BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

STUDENT, Petitioner, v. CORONA-NORCO UNIFIED SCHOOL DISTRICT, Respondent.	OAH NO. N2005070232

DECISION

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on April 17-19, 2006, in Norco, California.

Advocate James Peters of TOP Educational Consultants represented Petitioner Student (Petitioner). Present on Petitioner's behalf were his parents, MOTHER and FATHER. Donna Kohatsu attended the hearing as an assistant to Mr. Peters, as did Michelle Brayley on one day of the hearing. Additionally, attorney Peter Collisson observed the hearing for a portion of one afternoon.

Attorney Constance Taylor of the Law Offices of Margaret Chidester & Associates represented Respondent Corona-Norco Unified School District (District). Penny Valentine, Administrative Director of Special Education, was present on the District's behalf. Peggy Reed, Director of Special Education, attended on one hearing day. Attorney Danh Luu also attended on one hearing day.

The ALJ received sworn testimony and documentary evidence at the hearing on April 17-19, 2006. Upon receipt of the written closing arguments on April 26, 2006, the record was closed and the matter was submitted.

On the final hearing day, the ALJ set the deadline for submission of closing briefs at no later than 5:00 pm on Wednesday, April 26, 2006. OAH received closing briefs from both parties' representatives via facsimile (fax) at approximately 5:00 pm on that date.[1] At approximately 6:43 pm in the evening on April 26, Petitioner's advocate, James Peters, submitted one additional page, to be inserted into Petitioner's closing argument as "page 5 insert 2nd ¶." Petitioner's advocate wrote that "this page did not come through the fax, instead a phone list came through." On April 27, OAH received the District's motion to exclude this additional page. The District argued that the additional page was untimely, that the explanation for the late submission was a pretext, that Petitioner's advocate created the additional page as a rebuttal to the District's closing brief, and that the additional page alleged facts that were not part of the evidence admitted at hearing.

The deadline for submission of closing briefs was 5:00 pm on April 26. Absent extraordinary circumstances, a document will not be considered if it arrives after the deadline. Not only did Petitioner's advocate fail to establish extraordinary circumstances warranting an exception to the deadline, but the proffered reason for the late submission appears to be false. Petitioner's closing brief consisted of 17 consecutively numbered pages, so the advocate's attempt to insert an additional page between pages 5 and 6 is highly questionable. Moreover, none of the pages submitted in Petitioner's closing brief contained a phone list. In light of all circumstances, the District's motion to exclude the additional, late-submitted page is granted.

ISSUES

1. During the 2004-2005 school year, was Petitioner eligible for special education under the category of:
    (a) speech-language impairment;
    (b) autistic-like behaviors, specifically due to Asperger's Disorder?

2. If Petitioner was eligible for special education, did the District deny him a free appropriate public education (FAPE) during the 2004-2005 school year by failing to offer the following:
    (a) the supports and services Petitioner needed, specifically a full-time, one-to-one aide;
    (b) modifications to the core curriculum;

[1] According the fax machine's Transaction Report, OAH received the final page of the District's closing brief at 4:44 pm; because that brief arrived before 5:00 pm, OAH staff stamped it as received on April 26, 2006. The Transaction Report for Student's closing brief indicates that the transmission began at 5:01 pm, and was completed at 5:06 pm. Similarly, the time-stamp at the top of Student's brief begins with "5:06 pm" on the first page, and ends with "5:09 pm" on the last page. Because Student's brief arrived after the close of business on April 26, OAH staff did not stamp Petitioner's brief as received until April 27, 2006. (See Cal. Code Regs., tit. 1 § 1006, subd. (h).) Because the deadline for OAH's receipt of the briefs was no later than 5:00 pm on April 26, Student's closing brief was late. However, the six-minute delay likely did not prejudice the District, and the District did not object to the late submission. Out of an abundance of caution, the ALJ will consider the Student's closing brief despite the late submission.

(c) functional analysis assessment (FAA) pursuant to the Hughes Bill;
(d) designated instruction and services (DIS) of speech-language therapy twice a week for 60 minutes per session, tutoring to catch up for the time he missed school, and a social skills program including counseling and facilitation of peer socialization?

FACTUAL FINDINGS

Jurisdictional Matters

1. Petitioner is an eleven-year-old student who resides within the boundaries of the District. He has never been found eligible for special education. He is not currently attending any District school, although he has received some home-hospital instruction services from the District.

Factual and Procedural Background

Highland Elementary School

2. Petitioner attended kindergarten and his early elementary school years at the District's Highland Elementary School (Highland). During that time, he qualified for the District's Gifted And Talented Education (GATE) program. When he was in first grade, and again when he was in second grade, his parents expressed concern to his classroom teacher that Petitioner sometimes stuttered; in response, both the first-grade and second-grade teachers referred Petitioner to District speech-language pathologist Naida Geller-Smith for screening. On both occasions, Ms. Geller-Smith screened Petitioner in the speech therapy room and found that Petitioner did not have a stutter.

3. For the 2004-2005 school year, Petitioner began attending fourth grade at Highland, in a fourth-and-fifth-grade combination class taught by Amy Sanchez. In December 2005, Ms. Sanchez told Ms. Geller-Smith that Petitioner sometimes stuttered when he had to speak in front of a group of children. Ms. Geller-Smith responded that she would refer Petitioner for a special education assessment in the area of speech-language. In December 2005, Ms. Geller-Smith sent Petitioner's parents an assessment plan, which proposed assessment only in the area of speech and language development. Father signed the plan and wrote the date of the signing as December 17, 2004. Father reported that he mailed the signed assessment plan back to Ms. Geller-Smith on or about December 17, 2004, although Ms. Geller-Smith reported that she never received the signed plan.[2]

[2] There are conflicting factual allegations concerning why the District did not conduct that speech-language assessment in January 2005, pursuant to the December 2004 assessment plan. However, because the matter was not raised as a hearing issue, the conflicting allegations need not be resolved in this Decision.

4. Petitioner was an intelligent, serious child who was well-liked by his teachers. He received above-average grades and otherwise performed well academically. He was articulate in most settings, but stuttered when he got nervous, such as when he was speaking in front of a group of children. At Highland, he had a group of five to six friends in his class. Nevertheless, he had difficulties with social skills, and had anxiety in social situations. He became very upset when other children teased him, and he was sometimes the target of bullies. Although he generally functioned well in the classroom, during recess he would sometimes have "meltdowns" when activities did not go as he wanted, particularly when other children teased or harassed him.

5. There was no evidence of Petitioner engaging in obsessive or ritualistic behaviors while at school. However, his parents observed some behaviors at home, such as walking around his chair before sitting down and insisting upon eating using different forks during the same meal to eat different types of foods. Father observed that a particular behavior would subside, but that then Petitioner would develop a new behavior in place of the old one.

6. In early January 2005, shortly after returning to school following the winter holiday break, Petitioner was involved in a fighting incident with other boys during lunchtime. Father and Mother were extremely concerned about the incident because they believed that Petitioner was the victim of bullying by the other boys, and that Petitioner's injuries reflected that the other boys had attacked Petitioner. Highland's principal informed Petitioner's parents that Petitioner would be suspended for one day for fighting. Because the parents felt that Petitioner was not safe at Highland, they decided to remove him from that school.

Norco Elementary School and Treatment by Pediatric Neurologist Dr. Michael Saito

7. Subsequently, in January 2005, Petitioner transferred to the District's Norco Elementary School (Norco), where he was in a fourth grade GATE class. At Norco, Petitioner continued to perform well academically. However, he no longer had a group of friends in his new class, and had more social difficulties when interacting with his new schoolmates. Petitioner's parents grew increasingly concerned about other children bullying Petitioner at Norco, and about Petitioner's increasing resistance to going to school.

8. On or about April 21, 2005, Mother took Petitioner for an evaluation by pediatric neurologist Dr. Michael Saito. Mother told Dr. Saito that Petitioner was being bullied at school due to his stuttering, and had developed school phobia. Dr. Saito made various recommendations, including that Petitioner withdraw from elementary school and receive home-hospital instruction, so that he would no longer be harassed at school. Dr. Saito also recommended that Petitioner receive speech therapy at West Coast Spine for stuttering, and see a psychologist for "anger management as well as adjustment disorder." At this initial appointment, Dr. Saito suspected that Petitioner might meet the Diagnostic and

Statistical Manual-IV (DSM-IV) criteria for either Asperger's Disorder or General Anxiety Disorder, but he did not make any formal diagnoses at that time.

9. Based upon Dr. Saito's recommendations, the parents withdrew Petitioner from Norco and requested that the District provide home-hospital instruction. Petitioner has not attended a District school since that time.

10. Petitioner continued to be a patient of Dr. Saito. In June 2005, on Petitioner's second or third visit, Dr. Saito diagnosed Petitioner with Asperger's Disorder pursuant to the DSM-IV criteria, and noted this diagnosis in his patient records. Dr. Saito did not provide a written report of the diagnosis to the parents, and the parents did not request any written report of the diagnosis.

May/June 2005 Special Education Evaluation

11. Pursuant to a referral from Petitioner's parents, District school psychologist Mark Pfeiffer prepared an assessment plan on or about May 6, 2005. Father signed this assessment plan and dated his signature May 11, 2005. Also in early May 2005, Ms. Geller-Smith received the signed assessment plan from December 2004, for the speech-language assessment. Later in May 2005, Ms. Geller-Smith and Mr. Pfeiffer each assessed Petitioner and subsequently concluded that he was not eligible for special education.

Due Process Proceedings and Individualized Education Program (IEP) Meeting

12. On June 29, 2005, prior to the District assessors presenting the results of their assessments, advocate James Peters and attorney Charles Appel filed for a due process hearing on behalf of Petitioner. The due process request neglected to specify under which category Petitioner was eligible for special education, and instead generally alleged that the District had denied Petitioner a FAPE.

13. During a telephonic pre-hearing conference before OAH ALJ Steven Adler on July 27, 2005, the District's attorney confirmed that Petitioner's advocates and/or parents had declined the District's proposal to convene an IEP meeting to consider the results of the District's assessments. As a result, in an order dated July 28, 2005, Judge Adler ordered the parties to convene and complete an IEP meeting on or before August 12, 2005.

14. On August 12, 2005, Petitioner's IEP team convened to review the results of the District's special education assessments. Petitioner's parents both attended, represented by Valerie Aprahamian, an educational advocate who worked with Mr. Peters at TOP Educational Consultants. During the meeting, Ms. Geller-Smith and Mr. Pfeiffer explained the results of their testing and their conclusions that Petitioner did not meet the eligibility criteria for special education.[3]

[3] Although the District assessors concluded that Petitioner was not eligible for special education, Ms. Geller-Smith offered to provide speech-language therapy to Petitioner through a general education program for "at-risk" students.

15. During the discussion at the August 12, 2005 IEP meeting, District staff offered that, if Petitioner's parents disagreed with the eligibility findings, the District would fund an independent educational evaluation (IEE) by either of two proposed psychologists in southern California, Dr. Greg Nunn or Dr. Nathan Hunter. The District presented an assessment plan for the IEE and proposed that "all parties agree to abide by the findings of the IEE." Ms. Aprahamian responded that the parents would only agree to the IEE if the District agreed to employ Dr. Wayne Sailor at the University of Kansas as the assessor; the District did not agree to this proposal, and the parties did not agree to an IEE.

16. Additionally, at the IEP meeting, District staff requested that the parents "make available any reports which would aid the District in appropriate diagnosis." However, neither the parents nor their advocate ever asked Dr. Saito to provide the District with any type of written report regarding the Asperger's diagnosis. Moreover, considering the testimony of Mr. Pfeiffer, the testimony of Petitioner's parents, and the documentary evidence, it is clear that neither the parents nor Petitioner's advocates ever informed the District that Dr. Saito had diagnosed Petitioner with Asperger's Disorder.

Evaluations and Eligibility for Speech-Language

17. As noted in Factual Finding 11, Ms. Geller-Smith conducted a speech-language evaluation of Petitioner as part of the District's special education assessment. That evaluation consisted primarily of standardized testing and an interview of Petitioner, and a brief discussion with Petitioner's mother. On the testing, Petitioner scored in the average to above-average range on the WORD-R, a language test of vocabulary and semantic skills, and scored in the superior range on the Test of Pragmatic Language. On the Stuttering Severity Instrument, Petitioner demonstrated excellent ability to articulate the sounds and words in the English language, and did not exhibit a stutter or other indicia of verbal dysfluency. From the testing and her observations of Petitioner, Ms. Geller-Smith further determined that Petitioner's voice was within normal limits in all areas, including vocal resonance, quality, and loudness. During the session, Petitioner told Ms. Geller-Smith that he sometimes experiences difficulty speaking whenever he feels that he is "being picked on." Based upon the results of her observations and testing, Ms. Geller-Smith explained in a report dated June 13, 2005, that Petitioner did not have a speech or language disorder pursuant to the eligibility criteria in California Code of Regulations, title 5, section 3030 [hereinafter section 3030]. Instead, Ms. Geller-Smith concluded that Petitioner's reported difficulties with speaking were a result of anxiety he felt in particular situations.

18. Private speech-language pathologist Sallie Dashiell also conducted a speech-language assessment of Petitioner, pursuant to a referral from TOP Educational Consultants. In or about July 2005, Ms. Dashiell met Petitioner over a few sessions and administered some informal tests of his speech and language, but did not conduct any standardized testing. Ms. Dashiell also interviewed Petitioner's parents and reviewed the District's June 13, 2005 Speech and Language Report prepared by Ms. Geller-Smith. In a report dated July 25, 2005, Ms. Dashiell wrote that Petitioner had "a psychogenic or functional voice disorder" and

recommended speech therapy for two hours per week. However, Ms. Dashiell's July 2005 report did not specify that Petitioner met the eligibility criteria for a speech-language impairment. In a follow-up letter dated September 27, 2005, Ms. Dashiell wrote to Mr. Peters to clarify that, although it was not specifically stated in her July 2005 report, she believed Petitioner was eligible for special education due to an abnormal voice and a fluency disorder pursuant to section 3030.

19. For several reasons, Ms. Geller-Smith's report and testimony were more persuasive than Ms. Dashiell's report and testimony. Ms. Geller-Smith conducted several standardized tests, and established in her testimony that the results of those tests demonstrated that Petitioner did not meet the criteria for abnormal voice or fluency disorder. Ms. Geller-Smith was a credible witness who was knowledgeable both about speech-language functioning and about the legal standards necessary to determine eligibility.

20. In contrast, Ms. Dashiell's testimony and assessment report were unconvincing. Ms. Dashiell conducted no formal testing, and appeared unfamiliar with the applicable legal standards for special education assessments. When asked during cross-examination whether her assessment complied with the requirements of California Education Code section 56320 regarding special education assessments, Ms. Dashiell acknowledged that she was not familiar with section 56320's requirements, yet nevertheless claimed that she "assumed" her assessment met those requirements. Moreover, considering that Ms. Dashiell represented that she completed her assessment prior to preparing the July 2005 report, that report's failure to state how Petitioner met eligibility standards cast doubt on her subsequent, belated assertion that Petitioner met those standards. Furthermore, Ms. Dashiell's criticisms of Ms. Geller-Smith's speech and language assessment were unavailing. For example, Ms. Dashiell contended that the District's assessment should have included observations of Petitioner in school and on the playground, and interviews with Petitioner's teachers, yet Ms. Dashiell herself did not conduct such observations or interviews.[4]

21. Additionally, Ms. Dashiell's personal relationship with Petitioner's advocate indicated that she was not a disinterested witness, while her characterization of that relationship was disingenuous. Ms. Dashiell acknowledged that she and Mr. Peters are good friends, that they once lived together, and that she testified in a prior special education hearing that she and Mr. Peters both consider her to be the stepmother of Mr. Peters' son. Despite these facts, Ms. Dashiell insisted that she and Mr. Peters have only a "business relationship." As ALJ James Ahler found in another special education decision, after noting the personal history between Ms. Dashiell and Mr. Peters: "The relationship between Peters and Ms. Dashiell and the coincidence between Ms. Dashiell's recommendation and petitioner's claim that he needed one hour of speech and language therapy twice a week, which was made three months before Ms. Dashiell evaluated petitioner, raised questions about Ms. Dashiell's credibility." (*Student v. Corona-Norco Unif. Sch. Dist.*, OAH No. 2005070169.)

[4] Observations in a school setting would not have been feasible at the time of either assessment, because Petitioner was not attending school.

22. Similar to Ms. Geller-Smith's conclusion that Petitioner's difficulties with speaking were a result of anxiety he felt in particular situations, Ms. Dashiell characterized Petitioner's speech problems as "situational." Given all of the above findings, the ALJ finds more persuasive the opinion from Ms. Geller-Smith that Petitioner's difficulty speaking when he felt anxious did not constitute an articulation or fluency disorder that caused Petitioner to require special education services.

Evaluations and Eligibility for Autistic-Like Behaviors

23. As noted in Factual Finding 10, in June 2005, Dr. Saito diagnosed Petitioner with Asperger's Disorder pursuant to the DSM-IV criteria. Dr. Saito testified that he made this diagnosis based upon his clinical observations of Petitioner and information reported by Mother. In his testimony, Dr. Saito emphasized that he was not familiar with the eligibility criteria for autistic-like behaviors; however, based upon his knowledge of Petitioner, Dr. Saito was still able to review the criteria and comment on whether Petitioner exhibited the behaviors described in each criterion.

24. As noted in Factual Finding 11, District school psychologist Mark Pfeiffer conducted a psychoeducational assessment of Petitioner. As part of that assessment, Mr. Pfeiffer administered standardized tests to Petitioner, and distributed behavior rating scales to be filled out by Petitioner, his parents, and Petitioner's fourth-grade teacher at Norco. Mr. Pfeiffer also interviewed Petitioner, Father, and District school staff, including the principal and assistant principal at Highland, and Petitioner's teacher and playground supervisor at Norco. During the interviews, Father indicated that Petitioner had begun receiving counseling from a psychologist; Mr. Pfeiffer requested that the parents make available a report from the psychologist, but subsequently Mr. Pfeiffer never received any such report. In a report dated July 13, 2005, Mr. Pfeiffer noted that Petitioner had some social and emotional difficulties, including anxiety and depression. However, he concluded that Petitioner did not meet the special education eligibility criteria for autistic-like behaviors, emotional disturbance, or specific learning disability (SLD), and did not meet the DSM-IV criteria for Asperger's Disorder.

25. Dr. Saito was a very credible witness who possessed specialized knowledge, extensive experience, and indisputable expertise regarding autism. However, as noted in Factual Finding 19, Dr. Saito was not familiar with the eligibility criteria for autistic-like behaviors under federal and State law. Hence, the ALJ gives great weight to Dr. Saito's testimony regarding medical and clinical matters, but does not give the same degree of weight to Dr. Saito's interpretation of the legal eligibility criteria.

26. Mr. Pfeiffer was also a credible witness who provided informative testimony. While he did not possess Dr. Saito's level of expertise regarding autism, Mr. Pfeiffer was knowledgeable about matters including educational testing and legal criteria for special education eligibility. Because of his extensive testing and interviews during the assessment process, Mr. Pfeiffer was also knowledgeable about Petitioner's academic and behavioral levels.

27. Regarding the criteria for autism eligibility under section 3030, subdivision (g) [hereinafter section 3030(g)], Mr. Pfeiffer testified that Petitioner did not meet any of the criteria, while Dr. Saito identified three criteria which Petitioner either met or met "to some extent." Regarding the first of these three criteria, the evidence did not establish that Petitioner had an inability to use oral language. As discussed in Factual Findings 4, 17 and 22, Petitioner was often articulate, but exhibited difficulties with using language in some situations when he felt anxious. There is no persuasive evidence or authority to establish that such difficulty with speaking during stressful situations constitutes "an inability to use oral language" pursuant to section 3030(g).

28. Considering the second identified criterion, there is insufficient evidence to find that Petitioner had "a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood." Dr. Saito testified that Mother had reported that Petitioner was phobic and would withdraw into his room, and that this met the criterion. Consistent with Factual Finding 4, testimony from Father and Mother established that Petitioner had continued impairment in social interaction. However, there was no evidence regarding whether these behaviors occurred when Petitioner was much younger, as the criterion requires.

29. Regarding the third identified criterion, Dr. Saito testified that Petitioner's poor transition abilities constituted an obsession to maintain sameness. Dr. Saito based his conclusion upon the information he received from Mother that Petitioner had difficulty transitioning from one task to another at school. Other evidence at the hearing did not support this conclusion. Neither of Petitioner's fourth-grade teachers indicated during their testimony that Petitioner had any difficulty with transitions. In a December 2004 letter, one teacher mentioned her concern that Petitioner often daydreamed and failed to pay attention in class, yet did not indicate that Petitioner had any difficulty with transitions. Given all of this evidence, Petitioner did not meet the criterion for "an obsession with sameness" during the 2004-2005 school year.

30. There was no evidence to establish that Petitioner met any of the four remaining criteria of section 3030(g) during the 2004-2005 school year. Dr. Saito testified that Petitioner did not have an extreme preoccupation with objects or inappropriate use of objects, and there was no evidence to the contrary. There was also no evidence that Petitioner had extreme resistance to controls or that he displayed peculiar motoric mannerisms and motility patterns. Regarding the final criterion of section 3030(g), Dr. Saito testified that Petitioner did not meet this criterion because he did not have self-stimulating behaviors.

31. Notably, Petitioner's continued impairment in social interaction adversely affected his educational performance during the 2004-2005 school year. While Petitioner performed well academically, his difficulties with social interactions were related to his "meltdowns" on the playground, his resistance to attending school, and his parents' decisions to transfer schools and eventually remove him from school altogether.

Bad Faith Conduct and Sanctions

32. On August 18, 2005, OAH ALJ James Ahler issued an order in the present case and thirteen other due process cases that Mr. Peters and Mr. Appel had filed against the District in late June 2005. As detailed in that order, Judge Ahler found that Mr. Peters threatened that he would file numerous due process cases against the District unless the District paid six invoices that Mr. Peters had submitted, totaling $63,112.50 for "advocate fees." Based upon those findings, Judge Ahler granted a motion from the District to put expenses and sanctions at issue in the present case and the other thirteen cases, and consolidated the issue of bad faith concerning all of the cases. Judge Ahler ordered that a due process hearing would convene to take evidence concerning the general issue of bad faith, but also specified that "in each case the ALJ hearing the matter shall determine whether the specific request for a due process hearing…was filed with subjective bad faith by Peters, Appel, or some other person."[5]

33. On November 23, 2005, OAH ALJ Stephen Hjelt issued an order in the present case concerning a renewed motion for sanctions filed by the District. In that order, Judge Hjelt recounted how Mr. Peters and his office, TOP Educational Consultants, filed fourteen due process hearing claims on behalf of fourteen different students when the District refused to pay Mr. Peters' demand for $63,122.50. Judge Hjelt's order stated in part that:

> For the reasons referenced in this ruling, it is found that TOP Educational Consultants and James Peters engaged in conduct, in this specific case, that was unprofessional, inexcusable and demonstrated a disregard for the process of this administrative court and disrespect for the court and opposing counsel. His actions are found to be in bad faith and are tactics that are frivolous.

Judge Hjelt further determined that Mr. Peters failed to comply with OAH orders and specifically made false representations to OAH and opposing counsel. In one instance, Mr. Peters failed to appear for a telephonic PHC scheduled for October 6, 2005; Mr. Peters did not contact OAH that day to explain his failure to appear, and the telephone contact number he provided stated that "the subscriber cannot receive messages at this time." Additionally, during the PHC on July 27, 2005, Mr. Peters represented to Judge Adler that a formal assessment by psychologist Dr. Greg Barry was "almost complete." Based in part upon that representation, Judge Adler ordered a continuance of the hearing and ordered Mr. Peters to file and serve that report on or before August 3, 2005. However, the document Mr. Peters

[5] Pursuant to that ruling, Judge Ahler subsequently issued an order in *Student v. Corona-Norco USD*, OAH No. N2005070226, finding that Mr. Peters and Mr. Appel had engaged in bad faith actions in filing that case. Judge Ahler granted the District's motion for sanctions, and awarded sanctions against Mr. Peters in the amount of $35,000, and against Mr. Appel in the amount of $1,000. In another of the fourteen cases Mr. Peters filed against the District, ALJ Alan Alvord took official notice of Judge Ahler's orders in OAH Case No. N2005070226 and awarded sanctions against Mr. Peters and Mr. Appel jointly in the amount of $15,462.89. (*Student v. Corona-Norco Unif. Sch. Dist.*, OAH No. N2006070214.)

eventually filed was only a five-sentence letter, not a formal assessment report; as a result, Judge Hjelt concluded that Mr. Peters made a false representation to Judge Adler regarding the existence of a report from Dr. Barry. In light of Mr. Peters' actions, Judge Hjelt found that:

> Mr. Peters' conduct as found above is an egregious departure from that conduct expected by competent advocates, be they attorneys or lay representatives, in special education matters. His conduct has operated as a form of guerilla warfare used to harass the District.

Finally, regarding the District's motion for sanctions, Judge Hjelt ruled that:

> District's Motion to Award Sanctions is deferred for final resolution by the administrative law judge hearing the Due Process Hearing. The Findings and Conclusions in this Order may be used by the hearing judge to determine the issue of bad faith as well as monetary sanctions for actions and tactics that are frivolous and without merit and for the sole purpose of harassing an opposing party.

34. Regarding the question of whether this case was filed in bad faith, the timing of the filing was suspicious, because the Petitioner's advocates filed the claim while the District was still conducting its assessment and before the IEP team convened to determine eligibility. Nevertheless, the facts concerning this student created reasonable grounds to believe that Petitioner might be eligible for special education, and therefore the eligibility issue constituted a colorable claim for hearing. Given these circumstances, there was insufficient evidence to support a finding of bad faith in filing the due process request in this matter.

35. During the PHC and hearing conducted by the present ALJ, Mr. Peters did not engage in any bad faith conduct, with the possible exception of his misrepresentations when attempting submit an additional page into Petitioner's closing brief after the deadline, as described on page 2 of this Decision.[6] Notably, it is of great concern that Mr. Peters and TOP Educational Consulting did not share Dr. Saito's diagnosis of Asperger's Disorder with the District. While this conduct, as well as the advocate's refusal to agree to an IEE by anyone but Dr. Sailor in Kansas, did not constitute bad faith actions or tactics warranting sanctions, it was nonetheless an extreme disservice to the student and a disturbing failure to provide competent advice to the parents.

[6] As described on page 2, that conduct already received the appropriate sanction of exclusion of the late-submitted document, and no further sanction is warranted.

LEGAL CONCLUSIONS

Applicable Law

1. In an administrative hearing, the petitioner has the burden of proving the essential elements of his or her claim. (*Schaffer v. Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed 2d 387].)

2. Under the Individuals with Disabilities Education Act (IDEA) and state law, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Cal. Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.7(a).) Similarly, California law defines an "individual with exceptional needs" as a student who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Cal. Ed. Code § 56026, subd. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions, referred to in the regulation as impairments, that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by "the degree of the pupil's impairment."

3. California Education Code section 56333 states that a student shall be assessed as having a language or speech disorder which makes him eligible for special education and related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services.[7] In order to be eligible for special education and related services, difficulty in understanding using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from any of five listed disorders, including abnormal voice and fluency disorder. (Cal. Ed. Code § 56333.) Abnormal voice is defined as "characterized by persistent, defective voice quality, pitch or loudness." (Cal. Ed. Code § 56333, subd. (b); Cal. Code of Regs, tit. 5, § 3030, subd. (c)(2).) Fluency disorder is defined as "fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener." (Cal. Ed. Code § 56333, subd. (c).) Similarly, the California Code of Regulations defines fluency disorder as "when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener." (Cal. Code Regs, tit. 5 § 3030, subd. (c)(3).)

[7] Federal law lists the eligibility category as "speech-language impairment," while California law uses the term "speech or language disorder." For purposes of this Decision, the two terms are used interchangeably.

4. Pursuant to California Code of Regulations, title 5, section 3030 subdivision (g), states a student meets the eligibility criteria for "autistic-like behaviors" if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to:

> (1) An inability to use oral language for appropriate communication.
> (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
> (3) An obsession to maintain sameness.
> (4) Extreme preoccupation with objects or inappropriate use of objects or both.
> (5) Extreme resistance to controls.
> (6) Displays peculiar motoric mannerisms and motility patterns.
> (7) Self-stimulating, ritualistic behavior.

If a pupil exhibits any combination of these behaviors and the autistic disorder is adversely affecting his educational performance to the extent that special education is required, the pupil meets the eligibility criteria for autism. (20 U.S.C. § 1402; 34 C.F.R. § 300.7; Cal. Code Regs., tit. 5 § 3030, subd. (g).)

5. The term "autism" is defined in federal regulations as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." (34 C.F.R. § 300.7(c)(1)(i).)

6. Under the IDEA, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents, that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Cal. Educ. Code § 56363(a).)

7. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight…an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at

the time the IEP was drafted." (*Adams*, 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

8. An ALJ has the authority to shift expenses from one party to another, when a party acts in bad faith.[8] (Government Code section 11455.30 [hereinafter, section 11455.30]). Section 11455.30 states that bad faith is defined in California Code of Civil Procedure section 128.5 [hereinafter section 128.5]. California cases applying section 128.5 hold that a trial judge must state specific circumstances giving rise to the award of expenses and articulate with particularity the basis for finding the sanctioned party's conduct reflected tactics or actions were performed in bad faith and that they were frivolous, designed to harass, or designed to cause unnecessary delay. (*Childs v. Painewebber Incorporated* (1994) 29 Cal.App.4th 982, 996; *County of Imperial v. Farmer* (1998) 205 Cal.App.3d 479, 486.). Bad faith is shown when a party engages in actions or tactics that are without merit, frivolous, or solely intended to cause unnecessary delay. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) However, the bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*Id*., at page 702).

Determination of Issues

Issue 1(a): During the 2004-2005 school year, was Petitioner eligible for special education under the category of speech-language impairment?

9. Petitioner contended that he was eligible under the category of speech or language disorder due to an abnormal voice and a fluency disorder. Pursuant to Factual Findings 17-22, during the 20042005 school year Petitioner did not have an abnormal voice or a fluency disorder as defined in section 3030(g), and did not have a speech or language disorder pursuant to that section and California Education Code section 56333. Therefore, Petitioner was not eligible under the category of speech-language impairment.

Issue 1(b): During the 2004-2005 school year, was Petitioner eligible for special education under the category of autistic-like behaviors, specifically due to Asperger's Disorder?

10. Petitioner contended that he had Asperger's Disorder and was eligible for special education under the category of autistic-like disorders. Pursuant to Factual Findings 27-30, during the 2004-2005 school year Petitioner did not exhibit a combination of the

[8] This authority is modified by California Code of Regulations, title 1, section 1040, and title 5, section 3088 [hereinafter, section 3088]. Section 3088 treats contempt sanctions differently from sanctions shifting expenses from one party to another. Section 3088(c) requires that, "Prior to initiating contempt sanctions with the court, the presiding hearing officer shall obtain approval from the General Counsel of the California Department of Education [hereinafter, CDE]." Conversely, with regard to expenses, section 3088(b) specifically omits any requirement that an ALJ obtain approval from the CDE. Accordingly, section 3088(b) does not modify or limit the ALJ's authority when presiding over a special education hearing from shifting expenses from one party to another when a party has acted in bad faith.

criteria listed in section 3030(g). Therefore, Petitioner was not eligible under the category of autistic-like behaviors.

Issue 2: If Petitioner was eligible for special education, did the District deny him a free appropriate public education (FAPE) during the 2004-2005 school year by failing to offer the following:

(a) the supports and services Petitioner needed, specifically a full-time, one-to-one aide;
(b) modifications to the core curriculum;
(c) functional analysis assessment (FAA) pursuant to the Hughes Bill;
(d) designated instruction and services (DIS) of speech-language therapy twice a week for 60 minutes per session, tutoring to catch up for the time he missed school, and a social skills program including counseling and facilitation of peer socialization?

11. Because Petitioner was not eligible for special education, he was not entitled to receive a FAPE, and therefore this Decision does not reach the question of whether the District denied him a FAPE.

District's Motion for Sanctions

12. There is no excuse for Mr. Peters' misconduct described in Factual Findings 32 and 33. However, pursuant to Factual Findings 34 and 35, Mr. Peters did not engage in bad faith conduct before this ALJ. Moreover, the ALJ considers that, pursuant to Factual Finding 32, footnote 7, the large sanctions awards already awarded to this District against Mr. Peters may have deterred him from engaging in further improper conduct. Considering all of these factors, this Decision will not award further monetary sanctions against Mr. Peters.

ORDER

13. All of the Petitioner's claims for relief are denied.

PREVAILING PARTY

14. 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. The following findings are made in accordance with this statute: The District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

15. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Cal. Ed. Code § 56505, subd. (k).)

Dated: May 23, 2006

_____

SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division