is entitled to obtain an independent evaluation of a child at public expense. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.502(a) & (b).) An independent evaluation is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to

request an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests a publically-funded, independent evaluation, the school district must, “without unnecessary delay,” either initiate a due process hearing to show that its evaluation is appropriate, or provide the independent evaluation at public expense. (34 C.F.R. §300.502(b)(2); See Ed. Code, § 56329, subd. (c).)

14. The term “unnecessary delay” as used in chapter 34 of the Code of Federal Regulations, section 300.502(b)(2), is not defined in the regulations. “It permits . . . a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an [independent educational evaluation].” (*Letter to Anonymous* (OSEP Aug. 13, 2010) 56 IDELR 175.) The determination of “unnecessary delay” is a fact-specific inquiry. (*Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, No. C 06-0380 PVT) 2006 WL 3734289, p. 3 [three months unnecessary delay]; *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111 [four month delay unnecessary]; *M.M. v. Lafayette School Dist.* (N.D.Cal. Aug. 8, 2012, CV 09-4624, 10-04223) 2012 WL 3257662 [waiting 74 days constituted unnecessary delay]; *J.B. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12–06358 SI) 2013 WL 1891398, p.4 [seven month delay unnecessary].)

15. Some delay in the provision of an independent evaluation, or in filing for a due process hearing after declining to fund an independent evaluation, is reasonable if the school district and the parents are engaging in active communications, negotiations, or other attempts to resolve the matter. (*J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 15, 2009, No. 2:07-cv-02084-MCE-DAD) 2009 WL 1034993, p.7-8 [two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent, and district filed for due process less than three weeks after negotiations

came to an impasse, was not unnecessary]; *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 28, 2007, No. 06-5172) 2007 WL 2851268, p.10 [six-week delay in filing for due process not a per se violation given ongoing efforts to resolve the matter].)

16. Tracy did not unnecessarily delay in filing its due process request to defend its assessment. Parent first requested an independent psycho-educational evaluation on November 14, 2016. Forty-three calendar days later, on December 27, 2016, Tracy filed a request for due process hearing to defend its assessment. During these six weeks, Tracy discussed and clarified the request with Parent; Parent, in part, rescinded her request; and Tracy sent three prior written notices to Parent denying her request for an independent evaluation in the areas covered by its psycho-educational assessment. Tracy's communications with Parent to better understand her independent evaluation requests did not cause Tracy to unduly delay in filing to defend its assessment. Whether Tracy's offer to refer Student to the California Diagnostic Center, in lieu of an independent evaluation, constitutes a de facto offer to fund an independent evaluation or whether it is an offer to resolve the dispute need not be determined herein as this Decision awards Student an independent educational evaluation on other grounds.²³ Tracy was procedurally compliant in timely filing for hearing to defend its assessment when it became clear that Parent was maintaining her request for an independent evaluation.

An Assessment must be Sufficiently Comprehensive

17. The purpose of a special education assessment is to identify a student's unique and individualized needs. The IDEA and California state law require that a school

²³ Having found that Tracy timely filed for hearing to defend its assessment, no determination is made as to Tracy's intervening actions, nor is such a determination required to resolve the issue for hearing.

district assess a student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); See 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) Children who may be eligible for special education “must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs.” (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110, cert. denied (Apr. 17, 2017, No. 16-672) __ S.Ct. __; [2017 WL 1366731] (*Timothy O.*.)

18. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve “a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (*Timothy O., supra*, 822 F.3d 1105, 1110.) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6); *Letter to Baus* (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(1).)

ANALYZING A PROCEDURAL VIOLATION

19. A district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033.) The failure to obtain critical assessment information about a

student, "render[s] the accomplishment of the IDEA's goals -- and the achievement of a FAPE -- impossible." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1210 quoting *Amanda J. v. Clark County School Dist.* (9th Cir.2001) 267 F.3d 877, 894.)

20. A procedural error 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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit has held that a procedural error resulting in a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013)720 F.3d 1038, 1047 (*Doug C.*)) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Id.* at 1047 quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.) "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." (*Amanda J., supra*, 267 F.3d 877, 892.)

21. Tracy's own assessment plan required it to consider the results of Student's prior assessments; this it did not do. Ms. Magdaleno included a chart of the results of Student's 2010 and 2013 psycho-educational assessments for reference only. It was important to examine Student's prior assessments to determine if her educational program was affording her the opportunity to make appropriate progress in light of her individual circumstances. Despite Ms. Magdaleno's opinion that past results had no

impact on her current assessment or opinion, she decided to use several testing tools because they had been used previously with Student. This indicated that changes over time, captured by the testing tools, were an important consideration. Ms. Bailey directly acknowledged this. However, neither assessor compared or contrasted Student's prior testing results with her current scores. Focusing on the current testing results deprived the assessors, and thus the IEP team, of valuable information regarding Student's progress or decline, and whether changes to her educational program may be warranted. As such, Tracy's psycho-educational assessment was not sufficiently comprehensive so as to constitute a "complete result" as mandated by the Ninth Circuit in *Timothy O.* This procedural violation denied Parent the opportunity to meaningfully participate in the IEP process as she was not informed of Student's decline in functioning.

22. Student contended, but did not prove, that Tracy's psycho-educational assessment was legally deficient for failing to assess Student in the area of autism, and failing to adequately assess her language, attention, executive functioning, memory, and auditory and visual processing needs.²⁴ On the facts of this case, Tracy was not on notice that Student may have autism. Significant deficits in verbal and nonverbal communication and social interaction, engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences, all generally evident before age three, are characteristics often associated with autism. (Cal. Code Regs., tit. 5, §

²⁴ Student also contended that Tracy failed to assess her sensory integration and assistive technology needs, and should have conducted a health assessment due to her failed vision screening in September 2016. No findings are made in these regards as the only assessment at issue was Tracy's psycho-educational assessment.

3030(b)(1).)Parent never alerted Tracy to possible concerns in these areas. None of the three assessors, including Ms. Edache who had worked with Student for over five years, noted that Student displayed any characteristics commonly associated with autism. Further, the Teacher Rating Scales did not indicate any concern with social skills which correlate to autism. The Parent Rating Scales, which noted clinically significant concerns in the area of withdrawal and leadership, were skewed and thus unreliable because Parent based her ratings of Student's peer interactions on behaviors noted at a one-week summer camp, three months prior. Even so, the Parent Rating Scales noted Student's social skills to be in the average range. Dr. Schiff's opinion that additional autism testing was warranted was not persuasive as she never met Student, did not interview Parent, and relied on Parent's questionable behavior rating scales.

23. Tracy did assess Student's language needs by means of the Oral Language Battery as well as through Ms. Edache's separate speech and language assessment which is not at issue in this hearing. That Ms. Magdaleno did not collaborate with Ms. Edache did not render the psycho-educational assessment legally deficient. Tracy administered test instruments that assessed Student in the areas of attention, executive functioning, memory, and processing. The results from the assessment tools did not indicate a need for additional testing in these areas. Although Dr. Schiff would have referred Student to a licensed audiologist for an audio logical assessment, such a referral is not required unless a student continues to fail a threshold hearing test. (Cal. Code Regs., tit. 5, § 3028.) Tracy's testing was sufficiently comprehensive to establish that Student had an auditory processing deficit. Tracy also adequately assessed Student's visual processing by means of the Visual Motor Integration test, and the Spatial Cluster of the Differential Abilities Scales. Tracy's failure to adequately explain its conclusion that Student did not have a visual processing deficit rendered the assessment report inadequate, rather than the underlying assessment.

24. The IDEA and its implementing regulations require that assessments include a means of obtaining and incorporating parent input. While Ms. Magdaleno did not conduct a Parent interview, she did have Parent complete the Structured Developmental History and the Parent Rating Scale from the Behavior Assessment System. Tracy did not solicit this Parent input until October 26, 2016, the last day of Ms. Magdaleno's testing. Upon receipt of Parent's ratings and History Form on October 27, 2016, Ms. Magdaleno completed the Draft Report, which included the same Parent background information as the Final Report. It is difficult to conceive of this as meaningful Parent involvement in the assessment process. Whether Tracy's psycho-educational assessment met the procedural requirement of including Parent input need not be determined in light of the numerous deficiencies inherent in the assessment process and written report.

Tracy's Assessors were Qualified and selected Appropriate Tools

25. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a), 56320, subd. (b)(3) [tests of intelligence and emotional functioning shall be administered by a credential school psychologist].) Assessments and other evaluation materials must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iv) and (v); 34 C.F.R. § 300.304(c)(iv) and (v); Ed. Code, § 56320, subd. (b)(3).)

26. No single measure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320,

subd. (e).) Rather, the assessor must use a variety of technically sound instruments. (20 U.S.C. § 1414 (b)(2)(A); 34 C.F.R. § 300.304(b)(1)&(2).) The selected instruments are to also assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) An assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) A school district is required to use those assessment tools necessary to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii).)

27. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible and in the form most likely to yield accurate information on the student’s functioning; and must be used for the purposes for which the assessment or measures are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(i), (ii) & (iii); 34 C.F.R. § 300.304 (c)(1); Ed. Code, § 56320, subds. (a), (b)(1) & (2).)

28. The determination of what tests are required is made based on information known at the time. (*Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech and language testing where concern prompting assessment was deficit in reading skills; speech and language was an area of strength; the assessment included some measure of communication skills; and the results did not indicate a need for more comprehensive speech and language assessment].) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542.)

29. Ms. Magdaleno is a credentialed school psychologist and was qualified to conduct Student's psychological assessment. Ms. Bailey, as a credentialed special education teacher, was qualified to administer Student's academic achievement tests and the Oral Language Battery. Both assessors were knowledgeable of Student's disability and experienced and trained in administering the tools they utilized for Student's psycho-educational assessment.

30. The assessment consisted of multiple standardized assessment tools administered to Student in her native language of English; selected and used in a non-discriminatory manner; and for the purposes for which they were valid and reliable. Although Dr. Schiff might have used alternate instruments had she assessed Student, this did not establish that Tracy's assessors administered inappropriate test measures. Although the Differential Abilities Scales yields a General Conceptual Ability score as opposed to an I.Q. score, the evidence at hearing established that this measure was valid for measuring Student's intellectual ability for the purposes of determining whether she had a severe discrepancy between her academic achievement and cognitive ability. Despite the existence of an updated Third Edition to the Behavior Assessment System, use of the Second Edition was still authorized at the time of Student's psycho-educational assessment. Student did not establish that the psycho-educational assessment was flawed due to the use of inappropriate measurement tools. Tracy used of a variety of technically sound, standardized, assessment tools meant to gather relevant information that would assist in determining Student's eligibility and educational needs.

Multiple Errors Rendered the Results Invalid and Unreliable

31. Errors by both assessors in the administration and scoring of several test instruments rendered the results of some of the subtests and the related cluster scores invalid. The reliability of the results from a standardized test instrument is dependent on

the assessor following the instruction manual. Based on the multiple errors, Tracy was unable to show that many of the assessment tools were administered and scored correctly in accordance with the publisher's instructions. The cumulative effect of the multiple errors rendered the results of the psycho-educational assessment inherently unreliable.

32. Ms. Magdaleno erred in her administration of Student's intellectual and auditory processing tests and in scoring the results. On the Differential Abilities Scales, she made an administration and scoring error on the verbal similarities subtest. Her initial error, and subsequent failure to double check her scoring, resulted in inaccurate reporting not only of Student's score on this subtest, but also on the Verbal Cluster which relied on that score, and Student's overall General Conceptual Ability score. While Student's corrected Verbal Cluster and General Conceptual Ability standard scores resulted in a change of only one point lower, this was a fundamental difference in light of the fact that Student was being assessed in relation to her specific learning disability. The determination of a specific learning disability is based on a precise mathematical formulation; here, the underlying math was incorrect. Ms. Magdaleno found this error upon careful review of the data in preparation for testimony. Student was entitled to rely on the assessor taking equal care in the initial calculation; in entering the results to generate a score report; in drafting and editing the assessment report; and in reporting the results to the IEP team.

33. On the Test of Auditory Processing, Ms. Magdaleno also erred in her administration of the word memory test which is included in the Auditory Memory Index. She failed to indicate, as required by the instruction manual, when Student reached a ceiling on this subtest. This error rendered the results of the subtest and the index score invalid and unreliable.

34. Ms. Bailey administered a combined total of 20 subtests to Student from the Woodcock Johnson's Standard Battery Tests of Achievement and the Oral Language Battery. She failed to follow the publisher's instructions on five of these subtests including the sentence repetition, calculations, word attack, sentence reading fluency, and sentence writing fluency, which resulted in a total of eight errors. Her errors included miscalculating the number correct a total of five times. Ms. Bailey also failed to determine the basal (the item number wherein all prior items are presumed correct) as required by the publisher on three different subtests, which resulted in her failure to administer and score the correct items, rendering those subtests and all involved cluster scores invalid.

35. Ms. Bailey did not discover her errors prior to her testimony. Her testimony that she recalculated some of the correct scores, and that the impact of the change in scores was *de minimis* based on the corrected results, was given little weight. Ms. Bailey provided no corroboration by means of the corrected computer generated score reports. The scores speak for themselves; any testimony as to what should have been entered or what the result would have been was unreliable. For at least one of the errors, the publisher's scoring table showed that had the correct score been entered, Student's grade equivalency would have been more than one full grade level lower than reported. Even if Tracy had established that a one or two point change in scores would not have changed Student's overall level of functioning, the results were still unreliable for the purpose of accurately identifying Student's individual strengths and weaknesses. A change in the scores does matter when viewed from the perspective of determining Student's specific needs.

36. The failure of both assessors to follow the publisher's instructions in the administration and scoring of multiple assessment tools called into question the reliability of the entire assessment. These flaws were not cured after the fact by their

hearing testimony. The assessors failed to provide evidence of the corrected score reports nor did they issue a corrected written report. These testing errors constitute a procedural violation that impeded Student's right to a FAPE and significantly impeded Parent's ability to meaningfully participate in the IEP team meeting. Pursuant to the Ninth Circuit's holding in *Amanda J.*, without accurate assessment data, derived from tests administered in accord with the producer's instructions, the "achievement of a FAPE is impossible." (*Amanda J.*, *supra*, 267 F.3d 877, 894.)

Additional Assessment Requirements – Specific Learning Disability

37. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities. (34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030(b)(10).) The basic psychological processes include attention, visual processing, auditory processing, phonological processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030(b)(10).)

38. In California, a student is eligible for special education in the category of specific learning disability if, among other things, she exhibits a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (Cal. Code Regs., tit. 5, § 3030(b)(10)(B).) A severe discrepancy exists if, on standardized tests, a student's scores show a standard deviation of 1.5 or more between ability and achievement according to

a complex mathematical formula set forth by regulation.²⁵(*Ibid.*) This difference must be adjusted for a standard error of measurement not to exceed 4 standard score points. (*Ibid.*) If such a discrepancy exists it must be corroborated by other assessment data including tests and observations. (*Ibid.*)

39. The determination of whether a student suspected of having a specific learning disability is a child with a disability, must be made by the student's parents and a team of qualified professionals including the child's teacher and at least one individual qualified to conduct assessments. (34 C.F.R. § 300.308.) The student must be observed in her learning environment to document the student's academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a); Ed. Code § 56341, subd. (c).) In determining whether a student has a specific learning disability, the team must decide to use past classroom observation data or have one team member conduct an observation of the student's academic classroom performance after the child has been referred for assessment. (34 C.F.R. § 300.310(b).)

40. During Ms. Magdaleno's classroom observation, Student was working independently on worksheets. Therefore, Ms. Magdaleno did not observe Student's academic performance and behavior in her established areas of academic difficulty. However, Student had been in Ms. Bailey's class since the beginning of the 2014-2015 school year. Ms. Bailey was a member of Student's IEP team and able to supply the team with relevant past academic observations. There was no procedural error in this regard.

²⁵ A school district is not required to use the severe discrepancy model to determine eligibility in the category of SLD; it may use "response to intervention" instead. (Ed. Code, § 56337, subds. (b), (c).) Tracy uses the severe discrepancy model.

TRACY'S ASSESSMENT REPORT FAILED TO MEET LEGAL REQUIREMENTS

41. Tracy contends that its written assessment report was provided to Parent and met all legal requirements. Tracy argues that to the extent the report may have been deficient, there was no substantive harm, and any harm was cured by a full IEP team review of the assessment. Student contends Tracy did not provide Parent the Final Report prior to the time of hearing in April 2017; that the written report was deficient as it failed to include a discrepancy analysis or eligibility determination, and failed to identify Student's educational needs; and that the IEP team did not discuss the results of the Oral Language Battery. Student maintains these deficiencies denied Parent meaningful participation.

42. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1); Ed. Code, § 56329, subd. (a)(1).) However, in order to aid the IEP team in determining eligibility, an assessor must produce a written report that includes information about whether the student may need special education and related services, along with the basis for that determination. (Ed. Code, § 56327, subds. (a) and (b).)

43. Upon completion of an assessment, the district shall provide parents with a copy of the evaluation report and the documentation of determination of eligibility. (20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2); Ed. Code, § 56329, subd. (a)(3).) The personnel who assess a student must prepare a written report that includes: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) for students with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special

education and related services; and (7) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage. (Ed. Code, § 56327.)

44. Tracy's psycho-educational assessment report contains numerous errors as a result of the inaccurate and unreliable data it reported. Because the underlying assessment was not reliable, the assessment report cannot be relied upon to help identify Student's special education needs. In addition, the report fails to include the required components of a determination of whether Student may need special education and related services; the basis for that determination; and whether Student has such a discrepancy between achievement and ability that it cannot be corrected without special education services.

45. Ms. Magdaleno failed to analyze the testing data and provide an opinion within her assessment report as to whether Student may meet the criteria for having a specific learning disability. The report does not correlate Student's academic scores to her ability. It does not identify whether or not Student has a severe discrepancy in a specific academic area, or how Student's processing disorder and academic deficit or deficits impact her ability to access the curriculum. While it is the IEP team that determines eligibility, the team is aided by the assessor's report in making that determination. The important role of the IEP team in determining eligibility does not relieve the assessor of her duty to include within her written report an analysis of her data with regard to possible eligibility. Regardless of whether Ms. Magdaleno and Ms. Bailey discussed the significance of their findings with the IEP team at the November 2, 2016 IEP meeting, they failed to draft a legally compliant assessment report.

46. While the report lists Student's scores from the test instruments, it fails to interpret the results or explain the significance of the data such that the IEP team could rely on it to develop an appropriate IEP. The assessment report fails to identify Student's individual strengths and weaknesses in a manner that is readily understandable. Rather,

it includes contradictory conclusions without explanation. The report is notable for its missing link between Student's low scores in certain areas, and how these deficits impact her learning. The assessment report fails to identify Student's needs because the assessors mistakenly believed this was the exclusive province of the IEP team. This deference to the IEP team, rather than ensuring meaningful participation, resulted in the team being deprived of relevant information as to Student's needs, as uncovered by the assessment results, and what she may require to make appropriate progress in light of her unique circumstances.

47. The report as a whole was insufficient to provide the IEP team relevant assessment information upon which to develop an appropriate program for Student. The underlying data was not reliable. The reported results contained multiple inaccuracies, were not explained, nor are they able to be interpreted. Finally, the report failed to identify Student's educational strengths and weaknesses based on the test data. For all these reasons, the report was not legally compliant. These procedural deficiencies significantly impeded Parent's ability to participate in the IEP decision-making process.²⁶ Without accurate, complete results, Parent could not understand whether Student had a severe discrepancy between cognition and achievement, and in what academic area. Without an understanding of what Student's scores meant in

²⁶ Tracy relies on *C.W. v. Capistrano Unified School District* (9th Cir. 2015) 784 F.3d 1237, and the underlying district court case, in its closing brief. These cases are factually and procedurally distinct from the case at hand. Even so, they support the legal conclusions reached herein, as they generally conclude that testing errors and assessment report deficiencies that are material and result in substantive harm, render an assessment fundamentally flawed.

regard to her possible educational needs, Parent was unable to advocate for appropriate programming.

NO PERSUASIVE EVIDENCE TRACY PROVIDED FINAL REPORT TO PARENT UPON COMPLETION

48. Parent requested that Tracy provide her with a copy of all assessment information prior to any IEP team meeting. The law does not specify when an assessment report must be provided to a parent, other than "upon completion." Parent received a copy of the draft assessment report a few days prior to the November 2, 2016 IEP team meeting. The Draft Report did not include the results of the Oral Language Battery that was administered on October 31, 2016, and only contained 5 of the 13 recommendations that were added to the Final Report. Of note, Tracy witnesses did not discuss the preparation and distribution of a Draft Report until Student admitted this document as an exhibit at hearing. Ms. Bailey provided incomplete and inconsistent testimony as to the distribution of the assessment report.

49. Ms. Bailey sent documents home to Parent with Student by way of her communication folder. Parent received the Draft Report not sooner than Thursday, October 27, 2016, as it incorporated her rating scales from that date, and no later than a few days prior to the November 2, 2106 IEP team meeting. The Final Report is undated, yet it incorporated results from the Oral Language Battery administered on October 31, 2016. Ms. Bailey's inconsistent testimony as to the distribution of the Final Report was not persuasive and uncorroborated, such that Parent's testimony was afforded greater weight. Tracy did not prove by a preponderance of the evidence that it provided Parent a copy of the Final Report prior to the November 2, 2016 IEP team meeting. Although Tracy left copies of the Final Report on the table at the IEP team meeting, there was no evidence Tracy provided a copy of the Final Report to Parent at the November 2, 2016 IEP team meeting, or at any other time as required by law.

50. Without a copy of the Final Report, Parent's ability to participate in the IEP team meeting was significantly compromised. While Ms. Bailey reviewed the results of her assessment in general at the IEP team meeting, she did not review specific scores. Parent did not have Student's scores from the Oral Language Battery which showed standard scores on subtests as low as less than 40 and 63, both in very low range (69 and below). Because Tracy did not provide this critical assessment information to Parent, she was not able to meaningfully participate in the IEP team meeting. Further, Ms. Bailey did not have an opinion as to whether her test results showed that Student had oral language needs, and she deferred to other members of the IEP team for that determination. At the November 2, 2016 IEP team meeting, Tracy recommended that Student's language services cease. As such, this procedural violation also deprived Student of educational opportunity because if these scores were provided to Parent, there is a "strong likelihood that alternative educational possibilities for the student would have been better considered." (*Doug C., supra*, 720 F.3d 1038,1047.)

51. Tracy's psycho-educational assessment was fundamentally flawed by the failure to follow the instructions of the test producers, scoring errors, and the failure to consider Student's past assessments and decline in functioning. The written assessment report was legally noncompliant due to the failure to analyze whether Student may have a severe discrepancy between ability and achievement in certain areas, and may need special education. Further, the assessment report included unreliable and erroneous data, and contained inconsistent statements, failed to include an interpretation of testing data, and did not identify Student's individual strengths and weaknesses. The totality of the procedural violations identified herein significantly impeded Parent's ability to meaningfully participate in the decision-making process and resulted in a loss of educational benefit to Student, such that she is entitled to an independent psycho-educational evaluation.

REMEDIES

1. The courts have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of the Town of Burlington, Mass. v. Depart. of Education of the Commonwealth of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*.) This broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 243 fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d at p. 1496.)

2. Tracy did not establish that its psycho-educational assessment and written assessment report were legally compliant, and this denied Student a FAPE. Therefore, it is equitable to order Tracy to fund an independent psycho-educational evaluation of Student.

ORDER

1. Tracy shall fund an independent psycho-educational evaluation of Student and shall also fund the assessor's attendance at an IEP team meeting to review the results, if requested by Parent.

2. Within five business days of this Decision, Tracy shall provide Parent with its Special Education Local Plan Area criteria for psycho-educational evaluations including academic assessments. Parent shall select an assessor who meets the specified criteria and provide Tracy with the contact information for her chosen assessor within 15 business days of this Decision.

3. Within 10 business days of receipt of the contact information for the chosen qualified assessor, Tracy shall send the assessor a contract to perform the independent assessment. Tracy shall cooperate with all reasonable requests of the assessor.

4. The independent assessor shall provide the assessment report directly to Parents. If Parents wish for Tracy to consider the results of the independent evaluation at an IEP team meeting, they shall notify Tracy and provide a copy of the written report. Tracy shall convene an IEP team meeting no later than 30 days after receipt of the independent report. Tracy shall fund the attendance of the assessor at an IEP team meeting to review the assessment results. Tracy shall reimburse the assessor's travel costs.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on the sole issue for hearing.

RIGHT TO APPEAL

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

DATE: June8, 2017

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings