

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2015021006

v.

AVESON CHARTER SCHOOLS, AVESON
SCHOOL OF LEADERS AND AVESON
GLOBAL LEADERSHIP ACADEMY (CHARTER
SCHOOLS).

DECISION

Parent filed a due process hearing request on Student's behalf with the Office of Administrative Hearings, State of California, on February 19, 2015, naming Aveson School of Leaders and Aveson Global Leadership Academy. On July 22, 2015, Student filed a second amended complaint, adding Aveson Charter Schools as a respondent. Administrative Law Judge Laurie Gorsline heard this matter in Altadena, California, on September 29, 30, October 6, 7, and 13, 2015.

Attorney Lisa Dennis, Attorney Carolyn Olson, Attorney Abraham Labbad, and special education advocate Hamlet Yarijanian represented Student. Mother attended all days of hearing, and Father attended one day of hearing. Attorney Michael Ohira represented all Respondents. Kate Bean, Executive Director for all Respondents, attended all days of hearing.

At the close of hearing on October 13, 2015, the ALJ granted a continuance to October 26, 2015, for the parties to file written closing arguments. Upon receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did Aveson Charter Schools, Aveson School of Leaders, and/or Aveson Global Leadership Academy deny Student a free appropriate public education between September 2011 and the December 2014 individualized education program team meeting by failing to comply with their child find obligations?

2. Did Aveson Charter Schools and Aveson School of Leaders deny Student a FAPE by failing to timely provide Parents with an assessment plan in response to Parent's fall 2011 request for assessment?

3. Did Aveson Charter Schools and Aveson School of Leaders deny Student a FAPE by failing to timely complete Student's psychoeducational assessment in response to Parent's fall 2011 request?

4. Did Aveson Charter Schools and Aveson School of Leaders deny Student a FAPE by failing to conduct an appropriate psychoeducational assessment of Student in February 2012?

5. Did Aveson Charter Schools and Aveson School of Leaders deny Student a FAPE at the March 22, 2012 IEP team meeting by:

(i) Failing to have all the required members of the IEP team present, specifically Student's general education teacher and the school psychologist who conducted Student's assessment?

(ii) Failing to find Student eligible for special education?

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

SUMMARY OF DECISION

Student met his burden of proof in establishing that the exception to the two-year statute of limitations applied to the claims concerning Aveson School of Leaders and Aveson Charter Schools (collectively, Aveson), who failed to provide Parents with a copy of their Parent's Rights and Procedural Safeguards. Student only attended Aveson Global Leadership Academy after September 2014, and thus no statute of limitations analysis was necessary with respect to the single child find issue raised against them. However, Student failed to meet his burden of demonstrating that any Respondent violated their child find obligations by failing to assess him. Student was timely assessed in the third grade and the sixth grade, and Student failed to establish that Aveson should have assessed him in fourth or fifth grades. Student also failed to prove that Aveson denied him a FAPE by failing to timely provide Parents with an assessment plan or by failing to timely assess him in response to Parents' fall 2011 assessment request. Parents failed to rebut testimony from Aveson's witnesses that the assessment plan was timely provided to Parents, and Mother admitted she was not certain if she signed the assessment plan she returned to Aveson. Student proved by a preponderance of evidence that Aveson failed to conduct an appropriate psychoeducational assessment in February 2012. Student also proved that Aveson failed to have all required team members present at the March 22, 2012 IEP team meeting because they did not have the school psychologist who conducted Student's initial assessment at the team meeting, thereby interfering with Parents' opportunity to participate in the IEP process. Finally, Student failed to meet his burden of proof of establishing Aveson denied him a FAPE by failing to find Student eligible for special education at the March 22, 2012 IEP team meeting.

FACTUAL FINDINGS

1. Student was an eleven-year-old male at the time of the due process hearing. On December 11, 2014, Student was determined to be eligible for special education services as a child with a specific learning disability. Student lived with Parents during the relevant time period.

2. Aveson Charter Schools was a charter management organization and educational service agency and employed the administrators and teachers working at Aveson School of Leaders and Aveson Global Leadership Academy. Aveson School of Leaders served students in pre-kindergarten through fifth grades. Aveson Global Leadership Academy served students in grades six through twelve. Aveson School of Leaders and Aveson Global Leadership Academy are each independent charter schools, operating under the management of Aveson Charter Schools.

THE 2009-2010 AND 2010-2011 SCHOOL YEARS – FIRST AND SECOND GRADES

3. Student was in the first grade in the 2009-2010 school year and in the second grade in the 2010-2011 school years. Student attended first and second grades at Aveson Center for Independent Studies, a home school program under the Aveson School of Leaders charter. The home school program consisted of home school study with parents and one half-day per week of classroom work on campus. The parents were not required to teach a particular curriculum. The classroom work consisted of generally non-academic enrichment classes. Other than the one-half day per week of on-campus enrichment classes, parents were responsible for all curriculum and instruction at home. The students' work in the homeschool program was not graded, although parents were required to maintain all records of work completed and to present those records every 20 days to the home school advisor.

4. At home, Mother followed a European curriculum in which she delayed

Student's academic instruction until he was about seven years of age. Mother assisted in the classroom during the first and second grades. During second grade, the homeschool program director asked Mother to come into class to help because Student was disruptive in class.

5. In spring 2011, Student took the Standardized Testing and Reporting test, scoring at the Below Basic level in English-Language Arts and at the Far Below Basic level in Mathematics. The STAR test measured a child's progress in meeting California's academic content standards.

THE 2011-2012 SCHOOL YEAR – THIRD GRADE

6. In August 2011, Student enrolled in Aveson's full-time general education program for the third grade. Student was below grade level in reading, writing, and math because of the European curriculum followed by Parents. Mother enrolled Student in a full-time program because the curriculum was more difficult, Student resisted Mother's academic instruction, and Mother had observed that Student behaved better at school.

7. In August 2011, Mother requested a referral from the home school program director, and was provided with the name of an advocate. Mother had a one-time free telephone consultation with the advocate. The advocate told Mother to put her request for an independent educational program in writing, advising her that the school had to respond within a certain period of time, and not to sign the IEP.

8. On August 25, 2011, Mother met with Sebastian Cогnetta, Director of Curriculum Instruction for all Respondents. Dr. Cогnetta had a doctorate degree in education and was responsible for the general administration of instructional and day-to-day operational functions for all Respondents, including personnel management, assessment practices, curriculum instruction, and interventions. Mother gave Dr. Cогnetta a handwritten note requesting that Student be assessed for special education.

They discussed Student's history and use of European philosophy in delaying the instruction of reading or other academics until seven years of age. He explained that students usually went through a Student Study Team process to determine if a student required referral for special education assessment and that the team could provide immediate interventions to Student. The SST process was part of general education and followed response-to-intervention techniques to assist general education students with academic or behavioral challenges. Mother repeated her request to have Student assessed for special education, and requested that Aveson provide the SST interventions. Although Dr. Cognetta agreed to start the SST process and conduct the assessments for special education, he told Mother to put her request for special education assessments in an email and send it to him on the first day of school.

9. The first day of the 2011-2012 school year was September 6, 2011. On September 9, 2011, Mother sent a formal written request to Dr. Cognetta requesting assessment of Student for special education eligibility. In the formal request, Mother stated that: (1) Student had displayed behaviors that indicated he had attention difficulties and that Father, a child psychiatrist, suspected Student may have Attention Deficit Hyperactivity Disorder; (2) Student had just taken the first spelling test in his life and had performed poorly; (3) she had followed the model of "not pushing paper and pencil work until he turned 7 and lost his first teeth;" (4) Student may need some "gentle interventions to help him enjoy the learning process and keep up"; and (5) learning to read, write, and do math were all very new to Student, unlike his peers who may have been reading, writing, and doing math for years. She requested that Student be permitted to do independent study off campus to assist him in transitioning from home study to a full-time general education program.

10. Five to seven days later, Aveson provided an assessment plan to Mother but did not provide Parents with a copy of Parent's Rights and Procedural Safeguards.

The assessment plan did not indicate which assessments Aveson sought consent to conduct. Aveson personnel were unfamiliar with how to use the assessment plan form so they asked Mother to check off which assessments she thought were appropriate for Student.

11. In September 2011, Aveson began its tri-annual school-wide benchmark assessments in the areas of literacy and math. The assessments were normed and used across the country. Aveson used these screening assessments to determine students' readiness for grade level content. Dr. Cognetta created a database for the school-wide assessments. He monitored the results of assessments, and was responsible for meeting with teachers to determine the right course of action for individual students and their classroom needs. The assessments were more precise in literacy than in math. The literacy assessment had three scoring bands: benchmark, strategic (below benchmark), and intensive (need to follow up with for more assessments). Student scored in the strategic band. Based on the results of the assessments, Aveson personalized the learning process for each student, including Student, using response to intervention techniques as part of the core general education model for supporting all students, using three components: (1) comprehensive assessments (screening assessments in literacy and math to identify which students will benefit from additional support); (2) a tiered system of supports; and (3) the SST process (to identify and monitor interventions).

12. On September 28, 2011, Aveson initiated the SST process for Student, notified Student's teachers and Mother, and scheduled three SST team meetings with Parents and staff. Mother was asked to fill out a questionnaire and Student's teachers began observations and gathering data. Student's teachers implemented interventions in Student's classroom in order to support Student in the areas of concern, which were both behavioral (attentional challenges as to staying on task) and academic. The

interventions included checking-in on Student frequently, one-on-one conferences, and sending home incomplete work.

13. By September 30, 2011, Aveson received the completed but unsigned assessment form back from Mother who checked off four areas in which she wanted Student assessed. Mother did not understand that her signature was legally required before special education testing could begin. At hearing, Mother was not certain whether or not she signed the assessment plan. Both Dr. Cognetta and Kate Bean recalled that the assessment plan returned by Mother was not signed. Ms. Bean was the founder and Executive Director of all Respondents. She had a master's degree in education administration and multiple credentials. Her duties as Executive Director included overseeing all operations, including curriculum instruction, facilities, finance, legal, and special and general education.

14. Aveson added additional information to the assessment plan and returned it to Mother, following up with Mother to get her signature on the form. Student failed to present evidence as to when the revised assessment plan was sent to Mother or what specific information had been added.

15. On October 3, 2011, Aveson informed Mother that the special education assessments could take up to 60 days from the date she returned the completed assessment plan. Mother did not return a signed assessment plan until January 27, 2012.

16. During Student's third grade year, Mondays were a half-day program consisting of social learning and physical fitness. The academic instructional program for third graders began on Tuesdays. The school day on Tuesdays through Fridays were full days consisting of a 30-minute advisory class or home room class at the beginning of each day where attendance was taken; thereafter, students had two instructional blocks for literacy and math.

17. Student did not attend the full day of school on Tuesdays because Mother

removed Student from school so that he could attend WISH Learning Collaborative, a home school study program where Mother worked. Mother described it to Dr. Cognetta as a “camp-like” experience. Mother thought WISH was fun for Student and it was important to his transition to full-time public school that he attend WISH. Mother believed that regular full-time school was a drastic change for Student because he had been homeschooled and was used to a curriculum involving outings and creative endeavors, whereas Aveson was very academic. Student was not accustomed to sitting in a classroom every day doing mostly math and English. On Tuesdays, Student missed both math and literacy instruction at Aveson. Student was also frequently absent on other occasions during his third grade school year.

18. Mollie Murphy was Student’s third grade literacy general education classroom teacher. Ms. Murphy, a credentialed teacher, determined that Student was missing foundational skills because he had received no formal education until third grade. For Ms. Murphy’s third grade students, Tuesday literacy instruction was foundational for the instruction for the remainder of the week. Because Student was missing basic literacy skills, and was absent from school the first day of literacy instruction every week, Ms. Murphy provided Student with one-to-one instruction or small group instruction from a credentialed aide. Ms. Murphy also gave Student spelling work to take home to cover the material he missed and Student was required to complete many written assignments at home, which other students completed during class. Student did not always complete the work he missed, requiring Ms. Murphy to schedule adult time with Student to complete that work.

19. Student was behind in writing. He was sporadic in turning in his written work, he did not turn in work reflecting the instruction she had given because he had been absent, and it appeared to Ms. Murphy that Student had not written some of the assignments he completed at home because the work he turned in was above the level

at which he was working. Ms. Murphy suspected that Mother was doing Student's writing because the work product he completed in class was very different from the work product he completed at home. Ms. Murphy told Mother that Student would benefit more from his education if he were in class on Tuesdays; however, Mother continued to regularly pull Student from class on Tuesdays.

20. In October and November 2011, Aveson implemented other SST interventions to assist Student, including preferential seating, verbal warnings, expectation explanations, and small group and specialized academic instruction.

21. On November 17, 2011, Aveson held the first of three SST meetings. Mother, Student's math teacher Hee Lee, and Student Support Coordinator Casey Rasmussen attended the meeting. Ms. Rasmussen held a master's degree in education and a teaching credential and her duties included facilitation of SST procedures. The purpose of the SST meeting was to determine Student's areas of need, to develop goals and interventions to meet those goals. The SST notes state that Student followed a European curriculum in which Student was homeschooled and did not learn to hold a pencil, read, or write until he was about seven years old and that because of this Student was behind in reading, writing, and mathematics. Mother enrolled Student in the full-time program to provide him with more structure, and give him more attention in the areas of reading, writing, and math. She expressed concern that Student had dyslexia and attention deficit hyperactivity-like behaviors. Ms. Lee reported that Student had a hard time focusing. He was very dependent on one-on-one support to complete his work. His math skills were limited, and he was having a difficult time because he had been missing school on Tuesdays. With frequent check-ins, Student was sometimes able to stay in his seat, but was not able to stay on task. The SST developed one goal regarding Student's completion of assignments and an action plan to address task

completion and his attention issues. The team also recommended psychoeducational testing.

22. Ms. Murphy administered several routine assessments to the entire class at the beginning, middle, and end of Student's third grade year, including a reading comprehension assessment. She also assessed Student in the areas of spelling, reading fluency, and word accuracy. By January 2012, Student was reading at grade level and his spelling met benchmark. By May 2012, Student's reading fluency more than doubled. By the end of his third grade year, Ms. Murphy considered Student proficient in reading and developing in writing skills.

23. In early January 2012, special education teacher Sally Davis assessed Student in the area of academic achievement using the Woodcock-Johnson III Tests of Achievement and prepared a report dated January 11, 2012. Ms. Davis conducted the academic assessment in response to Mother's request for early intervention to gather information on Student to assist him. She did not believe she was required to obtain Parent's written consent prior to conducting her assessment. In the cluster areas of reading, math, and written language, Student scored in the average or low average range. On the subtests comprising the cluster scores, Student received one below average score of 79 in quantitative concepts subtest, a low average score in calculation, math fluency, and spelling, and all the other subtest scores were in the average, high average range, and superior range.

24. Aveson held Student's second SST meeting on January 26, 2012, to reevaluate the goals and strategies determined at the first SST meeting. Mother, general education math teacher Paul Chhuo, and Ms. Rasmussen attended the meeting and reported on Student's progress. Student was getting most of his work done in class and was completing the rest at home. Student was challenged by verbal reminders alone as a way to help him follow through with tasks and Student needed concrete visual

scaffolds to help him organize and follow-through with verbal directions. The SST developed one additional goal to assist Student with task completion and created a new action plan to address task completion and attention issues.

25. On January 27, 2012, Aveson received Parent's signed assessment plan. Aveson later lost or misplaced the signed assessment plan.

THE INITIAL PSYCHO-EDUCATIONAL ASSESSMENT

26. Aveson contracted with Academia, a company that provided special education services to public schools, to conduct Student's psychoeducational evaluation. Academia employed Francisca Mendoza as a school psychologist. Ms. Mendoza held a master's degree in psychology. In December 2011, Ms. Mendoza contacted Sally Davis regarding Student. Ms. Davis provided Ms. Mendoza with limited information about Student. At hearing, Ms. Mendoza could not recall what information had been provided.

27. In February 2012, Ms. Mendoza conducted Student's psychoeducational evaluation, which included evaluation in the areas of general intelligence, academic achievement, auditory perception, visual perception, visual motor integration skills, and social-emotional. Ms. Davis and Mr. Chhuo were members of the assessment team. Mr. Chhuo, Mother, and Student also filled out social-emotional rating scales. Ms. Mendoza reviewed the results of Ms. Davis' Woodcock-Johnson academic assessment. Ms. Mendoza never spoke to Parents.

28. On February 27, 2012, Ms. Mendoza prepared a psychoeducational evaluation report summarizing the assessment results. Student demonstrated superior cognitive ability with a score 124. Student was performing in the average range in reading, math, and broad written language. Student's overall scores in auditory perception, visual perception, and visual-motor integration were average. On the behavior rating scales, Mr. Chhuo rated Student Very Significant in poor attention and

impulsive control, Significant in 6 other areas, and Not Significant in 11 other rating categories. Mother rated Student's behavior as Not Significant in 13 categories, and Significant in the other 6 categories, including poor attention and impulsive control. Ms. Mendoza's report noted that Student had processing difficulty in the areas of visual memory, visual form constancy, and visual sequential memory. Mother and Mr. Chhuo endorsed significant areas of concern on the rating scales, but Ms. Mendoza did not comment on those matters as they related to eligibility for special education. Student was likeable and could interact with peers. Ms. Mendoza concluded that Student did not demonstrate a discrepancy between his cognitive ability and measured academic achievement, and therefore did not meet eligibility for special education services as a student with a specific learning disability.

29. At hearing, Ms. Mendoza explained that she only assessed Student for the special education eligibility category of specific learning disability because the main area of concern was academics. In her opinion, a child must have a severe discrepancy between cognitive ability and academic performance, and a processing deficit, and it must impact the child's ability to learn in the classroom to qualify for a special learning disorder. All possible interventions and supports must have been exhausted before a child is qualified for special education under specific learning disability. In her opinion, a student was not eligible for special education under the category of other health impairment unless a medical doctor had diagnosed the student with an attention deficit disorder. Ms. Mendoza explained that her assessment of Student included evaluation in the areas of visual processing, attention, executive functioning, and planning deficits. She determined that Student had no processing deficits and, although Student had difficulties with visual processing, his difficulties did not impact him in the classroom.

30. At hearing, Ms. Mendoza also explained that she determined if a child had attention processing deficits by looking at the rating scales, doing observations, and

conducting interviews with teachers. She identified executive functioning deficits in a child by conducting a formal assessment in the area of nonverbal intelligence, as well as classroom observations, and interviews with parents and teachers.

31. Ms. Mendoza conducted no classroom observations of Student, and she did not formally interview teacher or Parents. Ms. Mendoza claimed she conducted classroom observations of Student and interviewed Mr. Chhuo, but admitted that the data was not in her report. She also claimed she sent interview forms to Parents and Mr. Chhuo, but the forms were not returned. Her normal practice was to make a note in her report if the interview forms were not returned, but her report contained no such note. She also claimed she called Mother and left a message, but her report contains no reference of this attempted communication. Because the assessment report contained no information about classroom observations or interviews with either the teacher or Parent, and Parent denied ever speaking to Ms. Mendoza, Ms. Mendoza's testimony as to these areas was not persuasive.

32. At hearing, Ms. Mendoza explained she did not find the necessary discrepancy between Student's cognitive ability score and academic scores because, in her opinion, a discrepancy was determined by looking at the entire academic picture. While some of Student's behaviors were significant and he had some visual processing difficulties, she determined that they were not impacting Student academically and he was able to attend and focus during testing. Student's academic scores fell mainly in the average range or higher, Student's difficulties were not severe and, in Ms. Mendoza's opinion, providing general education interventions before qualifying Student for special education was important.

33. Ms. Mendoza's report stated that Student's test results did not appear to be primarily the result of limited school experience or poor attendance. The report did not explain or address the effects of homeschooling or Student's weekly absences from

the classroom, and when questioned at hearing, Ms. Mendoza could not credibly explain her conclusion. In her opinion, the phrase "limited school experience" did not necessarily mean that Student did not have previous school experience. Because Student was homeschooled and was missing one day of school a week, she felt it was important to give him time to transition to the public school system before qualifying him for special education. Not only did she demonstrate at hearing a lack of understanding as to the meaning of her conclusion, but also her testimony about the issue was confusing and inconsistent. Ms. Mendoza's conclusions in her assessment regarding Student's "limited school experience" were not reliable.

34. Ms. Mendoza's report did not fully state all of her findings or set forth the basis for the determinations she made in reaching the conclusion that Student was not qualified for special education.

THE MARCH 2012 IEP TEAM MEETING

35. Aveson held Student's initial IEP team meeting on March 22, 2012, followed by the third SST team meeting. The IEP team included Parents, Dr. Cognetta, Ms. Murphy, Ms. Davis, and Ms. Rasmussen. Mr. Chhuo and Ms. Mendoza, although invited, did not attend. Mother was unaware if Ms. Mendoza was required to be present and she did not waive the presence of Ms. Mendoza. Parents recorded the meeting, although at times the recording was intermittent.

36. Parents were not provided with a written copy of their parental rights and procedural safeguards prior to or at the March 22, 2012 IEP team meeting. Father initialed the IEP acknowledging notification of the IEP team meeting. Parents did not initial that they received special education procedural safeguards. At hearing, Parents denied receiving a copy of the parental rights and procedural safeguards, and claimed they had never been informed of their procedural rights and safeguards at the IEP team meeting. Although several charter school witnesses claimed that it was the custom and

practice to provide a copy of the parental rights and procedural safeguards during IEP team meetings, none of Aveson's witnesses could specifically recall whether or not a copy was provided to Parents.

37. During the March 22, 2012 IEP team meeting, Parents were provided with a copy of both Ms. Mendoza's and Ms. Davis's reports. The IEP team members reviewed the psychoeducational assessment report, including the results of the academic assessment. Ms. Davis explained the results of the Woodcock-Johnson assessment to Parents. Ms. Davis also presented the results of the psychoeducational assessment conducted by Ms. Mendoza, but told Parents she was not an expert in interpreting the results and offered to contact Ms. Mendoza to discuss the results of the assessment. Ms. Davis told Parents that Student did not qualify for special education because he did not meet the criteria for specific learning disability or have a qualifying disability. Parents asked questions during the IEP team meeting. Ms. Davis had difficulty explaining the psychoeducational assessment to Parents, demonstrated a marked unfamiliarity with the assessments and the rating scales and who had completed them, the results of the assessments, the difference between certain assessment tools, and could not provide a comprehensive interpretation of some of the assessment results beyond what was written in Ms. Mendoza's report.

38. At hearing, Ms. Davis admitted she was not qualified to conduct a psychoeducational evaluation. She also explained that eligibility requires consideration of a number of different factors and that Student was not eligible for special education for several reasons. Most of Student's scores on the academic instruction were within the average range, and while some of the scores were in the low average range, it was difficult to determine if it was because he actually had a learning disability or whether it was just because he had not had adequate instruction while being homeschooled. It was unclear what direct instruction Student had received prior to third grade and Aveson

had to be careful not to engage in over qualification for special education just because Student had some difficulties in class.

39. Father initialed the signature page of the IEP acknowledging his understanding that Student was not eligible for special education. Mother did not initial that item, stating that she needed more time to thoroughly read the paperwork. At the time, Mother did not understand why Student did not qualify, but thought that perhaps the school was correct in not qualifying Student for special education because Student was doing well and his performance had improved.

40. Mother did not know at that time that she had recourse to challenge the eligibility determination or Ms. Mendoza's assessment. She had never been through the process before and relied on the school personnel as the authorities familiar with the assessment and eligibility process. Father was not familiar with testing or scoring of the tests used in a psychoeducational evaluation. Parents were unaware that they could challenge the assessment, eligibility determination or the IEP process until they contacted an attorney two years later.

41. Student's performance improved over the course of the third grade even though Aveson did not consistently implement the SST strategies. Mother told the IEP team that the SST interventions were working and requested that Student continue receiving SST interventions because she did not know that she had any other options. Student had been doing all of his homework and making improvement in reading. Mother believed Student's attendance at WISH, the field trips, and Student's missing school benefitted Student. Dr. Cognetta agreed that Student could continue missing Tuesdays to attend WISH for the remainder of the year if it was beneficial to the Student. Student was meeting his task completion goal in math and made marked improved in completing his literacy assignments. With the implementation of a daily reminder checklist, Student had also made improvement in his organizational skills. The

next SST meeting was scheduled for May 31, 2012, to determine whether or not to continue Student's SST program.

42. At hearing, Ms. Rasmussen credibly explained that as of March 2012, the SST interventions were working and Student was making progress. The purpose of the SST process was to identify areas of concern and provide interventions for students in general education. If the additional support was successful, then the SST team determined if the support should continue, and if unsuccessful, the team determined if the student should be referred for assessment for special education. In Student's case, the purpose of the SST process was to provide immediate interventions because Student had already been referred for special education evaluation.

43. The SST May 31, 2012 SST meeting was cancelled. Aveson did not continue the SST process because of the growth Student demonstrated and Aveson had the appropriate supports in place to assist Student if Student was present in class.

44. In May 2012, Student took the Standardized Testing and Reporting test. Student scored at the Proficient level in English-Language Arts and at the Basic level in Mathematics.

45. In May 2012, Ms. Bean had a conversation with Mother in which she requested that Mother not remove Student from school because Student was responding to the interventions in place at school. However, Mother strongly felt that Student needed to attend WISH, and Mother said it was easier for her to have Student with her on Tuesdays because she taught at WISH on Tuesdays.

THE 2012-2013 SCHOOL YEAR – FOURTH GRADE

46. Terry Doub was Student's advisory and literacy teacher in the fourth grade. She had a bachelor's degree in education and a teaching credential. Prior to working at Aveson, she was trained in providing response-to-intervention services to students, was

a response-to-intervention in-service trainer, and provided training to school staff for children with attention deficit disorders.

47. During the fourth grade, Mondays were half days. Literacy and math instruction occurred on Tuesdays through Fridays. The math and literacy instructional blocks each day were each two hours long. Student had literacy laboratory during the first hour of literacy class as a general education response-to-intervention one-on-one support. Because Student had made great strides in literacy laboratory during the third grade, he continued receiving this intervention in the fourth grade. On Tuesdays, Ms. Doub gave topics and directions for the week's scheduled work. Students were required to complete various types of writing assignments, including personal narratives, opinion essays, and imaginative essays. Generally, the assignments were done during class time, but if students missed class they were permitted to do the assignments at home. The writing instruction included reviewing the elements of writing and the writing process. As a prewriting activity, students were required to prepare a writing map in class (which involved Ms. Doub sitting with students, reviewing their writing map, talking to them about their ideas and expanding upon them), preparing a rough draft (which involved peer editing and one-on-one teacher review and refinement of the draft), and preparation of final papers.

48. Dr. Cognetta told Mother that he wanted Student in class on Tuesdays to better serve Student. Mother continued to pull Student out of school on Tuesdays to attend WISH. Student missed both math and literacy instruction on Tuesdays, and he was also absent on other days. He also missed literacy laboratory. Student's absences caused Student difficulty in completing his assignments, although Ms. Doub attempted to work with Student during recess or at other times to help him catch up. Ms. Doub also tried to keep Mother informed of the work Student missed so that Student could complete the assignments at home.

49. Ms. Doub permitted Student to take his writing assignments home, but the assignments he completed at home were not his work product. Unlike the writing Student completed in class, the writing Student completed at home was well developed, had words he would not use, and contained advanced and complex sentences. The work completed at home reflected a level of sophistication that was above the level of performance Student demonstrated in class. The work product from home was typed-written. Ms. Doub spoke to Mother about Mother doing Student's work, but Mother claimed Student had merely told her what to type. Ms. Doub told Mother that Student's work should not be typed, but Mother continued typing Student's work. Student continued to turn in work that was not his own throughout the school year, causing Ms. Doub to hesitate to send work home.

50. In addition to the effect Student's absences were having on academics, Ms. Doub was particularly concerned that Student's absences could affect his social-emotional well-being in terms of his relationships with peers. By sometime around April 2013, Ms. Doub estimated that Student had missed approximately 60 days of school since September 2012. Ms. Doub and Dr. Cognetta met with Mother and told her that Student absences were causing problems for Student, he was missing instruction, and that it was a challenge for Ms. Doub to keep Student caught up with the work in the classroom. They explained that with more frequent attendance, they would be able to meet Student's needs in classroom and that the absences were impeding Student's instruction. Mother continued to pull Student out of school.

51. Despite his absences, Ms. Doub and Dr. Cognetta opined that Student made academic progress during the fourth grade. His math and literacy teachers rated Student as making progress and developing skills in reading, writing, and math. School-wide assessments were given in math and literacy during Student's fourth grade, at the beginning, middle, and end of the school year. Both Ms. Ms. Doub and Dr. Cognetta

tracked Student's performance. By January 2013, Student's reading fluency rate was well above benchmark and his accuracy level was at benchmark. The spelling assessment had four levels, and within each level there are three tiers, early, middle, and late. In September 2012, Student's spelling assessment put him in the middle tier of the second level, but by the end of the school year, Student had moved to the first tier of the third level which was just slightly below grade level. Student was also doing well on quizzes. On the writing assessments, Student was at a developing level, but his writing improved. In September 2012, Student had undeveloped ideas. By the end of the school year, Student was using strategies he had learned in class, had good word choice, and could focus and attend to write more. He just needed more teaching. Around January 2013, Student was exited from literacy laboratory because further assessment of Student (including consecutive results above established benchmark) indicated he no longer needed the additional support. Ms. Doub observed that Student was easily distracted and had difficulty with organizational skill, but that his level of distraction and organizational skills were not different from other students in her class. Dr. Cognetta credibly testified that Student's fourth grade math curriculum was tailored to his needs. Aveson provided Student with general education intervention support in his fourth grade math classroom, including push-in supports giving him more time with his teacher or the credentialed instructional assistant. By the end of the year, Student made progress and was performing significantly closer to the benchmark.

52. In spring 2013, Student took the Standardized Testing and Reporting test. Student scored at the Basic level in English-Language Arts and at Below Basic level in Mathematics. At hearing, Ms. Murphy credibly explained that the STAR testing was not a comprehensive or authentic measure of a student's ability in English-language arts because students demonstrate learning in many ways which the STAR testing did not capture. She believed that the STAR score was merely a measure of student's

performance on the particular day the test was given. Her testimony was corroborated by both Mr. Cогnetta and Ms. Bean.

53. In spring 2013, Ms. Bean spoke to Mother about Student's excessive absences. Ms. Bean told Mother that if Mother continued to remove Student from school, that Aveson would initiate action against Parents for failing to have Student attend school. Mother communicated that she felt very strongly about Student attending WISH. Although Ms. Bean and Dr. Cогnetta had initially understood that, from a social-emotional perspective, Student might need WISH as part of a transition from home school, by April 2013, they had determined Student's absences were not benefitting him.

THE 2013-2014 SCHOOL YEAR – FIFTH GRADE

54. Ms. Doub was Student's advisory instructor and literacy teacher in the fifth grade. Mother stopped pulling Student out of class on Tuesdays during the 2013-2014 school year.

55. Student continued to turn in work completed at home by his Mother. Some work completed at home was more sophisticated than the work he completed in class, it contained writing components which Ms. Doub had not yet taught and the timestamp on the documents contained a history which she believed established that Student had not completed the work himself since the timestamps were at 3:00 a.m. or 4:00 a.m. When Ms. Doub spoke to Mother, Mother admitted Student was busy after school and she was helping him, but insisted it was Student's work and that he had told her what to write and went to bed. Ms. Doub was not satisfied that the work Student completed at home was his own. She spoke to Student and he admitted he did not do it on his own.

56. Ms. Doub determined Student made a lot more growth during the fifth grade compared to the fourth grade. School-wide assessments were given in math and

literacy at the beginning, middle, and end of the school year. Student was reading at or above grade level at the beginning of the school year, and his scores improved to several points above grade level by the end of the year. In September 2013, Student's spelling assessment put him in the first tier of the third level, which was just slightly below grade level, but by the end of the year, his scores improved to the third tier of the third level. Student also continued to do well on quizzes. On the writing assessments, Student was at a developing level at the beginning of the year, and his writing improved as the year progressed. He was writing more, had great ideas and was very knowledgeable about topics on which he was working. His spelling improved and he demonstrated growth in spelling. Ms. Doub could not recall any area in which Student did not improve.

57. Aveson began utilizing a new math curriculum called Singapore Math during the 2013-2014 school year as part of the statewide transition to common core standards. Student scored at a level 2A in the beginning of the year school-wide assessments, which Dr. Cognition explained was equivalent to late third or fourth grade in a traditional American curriculum. The grade levels materials in Singapore Math were more advanced than the traditional American curriculum. Experts assisting schools in the implementation of common core state standards advised Aveson to expect students to initially place lower than their grade level materials, which was consistent with what Dr. Cognition observed at Aveson. Based on Student's scores, as part of the response-to-intervention tiered level of general education support and interventions, he received supports in the classroom throughout his fifth grade year. This included an instructional assistant specifically assigned to math class to support all students and to support him at his level in smaller groups, closer observation, additional assessments, and grade level fluency instruction. Student made progress in math, advancing two levels to a 3A level, which demonstrated accelerated growth. Most students in the fifth grade were either at

a 3A or 3B level at the end of the fifth grade regardless of where they started at the beginning of the school year.

58. In June 2014, Mother consulted with counsel. She learned she had the right to challenge the IEP process, including the assessment conducted by Ms. Mendoza.

59. In around mid-June 2014, Mother met with Kate Bean and Dr. Cognetta and verbally requested reassessment of Student because she believed Ms. Mendoza's assessment was incorrect. Ms. Bean asked Mother to put her request in writing and told Mother the school would reassess Student in fall 2014.

60. On August 27, 2014, Aveson prepared Student's official transcript which summarized Student's performance in the fourth and fifth grades in four specified areas at one of the following levels: Emerging, Developing, Proficient, and Advanced. For the fourth grade, Student's performance was rated by his advisors as "developing" in reading, writing, and math and "proficient" in citizenship. For the fifth grade, Student's teachers rated him as "proficient" in reading and writing, and as "developing" in math and citizenship. Student's fourth and fifth grade teachers prepared the official transcripts based upon the contemporaneous data on Student during the fourth and fifth grades. "Proficient" meant grade level. Aveson did not use traditional report cards during this time, and transcripts were only created upon parent request or upon a student's transfer to another school.

THE 2014-2015 SCHOOL YEAR – SIXTH GRADE

61. Student attended Aveson Global Leadership Academy in the sixth grade. In September 2014, Parents sent a written request for reassessment. Erica Silva conducted a psychoeducational reevaluation in December 2014. Ms. Silva holds a master's degree in clinical psychology, and a school psychology credential. She worked at Aveson Charter Schools as a school psychologist during the 2014-2015 school year.

62. Ms. Silva reviewed Student's educational records, including Ms. Mendoza's and Ms. Davis' 2012 assessment reports; observed him in the classroom and during testing; conducted interviews with Parents; sent out rating scales to Student, Parents, and Student's teachers; and conducted a series of standardized tests.

63. Ms. Silva determined that Student had a processing deficit in the area of attention and she made this determination based upon a variety of factors, including assessments, records review, interviews, rating scales, and her observations during testing. In attention, Student scored in the low range in planning and attention skills. All three raters reported that Student was struggling in the area of attention and in hyperactivity. She observed some attention issues during testing and classroom observations, including that Student was fidgety in his seat. Student's literacy teacher reported that Student was easily distracted and struggled with organizational skills. His science teacher reported that Student struggled to stay on task and with organizational skills. In math, his teacher reported Student had not completed all of his assignments and was working below grade level.

64. In addition to attention processing, Ms. Silva looked for an academic deficit discrepancy between academic performance and cognition; however, Ms. Silva considered Student's actual classroom performance as reported by his teachers to determine whether Student was struggling in school. Student's cognitive ability was in the above average range with a score of 113. Student's overall academic skills were within average to superior classification range, but he earned a below average score in the area of broad math and broad writing skills, and a low score in math fluency.

65. Ms. Silva found that Student demonstrated a severe discrepancy between intellectual ability and achievement in math calculation and math reasoning, and a disorder existed in the area of attention. Based on her review of Student's records, observations, interviews, rating scales, and standardized tests, Ms. Silva determined that

Student had a processing deficit in his attention skills. Because of his struggles in math that were not congruent with his cognitive ability, she recommended that Student met criteria for specific learning disability.

66. At the December 11, 2014 IEP team meeting, the IEP team found Student eligible for special education under the primary and only category of specific learning disability. Aveson Global Leadership Academy provided Parents with a copy of their parental rights and procedural safeguards.

67. At hearing, Ms. Silva stated that she did not disagree with Ms. Mendoza's assessment report and that she could not determine based on what she knew about Student whether he should have qualified for special education prior to August 2013. She explained that many factors affect the determination of whether Student qualified for special education. For example, Student was homeschooled for two years prior to his initial psychoeducational assessment and she found it difficult to determine what Student was doing during those two years. On the other hand, Ms. Silva was able to review several years of formal education records from after the third grade in order to make her December 2014 eligibility recommendation. Ms. Silva denied Student demonstrated special education eligibility based on Student's cognitive ability and academic achievement scores as reflected in the 2012 initial assessment. She looked at Student's 2012 scores, and could not rule out that his difficulties were the result of a lack of schooling or appropriate education since he had only been in school for six months at the time of the initial assessment. Ms. Silva did not agree that Student's scores were not necessarily the result of limited school experience and, in contrast to Ms. Mendoza, she would have analyzed that issue in the report. Ms. Silva was also unfamiliar with the rating scales used by Ms. Mendoza and declined to endorse that they necessarily measured the same behaviors. Ms. Silva's psychoeducational evaluation utilized different

assessment tools and was based on different information than the Aveson assessment conducted in 2012.

68. In February 2015, Student was assessed by Lindamood Bell. Parents obtained a summary of Student's numerical test scores and a set of academic instruction recommendations for Student.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This 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 (2006) et seq.³; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. §

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) 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, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it

desired to do so.] Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student, as the complaining party, bears the burden of proof.

ISSUES 1 THROUGH 5(I) AND (II) - STATUTE OF LIMITATIONS

5. Student argues that the two-year statute of limitations does not apply to his claims against Aveson because they failed to provide Parents with their Parent’s Rights and Procedural Safeguards and made false representations to Parents at the March 22, 2012 IEP team meeting.

6. Aveson contends that the two-year statute of limitations bars all of Student’s claims arising prior to February 19, 2013.

7. A request for a due process hearing “shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, subd. (1).) The two-year limitations period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) the withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid*; 20 U.S.C. § 1415(f)(3)(C)(D).) Invoking the exceptions to the statute of limitations requires a showing that the school district’s misrepresentation or withholding of information caused the failure to file the due process complaint on time. Thus, where the evidence shows that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of those options. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 246-247.)

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

1415(d)(1)(A); 34 C.F.R. § 300.504(a); Ed. Code, § 56301 subd. (d)(2). In addition, Education Code section 56500.1, subdivision (b) requires that parents be informed about procedural safeguards at an IEP team meeting. The IDEA's procedural safeguards are intended to protect the informed involvement of parents in the development of an education for their child. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [127 S. Ct. 1994].) "[T]he informed involvement of parents" is central to the IEP process. (*Id.*) Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

9. The weight of the evidence established that Aveson failed to provide Parents with a copy of their parental rights and procedural safeguards upon Parents' initial request for assessment in fall 2011 and at Student's initial IEP team meeting on March 22, 2012. The first time Parents received a copy of their procedural rights from any of the Respondents was in December 2014. While Aveson claimed it was their practice to provide a copy of parental rights and procedural safeguards during IEP team meetings, none of their witnesses could specifically recall that a copy was, in fact, provided to Parents at the March 2012 IEP team meeting. Furthermore, none of Aveson's witnesses persuasively explained why Parents were not specifically asked during the IEP team meeting to initial the space on the IEP acknowledging receipt of the procedural rights if such document had, in fact, been provided to Parents at that meeting.

10. The weight of evidence also established that the failure to provide Parents with their procedural rights and safeguards prevented Parents from timely filing the request for due process hearing. Parents were unaware of their procedural options until June 2014 when they consulted with counsel. Parents had never before been through the IEP process, were unfamiliar with the IEP procedure and were unaware that any

recourse was available to them to challenge the eligibility determination or Ms. Mendoza's assessment until June 2014. Although Mother had a 20-minute one-time free telephone consultation with an advocate in August 2011, the advocate did not discuss with Mother her procedural rights and safeguards other than to tell Mother about her right to an initial IEP and that Aveson had to respond to her request within a certain period of time. Accordingly, Student's complaint is timely.

ISSUE 1: THE FAILURE TO COMPLY WITH CHILD FIND OBLIGATIONS

11. Student contends all Respondents violated their respective child find obligations between September 2011 and December 11, 2014, by failing to assess Student. Student claims that he struggled in school from the time he entered third grade until the time he was finally found eligible for special education in December 2014.

12. Respondents argue that: Student was assessed for special education pursuant to Mother's request in third grade and was found ineligible for special education; Student was transitioning from homeschool during the third grade, and they had an obligation not to "over-identify" students as learning disabled; they were only required to refer Student to special education after the resources of the regular education program were considered and utilized; Parents did not communicate their disagreement with the initial psychoeducational assessment until just before Student entered sixth grade; Student's excessive absences adversely affected his education; and that because Student made gains during the third, fourth, and fifth grades and there was no reason to suspect he had a disability.

13. Legal conclusions 5 through 10 are incorporated by reference.

14. 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 Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

15. A school district’s child find obligation toward a specific child is triggered 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.)

16. A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who,

because of a disability, requires instruction and services that cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).)

17. 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. 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.)

18. Child find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process that 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 public agency must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R. § 300.301; Ed. Code, § 56302.1.) A child is

“found” when the district of location determines that a child needs special education and related services. (71 Fed. Reg. 46593 (August 14, 2006).)

19. When a student is referred for special education assessment, the school district must provide the student’s parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil’s regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent’s written consent, excluding days between the pupil’s regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).)

20. Student failed to establish by a preponderance of evidence that Respondents violated their child-find obligations by failing to assess him for special education between fall 2011 and December 2014.

Fall 2011 Initial Request for Assessment Made to Aveson

21. Mother first made her request for a special education evaluation to Aveson on August 25, 2011, when school was not in session. She followed up that request on September 9, 2011, three days after Student’s third grade school year began, with a formal written request for assessments in the areas of academics and behavior. Mother informed Aveson that Student had attention difficulties and her husband suspected Student may have ADHD. Prior to third grade, Student had been home-schooled and Student did not establish that Aveson had information that should have triggered knowledge of or a reasonable suspicion that Student had a disability requiring Aveson to initiate the assessment process for special education eligibility.

22. By timely initiating and completing the assessment and IEP process, Aveson satisfied their child-find obligations through March 22, 2012. Within a week of Mother's September 9, 2011 email request, Aveson timely sent out an assessment plan in order to begin the IEP evaluation process. Aveson also sent out a revised assessment plan to Mother, which Student failed to establish was untimely. Aveson completed the psychoeducational assessment of Student within one month of receiving Mother's signature on the assessment plan and prior to expiration of the 60 day-statutory deadline. After evaluation of Student in the areas of academics and behavior, the March 22, 2012 IEP team determined that Student was ineligible for special education.

After the March 22, 2012 IEP Through June 2014

23. Student failed to demonstrate that between March 23, 2012, and June 2014, Aveson had knowledge of, or a reasonable suspicion that, Student had a disability or suspected that special education services may be required to address that disability. Concurrent with Aveson's special education assessment, they implemented the SST process and the general education interventions, which included immediate interventions in the classroom to support Student. Ms. Rasmussen credibly testified that as of March 2012, the SST interventions were working and Student was making progress. By March 2012, his teachers reported that Student was meeting his task completion goal in math and had made improvement in completing his literacy assignments. With the implementation of a daily reminder checklist, Student also improved in his organizational skills. During his third grade year, Student responded well to the general education interventions that had been implemented and to the extra attention he received from his literacy teacher, despite the fact that Student had missed about 20 percent of his academic instruction because his Mother regularly pulled him out of school to attend WISH. Mother also informed the March 2012 IEP team Student was doing better. Student's scores in reading, spelling, and reading fluency all improved.

Student's writing skills were still developing and Aveson presented credible evidence that Mother interfered with Student's writing instruction by completing Student's writing assignments.

24. Student did not offer evidence credibly rebutting the evidence that Student made academic progress during this time period, that any difficulties he had in school were because of Student's limited education and frequent absences and that, therefore, Aveson had no basis for suspecting a disability requiring special education assessments. Student's educational records indicated that in third grade Student was making progress despite regularly missing math instruction on Tuesdays, and despite the fact that until third grade he had largely been educated at home in a one-on-one situation with an unspecified curriculum.

25. Similarly, during the fourth and fifth grades, Student failed to establish by a preponderance of evidence that Aveson had knowledge of, or a reasonable suspicion that, Student had a disability and reason to suspect that special education services may be required to address that disability. In fourth grade, in spite of his absences, Student was progressing in reading, spelling, and in his writing skills. This was corroborated by the fact that Student was exited from the literacy laboratory mid-year after consecutive assessments demonstrated that he no longer needed this additional support. In math, Student was performing below benchmark at the beginning of the year, but by the end of the year, he was performing significantly closer to the benchmark, and he was rated by his teacher as developing, meaning he was making progress and developing skills.

26. Student began attending school full time for the first time in the fifth grade. Student's scores in reading and spelling improved and he was reading above grade level at the end of the school year. He also continued to improve in spelling and writing and did well on quizzes. Student's literacy teacher credibly testified that Student made a lot more growth during the fifth grade as compared to the fourth grade. He

went from a rating of “developing” in reading and writing during fourth grade, to a rating of “proficient” in reading and writing as reflected on his official transcripts. Student also made progress in math even with the transition to a new curriculum, and although below grade level, demonstrated accelerated growth. Student’s marked improvement only after he began attending school full time supported Aveson’s position that they had no reason to suspect a disability, but instead that Student’s limited education and frequent absences had adversely affected his learning.

27. Student failed to establish that Student’s attention difficulties or performance on standardized tests triggered Aveson’s child-finding duties. Ms. Doub credibly testified that Student’s level of distraction and lack of organizational skills were not different from other students in her class. Furthermore, several Aveson witnesses established that the scores were not a comprehensive measure of a Student’s abilities because of the limited purpose of the test, the method of testing and the period of time over which the test is given. The test was only one measure of a child’s achievement. (See *Leighty v. Laurel School Dist.* (E.D. Pa. 2006) 457 F.Supp.2d 546, 562 [FAPE determination is not dependent on how well a particular student performs on standardized test administered by the state].)

28. Student claims that because he was not working at grade level instruction at all times during the fourth and fifth grades, Aveson should have reassessed him for special education. However, Student failed to explain away the fact that he missed a significant amount of academic instruction in the fourth grade, causing him difficulty in completing his work and in receiving instruction on the subject matter. Furthermore, Mother continued to interfere with Student’s schooling by doing his work during both fourth and fifth grades. The weight of evidence also established that Student made progress when he attended school. However, he lacked a formal education until third grade, and missed approximately 20 percent of his math and literacy instruction in both

third and fourth grades, and only began attending school full-time during the fifth grade. For these reasons, Student failed to successfully establish that Aveson should have reasonably suspected Student had disability and reason to suspect special education was required to address that disability.

29. Student also argues that because he was found eligible for special education in December 2014, Aveson should have suspected a need for eligibility assessments prior to him entering the sixth grade. However, the child-find obligation must be evaluated in light of information that Aveson knew, or had reason to know, at the relevant time and Aveson did not have this information during Student's fourth or fifth grades. Furthermore, Student did not establish, by way of expert testimony or otherwise, that because Student qualified for and was found eligible for special education in December 2014, Aveson should have reasonably suspected prior to that determination that Student had a disability requiring special education.

June 2014 Through December 2014

30. Student failed to establish Aveson Global Leadership Academy or Aveson Charter Schools violated their child find obligations during the time period he attended Aveson Global Leadership Academy. Student did not begin attending Aveson Global Leadership Academy until September 2, 2014, when he entered sixth grade. Student failed to offer any evidence establishing that Aveson Global Leadership Academy unreasonably delayed in initiating or completing its assessment after Student entered sixth grade. Specifically, Student made his written request for reevaluation sometime in September 2014 and Aveson Global Leadership Academy conducted its psychoeducational evaluation and Student's IEP to review that assessment by December 11, 2014. Student presented no evidence as to the specific date Parents made their written request for assessment to Aveson Global Leadership Academy, presented no evidence as to the specific date Parents were provided with an assessment plan, and

presented no evidence as to the date Parents returned the signed assessment plan to Aveson Global Leadership Academy for the reassessment. Absent such evidence, Student failed to establish that Aveson Global Leadership Academy's assessment was untimely.

31. In summary, Student failed to meet his burden of proof in establishing that Respondents procedurally violated their child-find obligations by failing to assess Student.

ISSUE 2: THE FAILURE TO TIMELY PROVIDE PARENT WITH AN ASSESSMENT PLAN

32. Student contends Aveson denied him a FAPE by failing to timely provide Parents with an assessment plan in response to Parent's fall 2011 request for assessment. Student argues that Mother did not receive the assessment plan until September 30, 2011, more than 30 days from the date Parent first requested that Student be evaluated for special education.

33. Aveson argues that Student did not establish that the assessment plan was sent to Mother more than 15 days after her written request for assessment.

34. Legal conclusions 5 through 10, 21, and 22 are incorporated by reference.

35. When a student is referred for special education assessment, the school district must provide the student's parent with a written proposed assessment plan within 15 days of the referral, not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, § 56321, subd. (c)(4).) The district has 60 days from the date it receives the parent's written consent, excluding days between the pupil's regular school sessions or terms or days of school vacation in excess of five school days, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043,

subds. (c) & (f), 56302.1, subd. (a).) The proposed assessment plan is also required to contain certain information, including but not limited to, an explanation of the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The assessment may begin immediately upon receipt of the parent's consent. (Ed. Code, § 56321, subd. (c)(4).)

36. The weight of evidence established that Aveson complied with 15-day statutory deadline because they sent an assessment plan to Mother within 15 school days of her August 25, 2011 and September 9, 2011 written requests. More specifically, Dr. Cognetta sent the assessment plan to Mother between September 14, and September 16, 2011. The 2011-2012 school year did not begin until September 6, 2011. In addition, Mother's August 25, 2011 handwritten note provided Aveson until at least September 21, 2011, in which to provide the assessment plan to Mother.

37. Although the original assessment plan did not contain the required information, Aveson provided Mother with a revised assessment plan. Student failed to provide any evidence as to when Aveson gave Mother the revised assessment plan. Thus, Student failed to establish by a preponderance of evidence that the revised assessment plan was untimely.

38. In summary, Student did not carry his burden of proof in establishing that Aveson denied Student a FAPE by failing to timely provide Parents with an assessment plan in response to Parent's fall 2011 request.

ISSUE 3: TIMELINESS OF ASSESSMENT IN RESPONSE TO PARENT'S FALL 2011 REQUEST

39. Student contends that Aveson's psychoeducational assessment was untimely because it occurred more than 60 days after their receipt of Mother's signed assessment plan. Student argues that Mother returned the signed assessment plan by September 30, 2011.

40. Aveson contends that the psychoeducational assessment was timely. They maintain that they did not receive signed parental consent to the assessment until January 27, 2012, and that the psychoeducational assessment was conducted within 60 days.

41. Legal conclusions 5 through 10, 21, 22, and 35 through 37 are incorporated by reference.

42. A school district's failure to timely conduct appropriate assessments may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al. supra*, 464 F.3d at p. 1031-1033.)

43. Student did not establish by a preponderance of evidence that Aveson failed to timely complete Student's psychoeducational assessment in response to Parent's fall 2011 request. Not only did Student fail to produce a copy of the signed assessment plan at hearing, but Mother also admitted that she was not certain if the assessment plan she returned by September 30, 2011 was signed. As such, the most reliable contemporaneous evidence as to when Mother returned the signed assessment plan to Aveson was reflected in the March 22, 2012 IEP, which identified the date as January 27, 2012. The evidence is undisputed that Aveson completed Student's psychoeducational assessment and held Student's initial IEP on March 22, 2011. The evaluation was completed within 60 days of January 27, 2012, and was timely.

44. In his closing brief, Student points to evidence he claims supports his position that Aveson received Mother's signed consent to the assessment by September 30, 2011. However, that evidence was not persuasive.

45. Accordingly, Student did not establish that Aveson failed to timely complete Student's psychoeducational assessment in response to Parent's fall 2011 request.

ISSUE 4: THE FAILURE TO PROPERLY CONDUCT PSYCHOEDUCATIONAL ASSESSMENT

46. Student contends that Aveson's psychoeducational assessment was not comprehensive because it failed to contain a parent interview, classroom observations, or a records review. Student also contends that the conclusions reached by Ms. Mendoza were incorrect, she provided no support for her conclusions, and failed to consider other categories of eligibility.

47. Aveson contends that its psychoeducational assessment was appropriate.

48. Legal conclusions 5 through 10 are incorporated by reference.

49. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a), 56506, subd. (b).)

50. Persons competent to perform the assessment, as determined by the local educational agency, shall conduct the assessment. (Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

51. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (*See Vasherese v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

52. Assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be given in the student's native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements: 1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; 2) are used for purposes for which the assessments or measures are valid and reliable; and 3) are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

53. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development, and medical findings, if any; (6) for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; (7) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (8) consistent with superintendent guidelines

for low incidence disabilities, the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

54. A failure to properly assess is a procedural violation 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). 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, *superseded in part by statute on other grounds* ["...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."].) A district's procedural violation could not "qualify an otherwise ineligible student for IDEA relief" and constituted harmless error because the student was substantively ineligible for IDEA relief. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 942; see *D.G. v. Flour Bluff Independent School Dist.* (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."].) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is

entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.)

55. Student demonstrated by a preponderance of evidence that Aveson significantly impeded Parents' opportunity to meaningfully participate in the decision making process by failing to conduct an appropriate psychoeducational assessment of Student in February 2012.

56. The February 2012 psychoeducational assessment conducted by Ms. Mendoza was inappropriate because it failed to include an observation of Student in the classroom. Because Ms. Mendoza failed to conduct an observation of Student in the classroom, her report neglected to detail the relationship of the relevant behavior to Student's academic and social functioning. Ms. Mendoza claimed she determined Student had no processing or executive functioning deficits, and that she made these determinations by looking at the rating scales, doing classroom observations, and conducting interviews with Parents and Student's teachers. However, the weight of the evidence established that Ms. Mendoza never interviewed Parents or Student's teachers or conducted any classroom observations.

57. The assessment also failed to adequately state the basis for the determination that Student was not qualified for special education. In order for a student to qualify for special education under the category of specific learning disability, the student must have a severe discrepancy between cognitive ability and academic performance, and a processing deficit, which impact student's ability to learn in the classroom. The report states that Student failed to meet the eligibility criteria for special education, but the explanation of that finding is limited to a single, short, and conclusory sentence without reference to the test results and without a comprehensive

explanation as to how that determination was made. It merely states that Student did not demonstrate a discrepancy between his cognitive ability and measured academic achievement, but provides no explanation for that conclusion. The report also states that Student had visual processing difficulties and Student's teacher and Mother had acknowledged significant areas of concern on the behavior rating scales; however, it does not otherwise address those issues. At hearing, Ms. Mendoza explained she determined that Student had no processing deficits and that Student's behaviors and visual processing difficulties were not impacting Student in the classroom. Ms. Mendoza's report failed to set forth these determinations in her report or provide any explanation for her conclusions.

58. The assessment was also inappropriate because it failed to explain Ms. Mendoza's determination that Student's test results were not primarily the result of disadvantages or limited school education and how her conclusions about that matter impacted her recommendation. Ms. Mendoza's testimony established that, in making the recommendation that Student did not meet the eligibility criteria for special education, Ms. Mendoza considered whether the test results were primarily the result of disadvantages or limited school education. She explained that because Student was homeschooled and was missing one day of school a week, it was important to give Student time to transition to the public school system before qualifying him for special education. Yet, nowhere in her report did she explain or address the effects of homeschooling or Student's weekly absences from the classroom. Ms. Mendoza claimed at hearing that she never received the interview forms from Parents or Student's teachers, and her report failed to detail what records she reviewed. Because she failed to explain the basis of her determinations, the assessment was inappropriate.

59. The assessment was also inappropriate because Ms. Mendoza failed to consider other areas of eligibility, specifically Other Health Impairment. At hearing, Ms.

Mendoza claimed that the only area of eligibility she considered was specific learning disability because the only area of concern was academics. However, Mother had also repeatedly expressed concerns in the area of attention and that Parents suspected Student had ADHD, which Ms. Mendoza did not consider as another basis for special education eligibility.

60. There can be no denial of a loss of educational opportunity or deprivation of educational benefits without Student first establishing his eligibility for special education. Here, as discussed below, Student failed to prove he was eligible for special education prior to December 11, 2014. However, the failure to conduct an appropriate psychoeducational assessment significantly interfered with the opportunity of Parents to participate in the IEP process. Because of the deficiencies in the initial assessment process, Parents did not have the required information to consider or meaningfully participate in the March 22, 2012 IEP team meeting. The inadequacies of the assessment left Parents struggling to decipher the significance of the assessment results and the report's cryptic conclusions.

61. Accordingly, the failure to conduct an appropriate assessment significantly impeded Parents' opportunity to meaningfully participate in the decision making process. Student's remedies are discussed below.

ISSUE 5(I): FAILURE TO HAVE ALL REQUIRED MEMBERS OF IEP TEAM PRESENT AT MARCH 2012 IEP TEAM MEETING

62. Student contends Aveson denied him a FAPE by failing to have Mr. Chhuo, Student's third grade math teacher, and Ms. Mendoza, the school psychologist, present at the March 22, 2012 IEP team meeting.

63. Aveson contends that all required members of the team were present. They argue that the attendance of a school psychologist was not necessary, and that Ms. Murphy, Student's general education literacy teacher, satisfied the requirement of

having one general education teacher attend Student's March 22, 2012 IEP team meeting.

64. Legal conclusions 5 through 10, 53, 56 and 57 are incorporated by reference.

65. An IEP team must include the following: At least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) It is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present at the IEP team meeting. (*R.B. v. Napa Valley Unified School Dist.*, *supra*, 496 F.3d 932, 938-940.)

66. Student failed to carry his burden of proof that Aveson denied Student a FAPE by failing to have Mr. Chhuo attend the March 2012 IEP team meeting. Ms. Murphy was Student's general education literacy teacher during the 2011-2012 school year. She provided instruction to Student prior to, and after, the March 22, 2012 IEP team meeting. The law requires only one general education teacher to be present at Student's IEP team meeting. Ms. Murphy satisfied that requirement.

67. However, Student proved by a preponderance of evidence that Aveson did not have an individual who could interpret the instructional implications of psychoeducational assessment present at the March 22, 2012 IEP team meeting.

68. More specifically, the March 22, 2012 IEP team consisted of Parents, Dr. Cognetta, Ms. Murphy, Ms. Davis, and Ms. Rasmussen. While Ms. Davis explained to Parents the results of the Woodcock-Johnson assessment she conducted, she was

unable to interpret the results of the psychoeducational assessment conducted by Ms. Mendoza. Ms. Davis was not a psychologist and was not qualified to conduct or interpret all elements of a psychoeducational assessment of Student. At the March 2012 IEP team meeting, she admitted she was not an expert in interpreting the results of the psychoeducational assessment. While Parents had the opportunity to, and did, ask questions during the IEP team meeting, Ms. Davis could not comprehensively answer Parents' questions. Ms. Davis demonstrated difficulty explaining the psychoeducational assessment to Parents, and was unable to provide a comprehensive interpretation of some of the assessments results beyond what was written in Ms. Mendoza's report. She seemed confused when discussing portions of the assessment performed by Ms. Mendoza, and demonstrated a lack of familiarity with the assessment tools, the difference between certain assessments, the assessment results, the rating scales, and who had completed them.

69. Many of Ms. Mendoza's determinations and the basis for her determinations regarding her finding of ineligibility were not set forth in her psychoeducational assessment report. Understandably, because the information was not contained in the report, Ms. Davis was unable to provide that information to Parents as part of the discussion of the instructional implications of psychoeducational assessment. Ms. Mendoza did not provide that information to Parents because she did not attend the IEP meeting.

70. The failure to have Ms. Mendoza present at the March 2012 IEP did not deny Student educational opportunity or deprive him of educational benefits because, as discussed below, Student failed to prove his eligibility for special education prior to December 11, 2014. However, the failure to have the person who conducted Student's psychoeducational assessment (and upon whose recommendation for eligibility the IEP team relied) present at Student's initial IEP team meeting interfered with Parents'

opportunity to meaningfully participate in the IEP process. Because Ms. Mendoza was not present to explain her report, her findings and the basis of her findings, including the educational implications of the assessment results, Parents did not have the required information to consider in order to meaningfully participate in the March 22, 2012 IEP team meeting. Ms. Mendoza's absence left Parents struggling to decipher the meaning and significance of the assessment results and the assessment report's cursory conclusions.

71. Student demonstrated by a preponderance of evidence that Aveson significantly impeded Parents' opportunity to meaningfully participate in the decision making process by failing to have the school psychologist who conducted Student's psychoeducational assessment present at the March 22, 2012 IEP team meeting. Student's remedies are discussed below.

ISSUE 5 (II): FAILURE TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION AT MARCH 22, 2012 IEP TEAM MEETING

72. Student contends that Aveson denied him a FAPE by failing to find him eligible for special education at the March 22, 2012 IEP team meeting.

73. Aveson contends that they properly concluded that Student was not eligible for special education based upon a valid psychoeducational assessment and that Father agreed that Student was not eligible.

74. Legal conclusions 5 through 10 are incorporated by reference.

75. A child qualifies for special education under the category of specific learning disability if he or she has "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations." (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.)

76. A district may “take into consideration whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning,” by computing and measuring mathematical differences between ability and achievement scores on standardized testing (the severe discrepancy approach). (Ed. Code, § 56337, subd. (b).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) and (e).)

77. Specific learning disability eligibility does not include a learning problem “that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (Ed. Code, §56337, subd. (a).) In addition, a discrepancy “shall not be primarily the result of limited school experience or poor school attendance.” (Cal. Code Regs., tit. 5, § 3030.)

78. 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 [decided under former Ed. Code, § 56337].) 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. (*Id.*)

79. Here, while there was some evidence of a discrepancy between Student’s academic cognitive ability and academic achievement on at least two of the subtests, Student failed to establish that he had a processing disorder and that any difficulties he

had in the classroom were not the result of limited school experience or environmental disadvantage.

80. Student did not present an expert to testify at the hearing and did not otherwise meet his burden of establishing that Student had a processing disorder through other evidence. Student failed to present credible evidence, by an expert or otherwise, that Student had an attention processing disorder. Although Ms. Mendoza's assessment was procedurally inappropriate, Student presented no competent persuasive evidence to rebut Ms. Mendoza's interpretations or conclusions.

81. To the extent a discrepancy existed between Student's performance and cognitive ability, he did not meet his burden of persuasion that any discrepancy was not primarily the result of limited school experience or poor school attendance.

82. As of March 22, 2012, Student had limited school experience and poor school attendance. Student had no formal education until he was in the third grade. Student was homeschooled and Mother had followed the model of "not pushing paper and pencil work" until Student turned seven years old and lost his first teeth. Student was only eight years old at the time of the March 2012 IEP. Unlike his peers whom may have been reading, writing, and doing math for years, those skills were very new to Student who was not accustomed to sitting in a classroom every day doing mostly math and English.

83. Student missed a significant amount of school during the 2011-2012 school year, and those absences, coupled with his limited school experience, adversely affected his learning. Student was missing foundational skills because he had received no formal education until third grade. Student was absent from school for the first day of weekly literacy instruction which regularly put him behind the rest of the class. Because of his weekly absences, he missed academic instruction, which adversely affected his work product, his ability to timely complete the work, and he was forced to

complete the work at home. The evidence was also convincing that some of the work completed at home was not his own, but had been prepared by his Mother.

84. Student's reliance on Ms. Silva's December 11, 2014 psychoeducational assessment and the December 2014 IEP team's determination qualifying Student for special education is not persuasive. This assessment took place more than two years after the initial psychoeducational assessment. Whether Student was eligible for special education as of March 22, 2012, must be evaluated in light of information Aveson had at that time. Further, Ms. Silva's psychoeducational evaluation utilized different assessment tools and was based on different information, which the March 2012 IEP team did not have. Nor did Student establish, by way of expert testimony or otherwise, that because Student was determined to have a specific learning disability in December 2014, he had a specific learning disability in 2012. Likewise, Student failed to establish that because Student was found eligible for special education in December 2014, he should have qualified for special education more than two years earlier. Ms. Silva explained that many factors must be considered in determining whether Student should have qualified for special education in March 2012. She credibly testified that she could not rule out that Student's difficulties at the time of the February 2012 assessment were the result of a lack of schooling or appropriate education because he had only been in school for six months. Ms. Silva refused to opine that Student should have qualified for special education prior to August 2013.

85. In sum, Student failed to establish that he was denied a FAPE by the failure to find Student eligible for special education at the March 22, 2012 IEP team meeting.

REMEDY

86. Student prevailed on *Issues 4* and *5(i)* by establishing that Aveson failed to conduct an appropriate assessment of Student in February 2012 and failed to have the school psychologist present at Student's initial IEP team meeting. As a remedy, Student

requested compensatory services in the form of LindaMood Bell academic instruction as set forth in the set of LindaMood Bell recommendations obtained by Parents in February 2015.

87. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

88. An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid v. Dist. of Columbia*, *supra*, 401 F.3d 516, 524.) Compensatory education awards depend upon the needs of the disabled child, and can take different forms. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1126.) Typically, an award of compensatory education involves extra schooling, in which case "generalized awards" are not appropriate. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir.1994) 31 F.3d 1489, 1497.) "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Ibid.*)

89. As discussed above, while Student met his burden of demonstrating that Aveson interfered with Parents' opportunity to participate in the individualized education program process by the failure to conduct an appropriate assessment and have the school psychologist present at the March 22, 2012 IEP team meeting, Student failed to establish that he was eligible for special education services as of that date. Having failed to establish eligibility for special education prior to December 11, 2014, Student failed to establish that he lost educational benefits. Accordingly, Student is not entitled to an award of compensatory education.

90. While an order for an independent educational evaluation might otherwise be appropriate where there is a failure to conduct an appropriate assessment, Student did not seek an independent educational evaluation. Furthermore, Aveson Global Leadership Academy assessed Student and found him eligible for special education in December 2014. Student has not taken issue with the December 2014 assessment making that recommendation.

91. While the evidence did not support an award of compensatory education to Student or an independent educational evaluation, it did support an order for special education training of the administrative and teaching personnel at Aveson. Aveson personnel were unfamiliar with the IEP process and its requirements in several respects. For example, Aveson failed to timely provide Parents with a copy of their procedural rights and safeguards at the required times. They also conducted an inappropriate assessment and failed to have the required personnel at the March 22, 2012 IEP team meeting. Furthermore, they provided the initial assessment plan to Parents without filling it out, Dr. Cognition admitted that Aveson personnel were unfamiliar with the form, and Ms. Bean confessed that Aveson personnel lost the completed assessment plan. Thus, as a remedy, Aveson shall provide at least 40 hours of special education training from an independent institution specializing in special education training to

school districts, to its entire administrative and teaching staff. The training shall include instruction in the areas of procedural rights and safeguards, assessment plans and assessments, IEP meeting requirements and school document retention requirements, and shall be completed by no later than one year of the date of this order.

ORDER

1. Aveson School of Leaders and Aveson Charter Schools shall provide at least 40 hours of special education training from an independent institution specializing in special education training to school districts, to all of their administrative and teaching staff.

2. The special education training shall include instruction in the areas of procedural rights and safeguards, assessment plans and assessments, IEP team meeting requirements, and school document retention requirements.

3. The training shall be completed by Aveson School of Leaders and Aveson Charter Schools by no later than one year of the date of this decision and order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed against Aveson School of Leaders and Aveson Charter Schools on Issues 4 and 5(i). Aveson School of Leaders and Aveson Charter Schools prevailed on Issues 1, 2, 3, and 5(ii). Aveson Global Leadership Academy prevailed on Issue 1, the only issue stated against it.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: December 7, 2015

_____/s/_____
LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings