

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2013120159

**DECISION**

On December 2, 2013, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH), naming Berkeley Unified School District (Berkeley).

Administrative Law Judge (ALJ) Theresa Ravandi heard this matter in Berkeley, California, on January 28-30 and February 4-5, 2014.

Deborah Jacobson, Attorney at Law, represented Parents and Student. Parents attended each day of hearing. Student was not present.

Jan E. Tomsy, Attorney at Law, represented Berkeley. Kay Altizer, Berkeley's Executive Director of Special Education attended the first week of hearing with the exception of the afternoons of January 28-29, 2014. Lisa Graham, program supervisor, attended as Berkeley's representative at that time as well as on February 4-5, 2014, in Ms. Altizer's absence.

At the conclusion of the hearing, the matter was continued to March 3, 2014, to afford the parties an opportunity to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

**ISSUES**

1. From February 2013 to November 2013, did Berkeley deny Student a free appropriate public education (FAPE) by failing to timely locate, identify, or evaluate her pursuant to its affirmative child find obligations?

2. Did Berkeley deny Student a FAPE by failing to find her eligible for special education and related services under the eligibility category of specific learning disability at the November 4 and November 12, 2013 individualized education program (IEP) team meetings?<sup>1</sup>

3. Did Berkeley deny Student a FAPE by failing to allow Parents meaningful participation in the decision making process at the November 2013 IEP team meetings?

### SUMMARY OF DECISION

This Decision finds that Berkeley violated its child find obligation because, by the end of March 2013, Berkeley had reason to suspect that Student might have a disability and be in need of special education. Specifically, Berkeley was aware that Student suffered from anxiety and frequently missed school, had enrolled in independent study where she did not attend to her weekly lessons or engage with the independent study teacher, and that Parents had contacted the special education department regarding the referral process.

However, Student did not prove that she is eligible for special education as a student with a specific learning disability. Student does have a severe discrepancy between her cognitive ability and academic achievement; however, she does not have a processing disorder. Her discrepancy likely resulted from poor school attendance and limited academic instruction. Even if Student has a processing disorder, the evidence established that she does not require special education and related services. Accordingly, because Student does not qualify for special education, she is not entitled to a remedy for Berkeley's violation of its child find obligations.

Finally, even though Student is not eligible for special education, this Decision finds that Berkeley afforded Parents meaningful participation in the decision making process at the November 2013 IEP team meetings. The IEP team considered outside assessments of Student; Parents fully participated in the discussions; and Berkeley did not predetermine Student's eligibility.

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<sup>1</sup> Issues Two and Three were amended to include both team meetings in November 2013. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

## FACTUAL FINDINGS

### *Background and Jurisdiction*

1. Student is a seven-year-old girl who, at the time of hearing, had not been found eligible for special education and related services. Student resides with her Parents within the educational boundaries of Berkeley.

2. Student was removed from her biological family at a young age due to trauma and neglect and was placed in foster care. She has a history of attachment disruption having been removed from her birth parent and then placed in multiple foster homes before she went to live with Parents at 15 months of age. Parents adopted Student when she was two and one-half years old.

3. Student attended Berkeley Arts Magnet School (Berkeley Arts) as a kindergartener during the 2011-2012 school year as well as for part of her first grade year from August 2012 through February 2013. From approximately mid-March through mid-April 2013, Student participated in Berkeley's independent study program.<sup>2</sup> Student next attended Berkeley's John Muir Elementary School (John Muir) from April 16, 2013, through the end of the 2012-2013 school year, where she completed first grade. She returned to John Muir as a second grader for the 2013-2014 school year and was still in attendance at the time of hearing.

### *Child Find through March 2013*

4. During kindergarten, Student missed 18 school days and was late (more than 30 minutes) an additional six days. Student frequently missed school during her kindergarten year due to chronic, uncontrolled asthma. There was no showing that prior to hearing Berkeley was aware of the reasons for Student's kindergarten absences. Despite these absences, Student had a successful kindergarten year, ending the year at or above grade level in all subjects and meeting all academic benchmarks. Student progressed in "reader's workshop," Berkeley's reading program.<sup>3</sup> At the end of her kindergarten year, Student's independent reading level was Level G, which exceeded the target grade level expectation of Level C. Parent was unpersuasive in her attempt to minimize Student's academic performance in kindergarten by claiming that Student was hesitant to read and read books with few words and lots of pictures. Her testimony that Student did not do well in writing

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<sup>2</sup> Although witnesses and exhibits referred to Student's participation in independent study, the evidence showed that independent study more accurately refers to a program designed for high school students, while elementary school age children may participate in a version of independent study known as home school. The terms are used interchangeably.

<sup>3</sup> Berkeley's reading curriculum uses an alphabetic system to describe students' reading levels with expectations that specific levels will be completed in a specific grade.

and spelling was not credited in light of Student's kindergarten report card, which showed that she was meeting and at times exceeding grade level spelling standards and had well-formed handwriting. This report card identified Student as an independent worker with a love of learning.

5. Student started to miss school during her first grade year, beginning in October 2012, with her non-attendance peaking in February 2013. By March 1, 2013, Student had been absent 25 school days since the start of the school year, late an additional five days, and tardy (less than 30 minutes) four days. She did not return to Berkeley Arts after February 2013.

6. On August 29, 2012, Student began first grade in Marcie Thomas' classroom. By November 2012, Student demonstrated anxiety about attending school and began to refuse to go to school by throwing a tantrum and refusing to get into the car to drive to school or to get out of the car once there. Parent acknowledged that at the time she did not know why Student refused to attend school. Parent did not inform Berkeley of the nature and extent of Student's school refusal or request assistance prior to November 2013.

7. In December 2012, Student's best friend transferred from Berkeley Arts to Jefferson Elementary School (Jefferson). Parents placed Student on the wait list for Jefferson because they believed the girls' bond was an educational asset. During this time, Student began play therapy with Dr. Boyka Dimitrova of WestCoast Children's Clinic in Oakland (WestCoast) because of her anxiety.<sup>4</sup> Parent worked with Dr. Dimitrova on ways to encourage Student to commit to attending school one step at a time. Parent would reason with Student but did not force her to attend school. In her therapy sessions, Student acted out themes of performance anxiety and failure. Parents did not provide Berkeley information about Student's therapy sessions or written verification of her alleged diagnosis of anxiety disorder.

8. The evidence established that it would be highly unusual for a student to experience school based anxiety and not have any manifestation while at school. School professionals would notice academic anxiety and a student with this condition would typically present at school as withdrawn, sad or crying, have difficulty engaging with peers, complain of being ill in an attempt to go home or be sent to the office, and refuse to

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<sup>4</sup> Dr. Dimitrova has worked in the field of mental health since 1996 and counseled children since 2005. She is not licensed but obtained her doctorate degree in clinical psychology in September 2011, from California School of Professional Psychology, Alliant International University, in San Francisco and is working under the supervision of a licensed clinician. She has worked as a therapist and assessment specialist at WestCoast since July 2010. During the 2009-2010 school year, she counseled children in elementary school at Ann Martin Center in Oakland. She obtained a bachelor's degree in psychology in 1995 and a master of arts in clinical and organizational psychology in 1997.

participate in activities. From kindergarten through the time of the November 2013 IEP team meetings, Student did not display any anxiety at school, when she was able to attend school.

9. By the end of the first trimester on October 26, 2012, Student had met all of her academic benchmarks. She was at independent reading Level F, a step back from her kindergarten achievement of Level G. Ms. Thomas, who had completed a reading recovery professional development course last year, was not concerned by this drop in level as such drops do occur and Student was still at grade level.<sup>5</sup> Although she wrote with a “b/d” letter reversal, this is common for first and second graders. Further, Student wrote with detail and edited her own work.

10. According to Parent, Student began to resist doing her school work during the second trimester of first grade. She told Parent the work was too difficult and that writing hurt her hand, and she refused to read aloud. Parent was concerned about how Student held her pencil when writing. However, there was no evidence that Parent informed Berkeley of these academic concerns at the time, nor was this the experience of Ms. Thomas. For the second reporting period at the end of February 2013, Student had met all math benchmarks, five of seven reading benchmarks, and seven of nine writing benchmarks; those she did not meet were a function of her lack of attendance. She was reading at Level H, above grade level, although her fluency was choppy. Student was below grade level in spelling, and continued to reverse some letters. She was a happy, engaged learner, who liked school. Based on her academics and class functioning when present, Berkeley had no reason to suspect Student had a disability.

11. Student’s poor attendance and Parents’ report of her anxiety and decision to enroll her in independent studies triggered Berkeley’s child find duties. By winter break of her first grade year, Student had missed 11 days of school and was tardy or late an additional five days. Ms. Thomas contacted Parent on January 16, 2013, expressing her concern about Student’s absences and requesting an update.

12. In a series of emails beginning February 4, 2013, Parent informed Ms. Thomas that Student was working with a therapist due to anxiety issues and requested a meeting so she could share concerns and determine how to best support Student at school. Parent also shared that in order to understand her needs, Student was being privately assessed. At hearing, Ms. Thomas acknowledged that based on Parent’s communications she knew that Student was having problems and needed help, and she wanted to involve the school counselor to get supports in place. Parent did not consent to this counselor’s involvement.

13. Parents and Ms. Thomas met on February 8, 2013. At this meeting, Berkeley learned that Student was refusing to go to school, had anxiety, sleep disturbances and

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<sup>5</sup> Ms. Thomas first obtained her general education teaching credential in 2000 and is authorized to teach kindergarten through sixth grade. She has taught at Berkeley Arts for the past 13 years, her first two years as a second grade teacher, and then as a first grade teacher.

difficulties at home, and that Parents were working with a therapist to support Student. Although Student had not displayed any worrisome behaviors at school, Ms. Thomas was concerned about Student missing so much school and its adverse impact on her learning. Parents' contention that Ms. Thomas informed them that Student had test anxiety was persuasively refuted by Ms. Thomas' testimony that Student's apprehension of tests was no different than that of other first graders and that she addressed it as a whole class issue. On one occasion, Parent informed her that Student was reluctant to return to class after recess and take a test.<sup>6</sup> Ms. Thomas had no trouble convincing Student to return. On a second occasion, Student was having a hard time separating from Parent and did not attend class that day. Separation issues are common for first graders as they adjust to being away from family during the school day.

14. Student had nine absences in February 2013. Based on Parent's February 25, 2013 email to Ms. Thomas, Berkeley was on notice that Student's continuing absences were due to her reported anxiety and that Parents were working with Student's therapist and pediatrician on her sleeping difficulties and separation anxiety and how to best support her return to a learning environment. Parent informed Ms. Thomas that Student's wellbeing and functioning had "dramatically improved" since being home and that her academics had suffered because of the emotional energy she exerted to keep herself together at school. At home, Student was no longer stressed, irritable, or worried. Prior to this communication, Berkeley was unaware that Student was exhausted and irritable when she returned home each school day. Parent separately informed Kristin Collins, principal of Berkeley Arts, of Student's issues and the therapeutic support they had privately accessed. These reports triggered Berkeley's child find duty as reflected in Ms. Collins' expressed position that Student's situation "sound[ed] serious."

15. Also in February 2013, Parents formally requested that Student be allowed to transfer to Jefferson. They informed Francisco Martinez, Berkeley's admissions director that the transfer of Student's best friend had contributed to her emotional distress and refusal to attend school such that Student could no longer succeed at Berkeley Arts. Parents shared their belief that if the girls attended the same school this would improve Student's mental health. There were no openings at Jefferson and only a special consideration exception granted by a superintendent could effectuate a transfer prior to the next school year. Parents asked that Student remain on the wait list and that they be allowed to pursue home school until there was an opening at Jefferson.

16. Near the end of February 2013, Ms. Collins suggested that the school convene a student study team meeting in order to determine the next step in supporting Student. A student study team meeting is an opportunity for the family and school professionals to identify a student's successes and challenges at school and to set goals to enable the student to succeed in class. Ms. Thomas emailed Parents on March 1, 2013, offering to convene a student study team meeting, expressing her concern that Student had not returned to school,

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<sup>6</sup> Parent was a "room parent" for Ms. Thomas' class and was frequently present in class and on the yard.

and sharing that it was “extremely important” for Student to attend class lessons. She wrote, “You can continue to read, write, and work on math but it just won’t compare to what we are doing in the classroom.”

17. Berkeley never convened a student study team meeting during Student’s enrollment at Berkeley Arts. Ms. Thomas’ testimony established that it is Berkeley’s practice to have teachers convene student study team meetings rather than directly refer students for special education assessments. Ms. Thomas has never referred a student for a special education assessment. She was emphatic that she, as a teacher, does not refer students for special education but rather initiates the student study team process which could then result in a referral. Berkeley teachers do not normally refer a student to special education testing, but rather share their observations at the student study team meeting and other professionals, such as the resource specialist, decide if a referral is warranted.

18. On March 1, 2013, Parents applied for independent study. In their application, they informed Berkeley that Student’s anxiety adversely affected her attendance and grades, and that she disliked taking tests. Student began independent study in the middle of March 2013. Student and Parent met with teacher Michelle Cruciani once a week for 90 minutes. Pursuant to Berkeley’s criteria for independent study for elementary students, Parent agreed to provide home instruction and supervision for Student’s coursework for 20-25 hours each week in-between the teacher sessions.<sup>7</sup> Assignments in independent study adhere to state curriculum standards. Berkeley witnesses established that it is unusual for a first grader to attend independent studies and that at this learning stage, class attendance is critical. The model of once a week teacher sessions for 90 minutes would not be able to cover much of the daily class lessons in the first grade curriculum.

19. Ms. Cruciani did not testify at hearing. Parent’s unrefuted testimony was that during her weekly sessions, Student refused to attend to instruction, sat under the table, wandered away, hopped around the room, and did not engage. Parent reported that during her work at home with Student it was difficult for Student to sit and attend, and when she was not refusing to read, she read slowly, stumbled over the words, and made many errors. Additionally, by Parent report, Student needed lots of prompting to write and did not know how to correctly hold her pencil. Student did not exhibit these concerns in class.

20. On March 25, 2013, Parents wrote to Berkeley’s co-superintendents in support of their request for a transfer to Jefferson. They attached a letter from Student’s primary care physician detailing Student’s history of anxiety, trauma, and separation issues which they believed should entitle Student to special consideration for transfer to Jefferson as an educational and mental health support.<sup>8</sup> Parents wished to expedite their request as Student

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<sup>7</sup> Parent is not a credentialed teacher nor has she received any formal instruction in teaching Student to read or write.

<sup>8</sup> The letter from Student’s pediatrician was not introduced into evidence.

had been out of the classroom for over a month “due to her inability to return to [Berkeley Arts].” Berkeley agreed to afford Student “sibling preference” if a space became available.

21. Concerned with Student’s low performance level during home school, and believing she was not deriving educational benefit, Parent contacted Elaine Eger, program supervisor of Berkeley’s special education department on or about March 27, 2013. Parent described Student’s anxiety and school refusal which drove them to independent study, and her failure to benefit, and asked about the process to refer Student to special education given her status as an independent study student. Ms. Eger emailed Berkeley’s student referral form to Parent on March 27, 2013.<sup>9</sup>

22. In summary, by the end of March 2013, Berkeley was aware of Student’s excessive absences and Parents’ report that these were due to her anxiety and school refusal. Berkeley also knew that Student was working with a private therapist and medical doctor to determine the best way to support her learning, and that Parents pulled Student from school because of her anxiety and enrolled her in independent study, although this program was generally inappropriate for first graders, and did not provide instruction comparable to that provided in class. Parents had informed six Berkeley professionals about Student’s anxiety and school refusal including Ms. Thomas, Ms. Collins, Mr. Martinez, Ms. Cruciani, Ms. Eger, and the co-superintendent.

#### *Continued Academic Progress through First Grade*

23. Student enrolled at John Muir on April 16, 2013, and began attending Caroline Johnston’s first grade class.<sup>10</sup> She transitioned well without any school refusal issues.<sup>11</sup> John Muir is a smaller school serving approximately 250 students from kindergarten through fifth grade. According to Parent, it did not have the testing focus of Berkeley Arts. Student presented with lots of confidence and fit in well with her new class, readily requesting roles in the class musical and bringing lots of ideas to her non-fiction writing unit. Ms. Johnston was impressed with Student’s level of curiosity and interest in sharing her ideas with the class. Although she was not present for Ms. Johnston’s prior instruction, Student quickly demonstrated her ability to learn the curriculum. She was

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<sup>9</sup> The student referral form generates Berkeley’s assessment process for determining eligibility for special education.

<sup>10</sup> Ms. Johnston earned a master’s degree in elementary education from California State University, Berkeley in 1997, and has a clear multiple subject teaching credential which qualifies her to teach kindergarten through eighth grade. This is her second year teaching first grade at John Muir. She previously taught first through third grade for 12 years in Oakland.

<sup>11</sup> From her enrollment on April 16, 2013, through the end of the first grade year, Student was absent five days, late two days, and tardy twice. Some of these were due to her participation in the WestCoast assessment.



attentive to her lessons and did not display any anxiety. Parents acknowledged that Student enjoyed her new class.

24. At school, Student was excited to read and wanted to read books above her level. She read aloud at least once a week with Ms. Johnston. Although reading accuracy was an area for improvement, Student's reading errors were not due to a lack of ability to decode words. Rather, in her enthusiasm to get to the end, and given her high comprehension, Student jumped over or substituted words. Student's reading, though slightly below grade level, was not a concern as she continued to demonstrate progress, and students frequently linger at Levels F/G/H. Ms. Johnston persuasively established that it is important to not pathologize an emerging reader who is progressing.

25. At the end of first grade, Student met 12 of the 13 benchmarks in math, seven of the eight benchmarks in reading, but only one of the seven in writing. This was due to the fact that she was not present at the time some of the benchmarks were taught, others were not applicable given Ms. Johnston's piloting of a non-fiction unit, and other missed benchmarks were common areas of struggle for all first graders. Student needed to improve in spelling patterns and memorization of sight words, something she had not consistently been exposed to given her excessive absences. By the end of first grade, Student's spelling, writing content, and mechanics remained below level. However, she demonstrated the ability to attend to and learn in the regular education setting. She was engaged in learning, hard working with solid math skills, an active and willing participant in all activities, and had formed good relationships. Student received an "excellent" in all areas of personal and social responsibility aside from two satisfactory marks in completing work on time and attendance.

26. Student's excessive absences in first grade and enrollment in independent study significantly impeded her ability to consistently demonstrate progress in reading, writing, and spelling. Being present for class lessons and participating are critical in order for students to learn and then transfer and build upon their skills. Additionally, a student needs to be present for the teacher to determine her strengths and weaknesses, which informs instruction and the grading process. Student was absent from a classroom setting during her first grade year approximately 56 days and late or tardy approximately 13 additional days, out of the total 180 instructional days. Student did not attend a formal classroom setting for a two month period from mid-February 2013, through April 15, 2013. Although she met with an independent study teacher approximately four times for 90 minutes each week, a total of six hours, she missed key class instruction.<sup>12</sup> Despite missed instructional time, she was approaching grade level.

27. Although Ms. Johnston had no concerns about Student's academic, behavioral, or emotional functioning in class, Berkeley convened a student study team meeting on May 23, 2013, at Parents' request. The team, consisting of Parents, Ms. Johnson, and

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<sup>12</sup> There was no instruction during Spring break, the first week of April 2013.

Audrey Amos, the principal of John Muir, determined that among Student's strengths were her ability to quickly adapt, her high confidence, and her enjoyment of learning. In terms of challenges, Student was just below grade level in reading and needed to focus on accuracy, and her writing was a concern, including letter formation and spelling conventions. Although spelling was an area of weakness, most children require systematic instruction in spelling patterns and this work was completed prior to Student's arrival in Ms. Johnson's class, so gaps were to be expected. Even so, Student brought lots of knowledge to her writing and was excited to write.

28. At the student study team meeting, Parents informed Berkeley that Student would not ask for help because of her performance anxiety, that her therapist diagnosed her with an anxiety disorder, and that she worked hard to maintain her composure at school such that she returned home exhausted at the end of each school day. Parent also shared that a recent private occupational therapy assessment determined that Student had fine motor difficulties and sensory integration issues and recommended occupational therapy. Parent expressed concern that Student was not at grade level and needed to be assessed for special education.<sup>13</sup> Berkeley agreed to offer Student breaks during the school day based on Parent report that attending to class and fine motor activities were taxing for Student, and to have Sandra Rudel, Berkeley's occupational therapist, observe Student in class. Class activities did not fatigue Student, and she usually refused the offered breaks.

29. During Ms. Rudel's observations, Student held her pencil with a slight thumb overwrap versus having her thumb on the pencil, and displayed a minor delay in letter accuracy and writing on the line.<sup>14</sup> Even so, Student's skills were in the average range especially in light of her frequent absences. Ms. Rudel provided Parents a packet of resources to support Student's handwriting over the summer.

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<sup>13</sup> Arguably, Berkeley had an obligation to assist Parents to put their request in writing and comply with the 15 calendar day deadline for submitting an assessment plan. (Ed. Code, §§ 56043, subd. (a) & 56321, subd. (b); Cal. Code Regs., tit. 5, § 3021, subd.(b).) Student did not identify as an issue for hearing whether Berkeley timely prepared an assessment plan so no findings are made in this regard.

<sup>14</sup> Ms. Rudel is certified by the state occupational therapy board and licensed by the national board of occupational therapists. She has worked as an educational occupational therapist for Berkeley for three and one-half years, and prior to that served as a medical occupational therapist at California Children's Services for three years. She holds a bachelor's degree in community health education and a master's in education therapy.

## *Determination of Severe Discrepancy*

### PRIVATE ASSESSMENT

30. Dr. Dimitrova wanted a full diagnostic picture of Student to understand how she was functioning emotionally given her history of early attachment disruption. She also observed Student to read quickly, mumble, and skip words, and believed a reading assessment was warranted. Therefore, in March 2013, Dr. Dimitrova referred Student for assessment with her agency.<sup>15</sup>

31. WestCoast assigned Dr. Margaret Owen-Wilson to assess Student.<sup>16</sup> At the time of hearing she had been licensed for one month as a clinical psychologist, and at the time of Student's assessment in May and June of 2013, she was a registered psychologist, required to be supervised by a licensed psychologist.<sup>17</sup> Dr. Barbara Mercer was her supervisor and met with her weekly.<sup>18</sup> Dr. Mercer independently reviewed her data and scoring, discussed the assessment and results, and reviewed her report. As part of her assessment, Dr. Owen-Wilson observed Student at school on May 5, 2013, reviewed records, interviewed Student, her therapist, Parents, and Ms. Johnston, and administered a battery of tests. Dr. Mercer established that it is important and constitutes best practice to incorporate school information by a review of educational records and teacher interviews. Dr. Owen-Wilson did not review any educational records at the time of her assessment.

32. Upon completion of her assessments in June 2013, Dr. Owen-Wilson prepared two assessment reports: a complete report for Parents dated September 27, 2013, and an

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<sup>15</sup> WestCoast considers it best practice to assign a separate assessor rather than have the treating therapist step into this role, in order to maintain boundaries and distance to support the integrity of the testing process.

<sup>16</sup> Dr. Owen-Wilson completed her postdoctoral fellowship at WestCoast from 2009-2011, and remained as an assessment specialist since February 2011. She has provided counseling and assessment services to children as an intern and trainee since 2006. She earned a master's and then doctorate degree in clinical psychology in 2009 from Alliant International University.

<sup>17</sup> From September 2013, until she received her license on December 5, 2013, Dr. Owen-Wilson was not registered as her registration expired despite her application to extend it beyond the initial 30-month period.

<sup>18</sup> Dr. Mercer has served as the assessment program director and clinical supervisor at WestCoast since 1986. She obtained her clinical licensure in 1982 and has provided mental health services in her private practice since 1979. She published two articles regarding psychological assessments in early 2011.

abbreviated version for Berkeley dated October 21, 2013.<sup>19</sup> The abbreviated report, at Parents' request, did not include any social-emotional testing data or information on psychological functioning or background information including the interview with Ms Johnston. Parents determined that social-emotional tests were not relevant to academic functioning and, although administered, the following tests were not reported on in the abridged report: Behavior Assessment System for Children, Second Edition (BASC-II), Parent and Student forms; Children's Apperception Test; Children's Sentence Completion Test; Projective Drawings: House-Tree-Person, Kinectic Family Drawing and Imaginary Animal; Revised Children's Manifest Anxiety Scale, Second Edition; and Rorschach Inkblot Test.

33. In order to measure Student's intellectual ability, Dr. Owen-Wilson administered the Wechsler Intelligence Scales for Children, Fourth Edition (WISC-IV), a standardized test she has utilized approximately 100 times over her career. The WISC-IV determines a student's full scale intelligence quotient (I.Q.) score based upon her scores on four indexes: verbal comprehension, perceptual reasoning, working memory, and processing speed. Each index is composed of core subtests and supplemental subtests. Student scored in the high average to superior range on each index, resulting in a full scale I.Q. of 121 in the superior range.<sup>20</sup>

34. Dr. Owen-Wilson assessed Student's academic achievement using the Wechsler Individual Achievement Test, Third Edition (WIAT-III). Student generally scored in the average range (standard score of 85-115, with a mean of 100 and standard deviation of 15), with the exception of word reading (standard score 82), and spelling (standard score 77). Her performance on the supplemental subtests varied from superior in receptive vocabulary and oral word fluency, to below average in oral reading accuracy (standard score 81), and low average in oral reading rate (standard score 88).

35. Under the state regulations for educational eligibility for a specific learning disability, a severe discrepancy is defined as 1.5 standard deviations (22 points), adjusted for the standard measurement of error (4 points) between cognitive ability and academic achievement. Therefore, any discrepancy 18 points or greater constitutes a severe discrepancy for the purposes of special education eligibility.

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<sup>19</sup> Only the abbreviated version was introduced into evidence.

<sup>20</sup> Student performed with significant variability on the subtests comprising the verbal comprehension index suggesting this index was not interpretable. Dr. Owen-Wilson testified that based upon Student's overall cognitive functioning it was most likely that her true verbal ability is in the superior range. There was no evidence of how her findings may have differed if she did not use the full scale I.Q. as the cognitive measure.

36. Dr. Owen-Wilson relied on the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition (DSM-IV), criteria in determining a severe discrepancy.<sup>21</sup> These diagnostic criteria do not match state and federal requirements for special education eligibility. However, in this instance, the DSM-IV criteria, as outlined by Dr. Owen-Wilson, are more stringent than the state criteria and require a difference of two standard deviations or 30 points. Under the DSM-IV, Student had a severe discrepancy between her I.Q. of 121 and her spelling, word reading, and oral reading fluency scores. Her I.Q. was 44 points higher than her spelling score of 77, 39 points higher than her word reading score of 82, and 33 points higher than her oral reading fluency score of 88. Using the educational criteria, Student would have qualified as having a severe discrepancy not only in spelling, word reading, and oral reading fluency, but also in the following subtests: early reading skills (standard score 92), math problem skills (standard score 92), alphabet writing fluency (standard score 103), and numerical operations (standard score 99).

#### BERKELEY'S PSYCHO-EDUCATIONAL ASSESSMENT

37. On June 11, 2013, Parents requested that Berkeley assess Student for special education services due to their perception of her below grade level performance in reading, writing and spelling, and difficulty with fine motor skills which prevented her from timely completing class assignments and homework. In addition, Dr. Owen-Wilson's preliminary findings showed that Student was not achieving commensurate with her ability.

38. Pursuant to the assessment plan signed by Parents on September 6, 2013, Holly Lee, a Berkeley school psychologist, completed a psycho-educational assessment and evaluated Student in the areas of health, intellectual development and social-emotional functioning during September and October 2013.<sup>22</sup> As part of her assessment, Ms. Lee interviewed Parents, Student, Christy Smith, a resource specialist, and Lisa Macdonald, Student's second grade teacher, reviewed records, observed Student twice in class and administered a battery of tests. Ms. Lee told Parents to share whatever they felt comfortable sharing but that all information would be documented in her report.

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<sup>21</sup> The American Psychiatric Association recently published the fifth edition of the DSM (DSM-V) in May 2013. However, Alameda County, where Dr. Owen-Wilson is employed, does not utilize this latest version.

<sup>22</sup> Ms. Lee is a nationally certified school psychologist and has been a licensed educational psychologist for six years. She began working as a school psychologist for Berkeley in August 2006. Since 1991, Ms. Lee has worked in the field of special education. She has conducted approximately 900 psycho-educational assessments since her internship in 2002. She holds a clear pupil personnel services credential in school psychology and earned a master of science in counseling from California State University, Hayward in 2004, and a bachelor of arts in psychology in 2000.

39. Ms. Lee used the Differential Abilities Scales, Second Edition (DAS-II), as an alternative to the WISC-IV, in determining Student's cognitive ability.<sup>23</sup> The DAS-II is composed of three core clusters including verbal ability, nonverbal reasoning, and spatial ability. The general conceptual ability score is comprised of these three clusters and reflects overall conceptual and reasoning abilities similar to the full scale I.Q. on the WISC-IV. Student received a standard score of 123 (94th percentile) in verbal ability, a standard score of 119 in spatial ability (90th percentile) and a standard score of 89 (23rd percentile) in nonverbal reasoning. The nonverbal reasoning cluster was significantly discrepant from Student's verbal and spatial cluster scores. Student's rushed performance on one of the subtests artificially lowered her overall nonverbal score which in turn resulted in a lower general conceptual ability score of 111.<sup>24</sup> Therefore, Ms. Lee relied upon Student's verbal score, her highest cluster score at 123, rather than the general conceptual ability score, in comparing intellect with achievement.

40. To assess Student's academic achievement, Ms. Smith administered the Woodcock Johnson, Third Edition, Tests of Achievement (WJ-III).<sup>25</sup> Ms. Smith has administered hundreds of academic assessments over her 30 year career. All of Student's academic achievement scores were in the average range (standard score 90-110) except for the writing samples test in which Student scored in the high average range (standard score 114). In the area of written expression, the WJ-III does not deduct points for spelling errors. However, Ms. Smith administered a spelling test as part of this battery and Student again scored in the average range with a score of 91. Student's results demonstrated strong academic skills. Further, Student's class work this school year was within the average range. Ms. Lee and Ms. Smith established that Student would not be expected to demonstrate achievement beyond second grade standards, the grade level curriculum she has been exposed to, despite her superior intellect.

41. Based upon Berkeley's testing measures, there was a severe discrepancy between Student's verbal cluster score of 123 on the DAS-II, and her WJ-III broad reading test score of 97 (a 24 point difference), broad math at 99 (a 22 point difference), as well as math calculation at 94 (a 29 point difference). The parties do not dispute that Student has a

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<sup>23</sup> Test publishers warn against administering an instrument a second time at an interval of less than one year as the results could result in a higher score reflecting a practice effect.

<sup>24</sup> Ms. Lee administered the matrices subtest prior to recess and in her rush to attend recess, Student did not demonstrate her best effort.

<sup>25</sup> Ms. Smith has been a special education instructor with Berkeley since 1991, and for the past 11 years she has worked with first and second graders at John Muir. She obtained a master's degree in special education in 1981 and resource specialist certificate in 2004. She holds a single subject teaching credential and a learning handicapped life credential which authorizes her to teach students with mild to moderate disabilities.

severe discrepancy between her cognitive and academic achievement scores as determined by both the private and Berkeley assessments. Further, teacher observations, grade reports, and work samples established that Student is intelligent and functions within the average range, thereby corroborating the test data.

### *Whether Student has a Processing Disorder*

#### AUDITORY PROCESSING

42. When there is a discrepancy between a student's cognitive scores and academic achievement scores, especially in reading, dyslexia may be suspected. Dr. Mercer established that there are two components to dyslexia: difficulty processing words, including the sounds that make up the word, and difficulty with reading fluency, which can be audiology based (hard time sounding out letters) or visually based (hard time recalling what a word looks like). According to Student's experts, her reading difficulty was audiology based. The evidence established that dyslexia is a language processing disorder.

43. A student with phonological dyslexia struggles in hearing, recognizing, processing, and understanding individual discrete sounds (phonemes) that make up a word, and also writing them on paper to form a correct word. Dr. Owen-Wilson determined, based upon Student's word reading score on the WIAT-III, that Student exhibited signs of phonological dyslexia including "neglect" wherein she left out or substituted parts of words. However, she did not administer any phonological testing and conceded this is not her area of expertise. Instead, she referred Student to the Oakland Scottish Rite Childhood Language Center (Scottish Rite) and Lindamood Bell program which specialize in remediating reading disorders.

44. As part of her assessment, Dr. Owen-Wilson administered a screening tool, the SCAN-3 for children, to determine if Student had any auditory processing issues.<sup>26</sup> Student scored in the borderline range on the auditory processing composite, suggesting a possible processing disorder. Therefore, Dr. Owen-Wilson referred Student to an audiology specialist to determine whether she had a central auditory processing disorder. Dr. Rupa Balachandran of the Hearing and Speech Society of Northern California assessed Student in August 2013, and determined that a central auditory processing deficit was not a factor impacting Student's reading. Neither party disputes this finding. Dr. Mercer established that Student could have phonological dyslexia even though she did not have an auditory processing disorder.

45. In diagnosing Student with dyslexia, Dr. Owen-Wilson again relied upon the DSM-IV. However, DSM criteria do not match special education eligibility criteria, such that even if Student proved that she met the DSM-IV criteria, this would not necessarily prove she had a specific learning disability. Regardless, Dr. Owen-Wilson's opinion that Student met diagnostic criteria was not persuasive. According to Dr. Owen-Wilson, in order

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<sup>26</sup> Witnesses were not aware of whether SCAN is an acronym.

to qualify as having a reading disorder under the DSM-IV, a student's severely discrepant scores on standardized academic tests in reading and/or spelling must also cause the student distress at home, school, or in her personal functioning.<sup>27</sup> Dr. Owen-Wilson diagnosed Student with a reading disorder based on Student's reading scores from one measure, the WIAT-III, and her conclusion that Student's reading difficulties caused her distress as manifested by her school refusal. She did not establish that the WIAT-III is valid and reliable for the purpose of diagnosing dyslexia and she accepted as fact Parents' report that Student was refusing school due to academic distress without any corroboration. Dr. Owen-Wilson's theory of academic distress did not account for whether Student's school avoidance was a learned and reinforced behavior nor address Dr. Dimitrova's treatment theory that staying home was Student's way of handling separation anxiety and fulfilling her need to be with Parents who served to regulate her. At school, Student presented as a happy engaged learner without any signs of anxiety. Student loved to learn, was eager to participate in reading tests and to read aloud in class, and was often the first to volunteer. Student's theory of academic distress did not convincingly account for her in-class presentation.

46. Berkeley testing data, class observations, work samples, and teacher reports established that Student did not have an auditory processing disorder. Given Parents' concerns with Student's reading, Ms. Lee specifically tested her in the area of phonological processing. She administered the Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2), which is the gold standard for assessing reading disorders, specifically the ability to break words down to their component sound parts. A deficit in one or more of the measured abilities is the most common cause of learning disabilities in general. Ms. Lee chose this instrument as part of her testing battery to specifically assess Student's reading abilities. The CTOPP-2 measures the three components of phonological processing: phonological awareness (ability to isolate sounds by deleting, blending and filling in sounds), phonological memory (ability to process and repeat sounds, including nonsense words), and rapid symbolic naming (ability to quickly retrieve information by rapidly naming numbers and letters). Student scored in the very superior range for phonological memory and in the average range for phonological processing and awareness. Ms. Lee established that a child with dyslexia would score low on at least one composite score. Student did not have a phonological processing disorder based on her scores on the CTOPP-2.<sup>28</sup>

47. Additional test data refuted Student's diagnosis of dyslexia. For example, the broad reading cluster of the WJ-III, administered by Ms. Smith, consists of three subtests:

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<sup>27</sup> Dr. Owen-Wilson did not fully explain the DSM-IV criteria or list it in her report. Neither party introduced into evidence the DSM-IV criteria for a reading disorder or the DSM-V criteria for a specific learning disability.

<sup>28</sup> Student argues that her participation in a summer reading program prior to Berkeley's testing elevated her scores. Even so, this does not invalidate the testing results, and Student did not prove any subsequent regression.



letter-word identification, reading fluency, and passage comprehension. Student scored in the average range for each test with her highest score in reading fluency (standard score of 104) which measures speed and accuracy.<sup>29</sup> Ms. Smith has worked with approximately 100 children with dyslexia, and established that a student with dyslexia would have difficulty on the broad reading cluster, and Student's results were not consistent with such a diagnosis.

48. As part of Ms. Lee's assessment, Student successfully read aloud a Level I book (end of first grade) demonstrating solid decoding, fluency and high comprehension by answering all questions about the text. In Ms. Lee's experience, a child with dyslexia would have struggled to read this book. Based on her observations, interactions, and interview with Student, Ms. Lee convincingly concluded that Student loved to read and had solid reading skills. At school, Student's preferred activity was reading and Ms. Macdonald frequently had to remind Student to put her book away when reading time ended.<sup>30</sup> Berkeley witnesses established that dyslexic children struggle to read and often avoid books and Dr. Owen-Wilson acknowledged that she would be surprised if Student enjoyed reading. Student's classroom functioning and presentation refuted a diagnosis of dyslexia.

49. Further, Student's progress in the reader's workshop program supported Berkeley's conclusion that Student did not have an auditory processing disorder. Student finished first grade at reading Level H, just below grade level. The grade level expectation for the end of the second trimester of second grade is Level L, with a student achieving Level M by the end of second grade. Student participated in the Scottish Rite Fast ForWord reading intervention program during the summer after first grade. Parent recalled Ms. Macdonald telling her at the start of the 2013-2014 school year that Student was at Level K. Therefore, when Student's first trimester report card for second grade identified her at Level J, Parent considered this as evidence that Student was in fact regressing. Ms. Macdonald was more persuasive in her testimony that based upon her informal assessment, Student entered second grade at reading Level I. She determined that Student was one of the five lowest scoring students in class and therefore identified as a focus student who received extra instructional time when present.<sup>31</sup> Thereafter, Student progressed rapidly in reading, moved out of the focus group by the end of October 2013, and was reading above grade level at the time of hearing.

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<sup>29</sup> Ms. Smith administered the reading fluency subtest although she overlooked reporting the scores in the body of her report.

<sup>30</sup> Ms. Macdonald has taught second grade at John Muir for the past five years. She holds a single and a multi-subject teaching credential.

<sup>31</sup> Berkeley's practice is for each teacher to identify the five lowest students in terms of reading and writing, and focus extra time and attention on these focus students to assist in building skills.

50. Parents' testimony that Student struggled with reading and writing to such an extent that she was virtually unable to perform these tasks and did not make progress was not persuasive in light of the testimony of Student's teachers, grade reports and work samples. Further, on the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), Parent reported that Student could usually read and understand material of at least the second grade level. Parents' point of comparison was that Student should be functioning above grade level because of her high intellect and her own desire to read higher level text.

#### SENSORY-MOTOR PROCESSING

51. Sensory dysregulation is a significant difficulty in processing sensory information such that it adversely affects a student's ability to perform in class and attend to instruction. During her play therapy with Student at home, Dr. Dimitrova observed that Student was unable to physically regulate and sought sensory stimulation through deep pressure, bumping into things, turning the radio to a high volume, placing herself in front of a blowing fan, and displaying fidgety behavior. She referred Student for an occupational therapy assessment at Children's Hospital and Research Center in Oakland (Children's Hospital).

52. Ryan Adam, registered and licensed occupational therapist at Children's Hospital evaluated Student and wrote a report dated March 22, 2013.<sup>32</sup> He did not interview Student's teachers or review educational records. According to his report, throughout his assessment Student was noncompliant, walked around the room, and appeared dysregulated as manifested by spinning, jumping, and acting "silly." Most telling, Mr. Adam concluded, "Some of her behavior was definitely seen as learned vs. just sensory driven, with secondary gains of avoidance or attention-seeking..." He did not diagnosis Student with a sensory-motor processing disorder. Rather, he concluded that her motor planning was intact, and although she had some sensory regulation difficulties which adversely impacted her ability to focus, he determined these are intertwined with behavioral needs. Student did not display any sensory dysregulation at school.

53. Although Mr. Adam observed Student to have an underdeveloped, inefficient neat pincer grasp which was likely to cause fatigue with writing, Student had mastered a static tripod grasp and wrote fluidly by the time of Ms. Lee's evaluation. Additionally, Berkeley's occupational therapist concluded Student had no fine motor issues that hindered her academics or writing.

54. Ms. Rudel completed an educational occupational therapy evaluation of Student in September 2013, to address her individual abilities and functioning within the class environment. She is trained to identify sensory processing disorders. Student did not exhibit any symptoms of such a disorder. Ms. Rudel did not observe any of the concerns

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<sup>32</sup> Mr. Adam did not testify at hearing. His report constitutes hearsay and is not sufficient in itself to support a factual finding. (See Cal. Code of Regs., tit. 5, § 3082, subd. (b).)

identified by Mr. Adam. During her assessment and observation, Student demonstrated bilateral coordination and her praxis skills or motor planning was intact.

55. Ms. Rudel administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, a foundational testing tool, to assess any difficulties with Student's fine motor skills, manual control, and body coordination. Student scored in the average to above average range, with her fine motor integration above average. Ms. Macdonald completed the Sensory Processing Measure, a rating scale which measures sensory and environmental issues, that may impact school functioning and identifies sensory processing or integration difficulties. Scores range from typical functioning to definite dysfunction. Overall, Student scored in the range of typical functioning with some problems noted in social participation and touch.

56. Based upon her observation of Student from last year and this year, her assessment and resulting test data, Ms. Rudel credibly concluded that Student did not have a sensory-motor processing disorder. Student attended well to teacher instruction, demonstrated average to above average fine and gross motor skills, was able to write legibly at her grade level, and did not require occupational therapy to access her education.

57. Ms. Lee's testing further supported Ms. Rudel's conclusion that Student does not have a sensory-motor processing disorder. Student demonstrated good sensory-motor skills on the pattern construction and recall of design subtests of the DAS-II spatial ability cluster where she scored above average and high average respectively. Ms. Lee observed Student to have good eye-hand coordination during her class observations and throughout the assessment process, with Student able to copy drawings for instance. In addition, Ms. Macdonald reported no difficulty with sensory-motor functioning.

#### ATTENTION

58. At home, Dr. Dimitrova observed Student to fidget, pace, change activity frequently, display quick movements, and speak fast with unintelligible, unclear speech which she attributed to be a symptom of attention deficit hyperactivity disorder. Similarly, Parents described Student as hyper with lots of energy. In her class observation, Parent observed Student to color instead of attend to instruction. Student had difficulty sitting still during Dr. Owen-Wilson's assessment and walked around the room or crawled under the table. Dr. Owen-Wilson attributed this psychomotor agitation to sensory integration issues even though Mr. Adam concluded that Student's observed need for stimulation and movement appeared to be learned, attention-seeking behaviors.

59. Dr. Owen-Wilson administered two tests to examine Student's ability to attend to prolonged, repetitive tests. Testing showed that Student was experiencing some symptoms of inattention. The Conner's Continuous Performance Test, Second Edition, revealed that Student had difficulty sustaining her attention and showed poor vigilance. At a confidence level of 60.25 percent, Student's response style matched that of a child diagnosed with attention deficit hyperactivity disorder. The Test of Everyday Attention for Children

measures visual and auditory attention. Student scored in the borderline range for two of the seven subtests including one that measured her attention to an auditory task and one that measured her ability to do two tasks at once.

60. Based upon observations, Parent report, and attention measures, Dr. Owen-Wilson concluded that Student provisionally met the diagnostic criteria under the DSM-IV for attention deficit hyperactivity disorder, inattentive type, which requires that various symptoms manifest in at least two different settings. Although Dr. Owen-Wilson testified that the second setting need not be school, such a diagnosis could only qualify a student for special education if there was an adverse educational impact and a demonstrated need for special education and related services in order to receive educational benefit. Student did not manifest inattentive behaviors at school. During Dr. Owen-Wilson's own class observation of Student, she observed only slight fidgety behaviors, and concluded that while Student experienced some symptoms of inattention, she was able to stay engaged. Relying on Parent report only, Dr. Owen-Wilson determined that Student's symptoms occurred in at least two settings.

61. None of Student's three teachers who testified at hearing, nor the resource specialist Ms. Smith who interacted with and observed Student at least eight times, nor Ms. Lee who formally observed Student twice in class and was in her classroom at least weekly, observed Student display any symptoms of inattentiveness or hyperactivity.<sup>33</sup> Student was on task for all professional classroom observations. Ms. Rudel observed that Student had good attention in class, only displaying fatigue, along with her peers, after about ten minutes of instruction. In addition, Student was able to attend to lengthy testing sessions with Ms. Lee of up to one and one half hours. During Berkeley's testing she was focused and on task with no attention issues.

62. Dr. Owen-Wilson's diagnosis of Student with attention deficit was provisional only, because she determined that Student's presentation also had an emotional, anxious component, and was complicated by sensory issues that made it difficult for her to sit still and attend. During her testing, Student became agitated when presented with challenging tasks or one with emotional content, and would try to soothe her agitation by distracting herself or moving around.

63. Based on Berkeley's testing data, Student did not show signs of a processing disorder in the area of attention. The working memory index of the WISC-IV measured Student's ability to sustain attention, concentration and exert mental control. Student scored in the high average range on this index which does not support a diagnosis of an attention

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<sup>33</sup> Ms. Macdonald has never seen the fidgety or pacing behaviors that Dr. Owen-Wilson reported during her assessment. Further, Ms. Macdonald's testimony, that Student loves animals and is very good at imitating a dog, normalized the assessor's report of Student crawling and pretending to be a puppy during test sessions.

deficit. The responses of both Parent and Ms. Macdonald on the BASC-II rating scales scored Student in the average range for attention with the raters agreeing that Student often paid attention and listened. On the Vineland-II, Parent identified one of Student's strengths as her ability to listen to an informational talk for at least 30 minutes.

#### VISUAL AND COGNITIVE PROCESSING

64. Ms. Lee administered the Test of Visual Perceptual Skills, Third Edition, which examines a student's ability to perceive information presented visually without motor involvement. Student's overall index score was 126, the 96th percentile, considered the superior range. On two additional indexes Student scored in the very superior range (standard score 130, 98th percentile). This data indicated that Student's visual perceptual abilities were a strength which assisted academic activities such as reading and writing. Aside from Parents' concern about letter reversals, Student did not present any credible evidence that she has a visual processing disorder.

65. Student did not contend that she had a cognitive processing disorder. She displayed good association, conceptualization and expression as demonstrated by testing, observations and teacher reports. By all accounts, Student is very intelligent and her high cognitive testing scores from the WISC-IV and the DAS-II indicated that she did not have a cognitive processing disorder.

#### *Exclusionary Factors*

#### EMOTIONAL DISTURBANCE

66. The term specific learning disability does not include a learning disability that is primarily the result of an emotional disturbance. Although the parties did not litigate whether Student has an emotional disturbance, Student placed her emotional functioning at issue. Student contends that Berkeley's psycho-educational assessment was inadequate as Ms. Lee did not investigate Student's anxiety, her history of trauma, or why she missed so much school. However, Student did not identify as an issue for hearing the adequacy of Berkeley's assessment or any alleged failure to assess in all suspected areas of disability, and no findings are made in this regard. There was insufficient evidence to determine whether or not Student's learning difficulties were primarily the result of an emotional disturbance, an automatic rule-out factor in determining a specific learning disability.<sup>34</sup>

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<sup>34</sup> In her closing brief, Student argues that her underlying emotional impairment and anxiety disorder are relevant in determining eligibility and that the identification of a particular eligibility classification is immaterial since an IEP must address all unique needs. This argument fails to account for several key factors: 1) an IEP is developed for an eligible student; 2) eligibility is limited to one of 13 specific categories and Student only placed one category, specific learning disability, at issue; and 3) the only relevance of an emotional disturbance in the context of a specific learning disability, is as an automatic rule-out.

## POOR SCHOOL ATTENDANCE

67. To be eligible as a student with a specific learning disability, Student's severe discrepancy between her ability and achievement cannot be predominantly the result of a lack of exposure to qualified instruction or poor school attendance. As previously noted, Student missed more than 11 weeks of the first grade class curriculum and was late or tardy an additional 13 days. Berkeley granted Student's application for independent study, knowing that this instruction was not comparable to classroom instruction. Student's pattern of school refusal re-emerged shortly after the start of her second grade year, at a frequency of up to three times per week, and continued through December 2013.

68. Student missed much of the review of first grade standards at the beginning of second grade. Class lessons build on each other, day to day. Ms. Macdonald's main concern regarding Student's academics was her attendance. In her experience, inconsistent attendance is the greatest impediment to learning. By the end of the first trimester of second grade in late October 2013, Student had missed four of six spelling tests, half of her math tests, and two thirds of her reading groups. She was below grade level in spelling and was inconsistently meeting standards in writing mechanics due to poor attendance. Ms. Macdonald clearly recalled Student missing mostly Mondays and Fridays which was particularly troublesome as Mondays were whole class instruction in language arts and Fridays were spelling tests.

69. Ms. Lee noticed Student's absences as she attempted to conduct her assessments and Student was not present. Based upon the available but incomplete attendance records, Ms. Lee calculated that between September 4, 2013, and October 31, 2013, Student missed at least 15 percent of her school days (six days) and was late an additional 15 percent of the time (seven days).<sup>35</sup> She credibly attributed Student's significant discrepancy between her cognitive ability and academic achievement to missed instruction. It is reasonable to conclude that Student would have been performing at a higher level academically had she regularly participated in the first and second grade curriculum at school. Student completed several weeks of a reading intervention program at Lindamood-Bell in December 2013, and throughout the winter break. Thereafter, from January 2014, through the time of hearing, Student had not refused a day of school.

### *Need for Special Education*

70. In order to be found eligible for special education, in addition to establishing that she had a specific learning disability, Student would need to prove she required special education in order to receive educational benefit. When present at school, Student was functioning well and her first grade instructional gaps were readily addressed in the general education classroom setting. She was producing grade level work in second grade, and

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<sup>35</sup> Due to staffing difficulties, Berkeley did not maintain accurate attendance records the first half of the 2013-2014 school year.

receiving educational benefit.<sup>36</sup> Student's report cards documented her progress. None of Student's teachers identified her as a child in need of special education. Ms. Macdonald persuasively established that Student did not require special education at the time of the IEP team meeting or at the time of hearing because she demonstrated the skills to independently perform consistent with grade level standards; Student was performing at and often exceeding grade level expectations during her second grade year.

71. Ms. Lee and Ms. Smith, based upon their assessments and observations, likewise established that Student did not require special education in order to receive educational benefit. Parents maintained that Student's need for special education was due to her failure to achieve commensurate with her superior intellect and that her academic and reading skills did not match her potential and were holding her back. Even so, Student would not be expected to test higher than the grade level curriculum to which she had been exposed, and she had limited exposure to the curriculum due to her frequent absences.

#### *Parental Participation at the November 2013 IEP Team Meetings*

72. The IEP team initially met on November 4, 2013, for two hours.<sup>37</sup> All required Berkeley members were in attendance along with Parents, their advocate Lara Forest, Dr. Owen-Wilson, and Dr. Dimitrova. Ms. Lee prepared a detailed psycho-educational report to present to Student's IEP team. In her report she listed the criteria for specific learning disability, and an analysis of why Student did not meet the criteria based upon her assessment. She was surprised at how well Student performed and was doing in her second grade class in contrast to what she had learned from Parents, and in light of Student's frequent absences even during the assessment process. Ms. Lee was clear in her report and persuasive in her testimony that the purpose of her report was to share information with the IEP team for the consideration of all members in determining eligibility, Student's need for services, and planning for success. She was clear that the IEP team as a whole determined whether or not Student was eligible for special education.

73. Ms. Lee provided Parents a draft copy of her report a day or two prior to the November 4, 2013 IEP team meeting. Parents also received draft copies of Berkeley's academic testing, occupational therapy and assistive technology reports by November 1 2013. Although Parents had requested the opportunity to review the reports even earlier than they received them, they did not request that the meeting be delayed to a later date.

74. Berkeley team members did not meet in advance of the IEP team meeting to determine Student's eligibility, but they had questions about the legal criteria for determining

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<sup>36</sup> Student did not prove her contention that any academic benefit was a result of her participation in Parent funded reading programs during summer 2013 and winter 2013-2014.

<sup>37</sup> This was a rescheduled date to accommodate Dr. Owen-Wilson.

a specific learning disability, including the impact of Student's poor school attendance, lack of math and reading instruction, and the significance of a diagnosis of dyslexia in determining the existence of a processing disorder. In response to their questions, Ms. Graham provided Berkeley team members with references to the education code and the criteria for specific learning disability prior to the IEP team meeting.<sup>38</sup> Ms. Graham's opinion was that dyslexia in and of itself did not constitute a processing disorder. It is reasonable to conclude that in responding to legal questions, Ms. Graham shared her interpretation of the law with Berkeley team members.

75. Berkeley's psycho-educational report addressed the first question to be answered, namely whether Student met eligibility criteria. Therefore, Ms. Lee discussed her report and eligibility criteria first pursuant to standard practice. Parents questioned Ms. Lee about her findings and pointed out errors such as Ms. Johnston being identified as a Berkeley Arts teacher. They had no questions for Susan Deutsch, assistive technology specialist, or for Ms. Rudel who both briefly presented their reports. Parents, their advocate, the assessor and therapist all participated in the discussion of Berkeley's findings and conclusions, although agreement was not reached. Ms. Forest questioned how the school would assist Student to perform to her full potential. Parent discussed Student's background and school refusal issues, and in her own words, she disagreed "passionately" with Berkeley's conclusions.

76. Dr. Owen-Wilson presented her report last. She acknowledged that Berkeley team members listened, considered, and responded to information she presented. Due to the many questions posed, she was not able to completely discuss her findings. Even so, Parent did not request additional time for Dr. Owen-Wilson to address the team. Dr. Owen-Wilson did not attend the reconvened IEP team meeting or request that it be rescheduled to allow for her attendance.

77. Although Dr. Dimitrova felt as though Berkeley did not ask for her input, she acknowledged that the team listened to her as she discussed Student's regulatory and early attachment issues, learning disability and related stress, and need for support. Berkeley team members heard for the first time that Student was reporting to her therapist that she could not read. Parent report of the severity and frequency of Student's school refusal was also new information that did not match Berkeley's knowledge and experience of Student at school.

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<sup>38</sup> Ms. Graham has been a special education program supervisor for seven years, the last three years with Berkeley. She has worked in the field of special education in various capacities for the past 14 years. Ms. Graham is a national board certified teacher and holds clear administrative services and multiple subject elementary level teaching credentials, as well as a level II educational specialist instructional credential in the field of deaf and hard of hearing. She earned a master's degree in organization and leadership from the University of San Francisco in California in 2006.



78. Berkeley members of the IEP team determined that Student did not have a processing disorder which adversely affected her educational performance such that she required special education and related services. Parents requested an opportunity for an expanded conversation and Berkeley agreed to reconvene the meeting. Ms. Graham believed a second meeting would allow the team time to consider Parent information.

79. In a November 6, 2013 email to all IEP team members, Ms. Graham shared portions of the education code detailing the eligibility criteria for specific learning disability, and informed the team that the purpose of special education was not to maximize a child's potential. Although she felt the team discussion had become cyclical and was not addressing the necessary criteria, she believed further discussion was warranted given the very different accounts of Student's reading abilities and her anxiety at home, and what the school team observed in terms of her abilities and engagement in class. Berkeley was ready to discuss other areas of suspected disability at the follow-up IEP team meeting.

80. The IEP team re-convened for over two hours on November 12, 2013. Parents, Ms. Forest, Ms. Graham, Ms. Amos, Ms. Lee and Ms. Smith attended.<sup>39</sup> Parents disagreed with Berkeley's position that Student was not eligible as she did not have a specific learning disability or a demonstrated need for special education. They provided Berkeley with two documents to support their position that Student qualified for special education. The first document was the May 23, 2013 student study team meeting notes, to support their contention that Student was behind in reading. The second was an October 16, 2013 letter from the Scottish Rite detailing Student's progress in its summer reading program.

81. The team did not reach a consensus regarding eligibility at the November 12, 2013 IEP meeting, and brainstormed strategies to support Student's school attendance. Parents, disagreeing with Berkeley's stance that Student does not have a specific learning disability, subsequently filed the complaint that is the basis of this Decision.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework*<sup>40</sup>

1. This due process hearing was held under the Individuals with Disabilities Education Act (IDEA), 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);<sup>41</sup> Ed. Code,

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<sup>39</sup> Parents agreed to excuse the attendance of Ms. Rudel and Ms. Deutsch.

<sup>40</sup> Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

§ 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].)

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

4. The IDEA affords parents or 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

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<sup>41</sup>All subsequent references to the Code of Federal Regulations are to the 2006 version.

to the child. (20 U.S.C. § 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; 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. (e).) At the hearing, the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

*Issue One: Child Find*

5. Student contends that as of February 2013, Berkeley should have suspected she might have a disability for which she required special education based on her many absences due to her anxiety which was exacerbated by the academic rigors of the first grade curriculum in light of her un-remediated reading disorder. Student also contends that her failure to maintain grade level standards in reading, writing and spelling placed Berkeley on notice that she should be referred for assessment. According to Student, Berkeley violated its child find obligation when it failed to refer her for a special education assessment in February 2013, and this violation denied her a FAPE.<sup>42</sup>

6. Berkeley contends that it had no knowledge that Student had academic anxiety or an anxiety disorder which resulted in school refusal, and Parents' failure to ensure Student's school attendance did not trigger child find. Further, based on Student's academic progress and classroom functioning, Berkeley argues it had no reason to suspect that Student had a specific learning disability; its subsequent testing proved it correct; and her minor academic difficulties resulted from her lack of attendance. Further, Berkeley argues that even if it did violate its child find duties, Student was not eligible for special education so any violation did not result in substantive harm.

#### CHILD FIND RESPONSIBILITIES

7. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as "child find." California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a) & (b).) "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.)

8. A school district's child find obligation toward a specific child is triggered

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<sup>42</sup> Student did not identify as an issue for hearing whether Berkeley violated its global child find duties of having and implementing written policies and procedures to seek out and serve students with special needs within its boundaries and training staff in this regard.

when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*)).

9. A district's child find duty is not dependent on any request by the parent for special education testing or referral for services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) The child find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade, and regardless of the severity of the disability. (*Cari Rae S.*, *supra*, 158 F.Supp.2d 1190, 1194; 34 C.F.R. § 300.111(a)(1) & (c)(1).) "[A] child should not have to fail a course or be retained in a grade in order to be considered for special education and related services." (71 Fed. Reg. 46580 (Aug. 14, 2006).) The law requires the district to seek and serve students who may require special education services and the fact that a student made adequate educational progress is not a valid reason not to assess. (*Cari Rae S.*, *supra*, 158 F.Supp.2d at 1196-1197; 34 C.F.R. § 300.111(c)(1).) Concomitantly, failing grades alone do not necessarily establish that a district has failed in its child find obligation or that it failed to provide an educational benefit to a student. (*Sherman v. Mamaroneck Union Free Sch. Dist.* (2nd Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford Sch. Dist.* (D. Vt. 1996) 928 F.Supp. 437, 446.)

10. Child find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process which is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

#### PROCEDURAL VIOLATIONS

11. A violation of child find and a failure to assess a child in all areas related to the suspected disability, are procedural violations of the IDEA. (*Cari Rae S.*, *supra*, 158 F.Supp. 2d 1190 at p.1196; *Park v. Anaheim Union High School Dist., et.al.* (9th Cir. 2006) 464 F.3d 1025, 1032).

12. However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation:

(1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*) ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].)

13. In *R.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir. 2007) 496 F.3d 932 (*R.B. v. Napa*), the Ninth Circuit determined that a school district's procedural violation of the IDEA by not including a child's special education teacher on the IEP team did not result in the loss of a FAPE where the student was not eligible for special education. The Ninth Circuit held, "A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place." (*Ibid.* at 942; *Cf. Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 612 (6th Cir.2006) [procedural violation denies a FAPE "only if such violation causes substantive harm to the child or his parents."].) The district's procedural violation "cannot qualify an otherwise ineligible student for IDEA relief" and constituted harmless error because student was substantively ineligible for IDEA relief. (*R.B. v. Napa, supra*, 496 F.3d at 942; See *D.G. v. Flour Bluff Independent School District* (5th Cir. 2012) 481 Fed. Appx. 887, 893, 2012 WL 1992302 [nonpub. opn.] ["IDEA does not penalize school districts for not timely evaluating students who do not need special education."].)

14. Berkeley was on notice of Student's excessive absences, which when coupled with Parents' report of Student's anxiety and school refusal, and Parents' decision to pursue independent study rather than risk further truancy, triggered its child find obligation by the end of March 2013. The threshold for suspicion is relatively low and the inquiry is not whether Student would have qualified for special education but whether Berkeley should have referred her for assessment. Berkeley's contention that it had no reason to suspect that Student had a specific learning disability, as confirmed by subsequent testing, confounds eligibility with its duty to assess pursuant to child find. Berkeley had an affirmative obligation to assess Student to determine eligibility because it had sufficient knowledge to suspect she might have one of the 13 enumerated disabilities and a need for special education as detailed herein.

15. Berkeley had numerous warning signs and thus reason to suspect a disability and the need for special education by the end of March 2013. By that time, Student had missed 51 days of school and arrived late nine times. Parents informed Berkeley that Student had been diagnosed with anxiety, had disturbed sleep, was refusing school, and that they were working with her therapist and pediatrician to attempt to return her to a learning environment. Based on these reports, Ms. Thomas believed Student had a problem and was in need of support by early February 2013, and by the end of the month, Ms. Collins recommended a student study team meeting given the seriousness of Student's situation. Thus, Berkeley had reason to suspect a disability. Its child find duty was not dependent upon

first identifying the source of Student's anxiety (i.e. academics or separation). Therefore, that Student's anxiety may have been triggered by the transfer of her best friend to another school, or that her school refusal might have been a learned behavior reinforced by rewards such as Parental attention, or that Student did not display any anxiety at school did not relieve it of its child find duty. Berkeley had an affirmative duty to assess Student to discover why she was not attending.

16. Berkeley's preferred manner of addressing student needs was to first convene a student study team meeting, before initiating a special education referral. Adherence to this protocol of steering families towards the student study team process, and Berkeley's offer of such a meeting, did not discharge its child find duty as to Student. Further, it raises a serious question as to Berkeley's global child find policies and procedures in terms of ensuring that staff are aware of legal requirements and supported in their individual duties. The fact that teachers do not refer students for special education assessments calls into question the efficacy of Berkeley's internal child find training.

17. In March 2013, Berkeley authorized Student's participation in independent study even though it knew this program would not provide instruction comparable to that delivered in its first grade classrooms. Further, Berkeley knew that Student did not engage in or attend to her weekly instructional meetings. Student is not required to first fail before Berkeley's child find duty arises, and Berkeley's position that Student was still making adequate progress did not relieve it of its fundamental duty to assess. Berkeley agreed that Student's educational performance was adversely affected by her excessive absences and removal from the classroom setting. Once on notice of Student's alleged school refusal and anxiety, and her concerning behaviors during her weekly independent study sessions, Berkeley was obligated to start the assessment process independent of any request from Parent and regardless of the fact that Parent did not provide a written diagnosis of Student's alleged anxiety disorder. Berkeley had an obligation to refer Student for a special education assessment by the end of March 2013, and it did not do so. Therefore, Student met her burden of proof that Berkeley procedurally violated the IDEA by failing to timely assess her for eligibility.

18. In order to be entitled to substantive relief, Student must also demonstrate that as a result of Berkeley's failure to fulfill its child find duties, she was deprived of educational benefit, her right to a FAPE was impeded, or Parents' ability to participate in the decision making process was significantly impeded. As determined by this Decision, Student did not establish that she is eligible for special education services as a student with a specific learning disability.<sup>43</sup> Therefore, Student did not prove a substantive denial of a FAPE and no award of educational services is warranted.

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<sup>43</sup> Student solely alleged eligibility under the category of specific learning disability. No findings are made as to whether Student may be eligible pursuant to another qualifying condition.

*Issue Two: Eligibility Criteria for Specific Learning Disability*

19. Student contends that she has a severe discrepancy between her cognitive ability and academic achievement in the area of reading and spelling as determined by both private and Berkeley assessments. She alleges she has an auditory processing disorder, namely, phonological dyslexia, as well as processing disorders in the areas of sensory-motor skills and attention, all of which contribute to her discrepant scores. Student maintains that her poor school attendance was a symptom of her un-remediated disorders and that her severe discrepancy was not primarily the result of limited school instruction or poor attendance. Finally, Student argues that she requires special education in order to attend school and receive educational benefit.

20. Berkeley agrees that Student's testing scores reveal a severe discrepancy not only in reading, but also in mathematics. However, Berkeley contends that Student does not have a processing disorder, and that even if she did, her discrepant scores are primarily due to her poor school attendance and missed instruction in reading and math. Further, Berkeley maintains that Student does not require special education based upon her average academic scores, her ability to perform at grade level, and her progress in the general education setting.

ELIGIBILITY DETERMINATIONS

21. Before any action is taken with respect to the initial placement of a special needs child in special education, an individual assessment shall be conducted by qualified persons who are both knowledgeable of the student's disability and competent to perform the assessment. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(iv); Ed. Code, §§ 56320, subd. (b)(3) & (g), 56322.) No single procedure 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, subds. (e) & (f); Cal. Code Regs., tit. 5, § 3030.)

22. A student is eligible for special education and related services if she is a "child with a disability" such as a specific learning disability, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).) Accordingly, "[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized." (Ed. Code, § 56303.) A student shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is a lack of appropriate instruction in reading or mathematics, limited English proficiency, or if the student does not otherwise meet the eligibility criteria under federal and California law. (20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b); Ed. Code, § 56329, subd. (a)(2).)

23. An ALJ has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v.*

*Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Cari Rae S.*, *supra*, 158 F.Supp.2d 1190, 1196.)

24. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 (*Hood*) [decided under former Ed. Code, § 56337].) *Hood* demonstrates that a child may have a specific learning disability, yet not be found eligible for special education, because the child's needs can be met with modification of the general education classroom. The Ninth Circuit held, "In essence, the Hoods assert that the law guarantees a learning-disabled child of superior ability enough individualized attention and services ... to elicit optimum performance from the child, when clearly no such requirement exists for children without disabilities, gifted or not." (*Id.* at 1108.)

#### SPECIFIC LEARNING DISABILITY CRITERIA

25. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1401(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) A specific learning disability includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1401(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).) A student who is assessed as being dyslexic and who meets the eligibility criteria under the category of specific learning disability is entitled to special education and related services. (Ed. Code § 56337.5, subd. (a).) If a student who exhibits the characteristics of dyslexia or another related reading dysfunction is not found eligible for special education, then her instructional program shall be provided in the regular education program. (Ed. Code § 56337.5, subd. (b).)

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

27. A specific learning disability does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional



disturbance, or environmental, cultural, or economic disadvantage. (20 U.S.C. §1401(30)(C); 34 C.F.R. §§ 300.8(c)(10)(ii), 300.309(a)(3); Ed. Code, § 56337, subd. (a).)

28. A school district shall determine that a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method.<sup>44</sup> (20 U.S.C. § 1414(b)(6); 34 C.F.R. §§ 300.307, 300.309(a)(1) & (2); Ed Code, 56337, subds. (b), (c).) The severe discrepancy method requires that a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); Ed. Code, § 56337, subd. (b)[authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Cal. Code Regs., tit. 5, § 3030, subd. (j).) The severe discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(5).)

29. A child may have a specific learning disability if she does not “achieve adequately for the child’s age or to meet State-approved grade-level standards” in specified academic areas when provided with appropriate learning experiences and instruction. (34 C.F.R. § 300.309(a)(1).) State law specifies that intellectual ability, for the purpose of calculating a severe discrepancy, includes both acquired learning and learning potential, and shall be determined by a systematic assessment of intellectual functioning. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(2).) The level of achievement, for the purpose of calculating a severe discrepancy, includes the student’s level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(3).)

30. In California, a severe discrepancy, for the purposes of determining a specific learning disability, is demonstrated by comparing standardized achievement and ability test scores and finding that they are more than 1.5 standard deviations apart. Using a standard deviation of 15, a 1.5 standard deviation would be a difference of 22 points. Thus, a severe discrepancy may be shown by test scores that are 22 points or more apart, taking into account a standard error of measurement of up to four points. If found, the discrepancy must be corroborated by other assessment data, which may include other tests, scales, observations, and work samples. (See, Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).) When faced with discrepant testing data, “a school district, considering all relevant material available on a pupil, must make a reasonable choice between valid but conflicting test results in determining whether a ‘severe discrepancy’ exists.” (*E.M. v. Pajaro Valley Unified School District* (9th Cir. 2011) 652 F. 3d 999, 1004.)

31. 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. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).) No single score or

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<sup>44</sup> Response to intervention was not used by Berkeley in this case, and will not be addressed in this Decision.

product of scores, test, or procedure shall be used as the sole criterion for the decisions of the IEP team as to the student's eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).) To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the IEP team must consider (1) data that demonstrate that prior to, or as a part of the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and (2) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. (34 C.F.R. § 300.309(a)(3)(b).)

32. A substantial difference between ability and school performance does not, by itself, indicate the presence of a specific learning disability. In *Kelby v. Morgan Hill Unified School Dist.* (9th Cir. 1992) 1992 WL 67857 [unpub. opn.], the Ninth Circuit rejected essentially the argument made here and upheld a finding of ineligibility. The district determined that a student with high potential and low grades did not have the required severe discrepancy or a processing disorder which hindered his ability to learn in the regular class, and that he would have received better grades had he turned in his homework. Similar to case at hand, the student argued a private evaluation showed a severe discrepancy and that his behavior problems resulted from his efforts to cope with the stress associated with his learning disability. The Ninth Circuit concluded, "The Kelbys argue that given student's above-average I.Q. score, his below-average grades indicate that he is not receiving the 'appropriate education' the IDEA guarantees to each child with a disability. The point that this argument misses is that having an unsuccessful educational experience does not, in itself, qualify a student for special education. Not every student with a learning difficulty has a 'specific learning disability.'" (*Id.* at \*3.)

33. Student failed to meet her burden of establishing that she met all three of the criteria for a specific learning disability under the severe discrepancy model, namely, that she has: 1) a severe discrepancy between intellectual ability and achievement; 2) which results from a disorder in one or more of the basic psychological processes; and 3) that her educational needs cannot be provided for with modification of the regular school program.

34. Student established that she had a severe discrepancy between her cognitive ability and academic achievement based upon testing data by Dr. Owen-Wilson and Berkeley which satisfied the numeric calculation pursuant to the state regulatory formula. The testing data from the two assessments corroborate each other in this regard as do reports of Student's school functioning. However, she did not establish that she has a processing disorder in one or more of the basic areas of psychological processing. Student contended but did not prove that she has dyslexia, sensory integration and dysregulation disorder, and attention deficits.

#### *AUDITORY PROCESSING - DYSLEXIA*

35. Even if Dr. Owen-Wilson's summation of the DSM-IV criteria for reading disorders is accepted as accurate, Student did not prove she met diagnostic criteria for a reading disorder. Dr. Owen-Wilson's opinion that Student met diagnostic criteria was not

persuasive. She relied solely on one test instrument, the WIAT-III, to determine Student's reading scores without establishing that this instrument is valid and reliable in determining a reading disorder. Special education law requires that test instruments must be used for purposes for which the measures are valid and reliable. Additionally, no single measure or assessment shall be used as the sole criterion for determining eligibility. Further, she relied solely on Parent report to support her finding that Student experienced distress due to her reading and spelling delays. Dr. Owen-Wilson concluded that Student had a reading disorder without reviewing educational records or interviewing Ms. Thomas, Student's teacher at the time of her first grade school refusals or her second grade teacher to corroborate her findings. The evidence showed that Student did not experience distress in the school setting. She was a happy engaged learner when present at school, did not display signs of academic anxiety, enjoyed reading and was excited to read aloud.

36. Dr. Owen-Wilson's testing indicated that Student may have a central auditory processing disorder, but this was ruled out by an outside expert. Dr. Owen-Wilson diagnosed Student with phonological dyslexia, an audiology based processing disorder, even though this is not her area of expertise, she did not conduct any phonological testing, and she did not refer Student to an expert in this area to confirm or rule out her suspicion of a reading disorder. Student did not introduce any testimony from an expert in audiology based processing disorders.

37. Berkeley's phonological testing data refuted Dr. Owen-Wilson's diagnosis of dyslexia. Student's scores of average to very superior on the CTOPP-2, an instrument which specifically assessed her ability to break words down into their component sound parts, demonstrated she did not have an auditory processing disorder. Further, Student's scores in the average range on the broad reading cluster of the WJ-III, including her highest score in reading fluency (standard score of 104) which measures speed and accuracy, were not consistent with a diagnosis of dyslexia.

38. Student's enjoyment of reading aloud in class and during free time, and ease of reading during her assessment was not consistent with Dr. Owen-Wilson's diagnosis of dyslexia. Reading is Student's favorite school activity. Student's enjoyment of reading is not consistent with Dr. Owen-Wilson's assessment results. Similarly, Student's progress in reader's workshop and attainment of second grade reading standards did not support Dr. Owen-Wilson's diagnosis of a reading disorder. Student completed kindergarten above grade level expectations at a Level G. Despite frequent absences, and approximately six weeks of no class instruction, she ended first grade at Level H, just below grade expectation. At the time of hearing, Student was reading above grade level.

39. Berkeley's test data, class observations, and Student's academic functioning, established that Student did not have an auditory processing disorder. To the extent Berkeley believed that dyslexia was not a processing disorder, as highlighted by Ms. Graham's testimony, its position was not credited. Nevertheless, based on the evidence summarized above, Student did not meet her burden of proving that she had the auditory processing disorder of phonological dyslexia or any other auditory processing disorder.

### *SENSORY-MOTOR PROCESSING*

40. Student contends that she has a sensory-motor processing disorder as demonstrated by her physical dysregulation at home and Mr. Adam's March 2013 occupational therapy assessment. However, Mr. Adam did not diagnose Student with a sensory-motor processing disorder and Student was not physically dysregulated at school. Ms. Rudel is qualified to identify sensory processing disorders. She conducted a thorough educational occupational therapy assessment of Student and credibly concluded that Student did not have a sensory-motor processing disorder. Student's ability to reconstruct patterns and designs during Ms. Lee's testing, and her demonstration of good eye-hand coordination and fine motor skills in class corroborated Ms. Rudel's conclusion. Student did not prove she has a processing disorder in the area of sensory-motor skills.

### *ATTENTION*

41. Student's scores on two test instruments administered by Dr. Owen-Wilson revealed symptoms of inattention and poor vigilance. However, because she determined that Student's sensory and emotional needs impacted her attention presentation and activity level, Dr. Owen-Wilson only provisionally diagnosed Student with attention deficit hyperactivity disorder, inattentive type. A provisional diagnosis of attention deficit hyperactivity disorder, inattentive type, does not establish a disorder for the purposes of establishing a specific learning disability especially when all agree that the one place attention is not impacted is at school. Parent did not contend that Student displayed any attentional issues at school and Dr. Owen-Wilson's own class observation of Student did not reveal attention deficits. Student was focused, engaged, and attuned to her learning when at school. Berkeley testing data did not corroborate Dr. Owen-Wilson's provisional diagnosis. For example, Student's scores in the high average range on the working memory index of the WISC-IV demonstrated her ability to sustain attention, concentrate, and exert mental control. Student did not prove that she had a processing disorder in the area of attention.

42. In conclusion, Student has a severe discrepancy between her intellect and achievement, but she did not prove she has a disorder in one of the basic psychological processes involved in understanding or using spoken or written language, including the areas of auditory processing, sensory-motor skills, and attention.

### *EXCLUSIONARY FACTORS*

43. Even if Student did establish that she had a processing disorder, the evidence showed that her severe discrepancy between ability and achievement was primarily a result of her lack of exposure to instruction and poor school attendance. Student missed approximately 56 days of class instruction during her first grade year, and was late or tardy an additional 13 days. Further, Berkeley authorized Student to participate in home school for approximately one month in spring 2013, even though Parent was not a credentialed teacher, was not trained to deliver Berkeley's first grade curriculum, and the weekly 90 minute teacher sessions were not comparable to the reading and math instruction delivered in a first

grade classroom. Student's school refusal re-emerged shortly after the start of the 2013-2014 school year and occurred up to three times per week through December 2013. Lack of regular school attendance is a barrier to learning as class lessons build day to day. Regular exposure to the first grade curriculum and core standards is critical to maintain an upward trajectory of learning in second grade. Student's absences were her primary problem in acquiring and advancing her academic skills and resulted in her severe discrepancy.

#### NEED FOR SPECIAL EDUCATION

44. Even if Student had proven that her significant discrepancy was due to a processing disorder and not the result of her poor school attendance, to qualify for special education, Student must also require specialized instruction and related services in order to receive educational benefit.<sup>45</sup> By all teacher accounts, from kindergarten through the time of hearing, Student was functioning well in the general education environment, receiving benefit, and making progress. Student's report cards demonstrated her ability to progress in reading, writing, spelling, and math. Academic concerns were aptly attributed to Student's pattern of absences and missed instructional time.

45. Despite the fact that under the California regulations, intellectual ability includes both acquired learning and learning potential, the Ninth Circuit clearly announced in *Hood, supra*, that the *Rowley* benefit standard applies to eligibility determinations. *Hood* instructs that it is not the role of special education to ensure that a child with superior intellectual ability performs to her potential. Rather, if a student, gifted or not, is receiving educational benefit in the general education setting, than she is not entitled to special education. With respect to the issue presented in this case, namely whether Student has a learning disability which causes her to struggle academically, Student did not prove she required special education and related services in order to receive educational benefit. She demonstrated the skills to independently perform consistent with grade level standards and often exceeded these standards. Parents' claim that Student requires special education in order to achieve academically commensurate with her intellectual abilities, overlooks the applicable legal standard. In conclusion, Student did not meet her burden of proof that she qualifies for special education due to a specific learning disability.

#### *Issue Three: Meaningful Parental Participation*

46. Student contends that Parents were not allowed to meaningfully participate in the eligibility determination because Berkeley had already concluded through its psycho-educational report, completed in advance of the IEP team meeting, that Student was not eligible, and ignored Parents' input and rejected the private assessment. Berkeley argues that it afforded Parents their full participatory rights and considered not only the private

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<sup>45</sup> Student contends that she requires special education to address her anxiety and emotional impairment which prevent her from attending school. However, Student must first establish eligibility, and whether she qualifies as having an emotional disturbance was not at issue in this hearing.

assessment, but also Parent input and scheduled a follow-up team meeting to further consider Parents' information. Since this Decision finds that Student is not eligible for special education, any violation of the right to meaningful participation need not be analyzed further. However, the evidence showed that Parents meaningfully participated in the November 2013 IEP team meetings.

#### LEGAL REQUIREMENTS FOR PARENTAL PARTICIPATION

47. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304.) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting, and is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.322(a), 300.501(c); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) Parental participation in the IEP process is considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*)) Violations that impede parental participatory rights "undermine the very essence of the IDEA." (*Id.* at 892.)

48. Under these guidelines, an educational agency must permit a student's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*); *Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman, supra*, 993 F.2d 1031, 1036.) A school district cannot independently develop an IEP without parental input and then present the IEP to the parent for ratification. (*Vashon Island, supra*, 337 F.3d 1115, 1131; *Target Range, supra*, 960 F.2d 1479, 1484.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J., supra*, 267 F.3d 877, 891.)

49. The personnel who assess the student shall prepare a written report of the results of each assessment and provide the report to the parent at the IEP team meeting regarding the assessment. (Ed. Code, §§ 56327, 56329, subd. (a)(3); See 20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306 (a)(2) [a copy of the evaluation report determination of eligibility shall be given to the parent].) The report shall include, among other components, a determination of whether the student may need special education and related services; the basis for making that determination; and, 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. (Ed. Code, § 56327, subs. (a), (b), & (f).)

#### PREDETERMINATION

50. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, a meeting of school district personnel in advance of an IEP team meeting to prepare for the meeting is permissible, and does not constitute predetermination. (*N.L. v. Knox County Schools, supra*, 315 F.3d 688, fn. 3 at p. 693.) School officials may permissibly form opinions prior to IEP meetings. However, if the educational agency goes beyond forming opinions and, instead, becomes “impermissibly and deeply wedded to a single course of action,” this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio 2013) 2013 WL 209478, \*7.).

51. Berkeley afforded Parents the opportunity to meaningfully participate in Student’s eligibility IEP team meetings. Parents received draft copies of each assessment report prior to the meeting, and during the meeting Berkeley considered the input of Parents, their advocate, Student’s therapist, and the private assessor. Parents meaningfully participated in the IEP team meetings, by pointing out errors in Berkeley’s report, sharing about Student’s anxiety, early history, school refusal and struggles to read, providing additional documentation to the team, and strongly disagreeing with Berkeley’s conclusion of ineligibility. When Parents requested that the meeting be re-convened to another date for further discussions, Berkeley agreed that a second meeting was warranted so that it could further consider Parents’ unique input about Student’s functioning at home. There is no requirement that Berkeley must agree with Parents’ position, or adopt the findings of Dr. Owen-Wilson.

52. Student’s contention that Ms. Lee’s preparation of her psycho-educational report constituted impermissible predetermination because it included her analysis of why Student did not meet the criteria for a specific learning disability and did not require special education, overlooks the requirements for a legally compliant assessment report. Berkeley’s assessment report met the legal requirement of specifically addressing, within the context of a specific learning disability, whether Student needed special education, the basis for that determination and whether Student’s discrepancy could be addressed with modifications to the general education classroom.<sup>46</sup> Student did not establish predetermination on this basis.

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<sup>46</sup> Student did not identify as an issue for hearing the adequacy of Berkeley’s psycho-educational assessment and no findings are made in this regard.

53. Ms. Graham held the opinion that dyslexia could not constitute a processing disorder. It is reasonable to conclude that in responding to Berkeley team members' questions about the criteria for specific learning disability prior to the IEP team meeting, she shared her interpretation of the law and opinion on dyslexia. However, team members are not prohibited from meeting in advance of the IEP team meeting or from discussing and forming opinions about the topic at hand. What is prohibited is attending the meeting with a mindset that they have already determined the eligibility question. Student did not prove this. At least one Berkeley team member held the opinion prior to the IEP team meeting that dyslexia was not a processing disorder. However mistaken as this opinion may be, Student did not establish that Berkeley predetermined eligibility and was not open to Parent input. In conclusion, Student did not prove that Berkeley denied Parents their participatory rights.

### ORDER

All relief sought by Student is denied.

### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student substantially prevailed as to Issue One. Berkeley prevailed as to Issues Two and Three.

### RIGHT TO APPEAL

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

Dated: March 17, 2014

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings