

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

In the Matter of:

RIPON UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007050230

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on September 5, 2007, in Stockton, California.

Attorney Patrick J. Balucan, Atkinson, Andelson, Loya, Ruud & Romo, represented Ripon Unified School District (District). Camille Taylor, Director of Special Education was present on behalf of the District.

No one appeared on behalf of Student. Neither Student's mother (Parent) nor Mary Ann Fiedler (Advocate), Guardian Angels Advocacy, were present.

On May 8, 2007, the District filed a request for a due process hearing (complaint) regarding the Student. A continuance of the hearing was granted on June 1, 2007. At hearing, oral and documentary evidence were received. As set forth in detail in the Procedural Matters section below, the record was held open pending issuance of an order to show cause (OSC) whether a continued hearing date should be granted. On September 13, 2007, Parent timely filed a response. District did not file a response. On September 17, 2007, the record closed and the matter was submitted.

PROCEDURAL MATTERS

A telephonic Prehearing Conference (PHC) was held on August 20, 2007, before ALJ Johnson. Mr. Balucan participated on behalf of the District. The ALJ telephoned Student's

Parent and Advocate and left messages, but no one appeared during the PHC on Student's behalf. Student did not file a prehearing conference statement, a witness list, or an exhibit list prior to the PHC as ordered by OAH in the Order Setting Due Process Hearing and Prehearing Conference of June 11, 2007. On August 27, 2007, the ALJ issued an Order Following Prehearing Conference (PHC Order), which clarified the issues in the case, and ordered the parties to file their final lists of witnesses and deliver their hearing exhibits to the other party at least three business days prior to the hearing.¹ The complaint and the PHC Order stated that Issue Number One, regarding the appropriateness of District's assessments, included the psychoeducational, occupational therapy, and speech and language assessments. The PHC Order narrowed the scope of Issue Number Two, as to District's March 2007 individualized educational program (IEP) offer, to the appropriateness of annual Goal Number Three (see Issues below). OAH served Student's Advocate with the PHC order.

By the beginning of the hearing on September 5, 2007, Student had not provided the District with any witness list, exhibit list, or exhibits. Mr. Balucan represented that on August 29, 2007, he received a letter faxed from Advocate indicating that Parent withdrew her March 2007 request for an independent educational evaluation (IEE) in the area of speech.² Mr. Balucan represented that on Friday, August 31, 2007, he had a telephone discussion with the Advocate in which he informed her that Parent's withdrawal of the request for a speech IEE did not resolve the case, and that District intended to proceed to hearing. The ALJ continued the hearing for twenty minutes to allow Student's representatives time to appear, and District's staff time to check for messages from them. The hearing commenced at approximately 9:50 a.m. with no messages from, or participation by, Student's Parent or Advocate.

During a lunch break on September 5, 2007, District received a faxed letter of the same date from Parent, directed to the attention of ALJ Johnson. The letter was marked as Exhibit 10 for identification and admitted into evidence. The letter referred to Student's recent withdrawal of her request for an IEE in the area of speech. The letter implied that Student therefore did not need to appear for the hearing in this case. Parent wrote that District's speech assessment was "inaccurate," that she has obtained private assessments, and that she intends to proceed to District's next IEP meeting to present the private assessors' recommendations for speech and applied behavior analysis (ABA) services. Parent's letter further indicated that Student did not contest District's psychoeducational or occupational therapy assessments. Based on Parent's letter, District withdrew the issue of the appropriateness of its occupational therapy assessment from the hearing. Because the issue of ABA services implicated District's psychoeducational assessment, and because the appropriateness of District's speech assessment and annual Goal Number Three were still issues, the hearing proceeded.

¹ During the conference, application of the five business day rule was discussed. (Ed. Code § 56505, subd. (e)(7).) However, due to the delay in issuing the PHC order, time for compliance with final witness and exhibit lists was shortened.

² The letter was not offered to be marked for identification or moved into evidence.

During the hearing, District realized that another component of the March 2007 IEP offer, other than annual Goal Number Three, had not been accepted by Student's parent, to wit: an offer for fifteen minutes of speech and language consultation once per week.³ Hence, District sought to clarify that this component was part of Issue Number Two. In District's complaint, Issue Number Two encompassed whether its entire offer of March 2007 constituted a free, appropriate public education (FAPE). The speech consultation part of the offer was therefore included within the scope of District's Issue Number Two and did not constitute a new issue. However, because it was not described in the PHC Order, the adequacy of notice of the issues was called into question. It was unknown whether Student's decision not to appear at hearing would have been different had she understood that the speech consultation services were still at issue. The ALJ granted District's request to clarify Issue Number Two to include the speech and language consultation services, subject to an order to permit Student to show cause whether a continued hearing date should be set to provide Student an opportunity to present evidence.

The hearing proceeded and District concluded its case in chief on September 5, 2007. The matter was not submitted and the record was held open pending an OSC for Student to show cause whether a continued hearing date should be granted due to clarification of Issue Number Two. Both parties were given until September 17, 2007, to file a response. On September 13, 2007, Parent submitted a letter, marked for identification as Exhibit 11 and admitted into evidence, indicating that Student did not need or want a continued hearing date to present evidence. On September 17, 2007, District not having filed a response, the record was closed.

ISSUES⁴

1. Were the District's psychoeducational and speech and language (SL) assessments conducted in early 2007 appropriate, such that no further assessments, including an ABA assessment, were necessary?
2. Did the District's March 8 and March 12, 2007 IEP offer Student a FAPE because annual Goal Number Three and consultation services for speech and language addressed Student's unique needs?

³ See page 6 of Exhibit 4. Parent signed consent to the IEP on March 14, 2007, except for: "I do not consent to the implementation of goal #3 or the consultation services of Karen Hansen-Rey [speech and language pathologist]." The third area of disagreement was Parent's request for an ABA assessment.

⁴ The issues for hearing have been reframed by the ALJ for purposes of clarity and organization.

CONTENTIONS OF THE PARTIES

District contends that the psychoeducational and SL assessments were conducted by qualified District personnel in early 2007 and were appropriate. District contends that Parent consented to the March 2007 IEP except for one goal and the SL consultation services, and except for Parent's objection to the absence of an applied behavior analysis (ABA) assessment or ABA therapy services. District contends that the March 2007 IEP offered Student a FAPE because annual Goal Number Three and SL consultation for fifteen minutes once per week addressed Student's unique needs in the areas of executive functioning, information processing, organization, and social pragmatics. District further contends that Student did not need an ABA assessment or ABA services.

Because Student did not appear to present her case, there is no direct evidence of Student's contentions. As gleaned from Parent's letters, testimony of District staff, and other documentary evidence,⁵ Student contends that District's SL assessment was inappropriate because District's speech and language pathologists improperly evaluated Student's social skills, discounted the opinions of a general education classroom teacher regarding Student's social skills deficits, and used an incomplete interview form for one test.

Despite Parent's assertion, in her letter of September 5, 2007, that she did not contest District's psychoeducational assessment, Student contends that District's staff was unqualified in the area of ABA services to provide an opinion at the March 2007 IEP meetings about the appropriateness of Parent's request for either an autism ABA assessment or ABA services. That contention necessarily raises as an issue the appropriateness of District's psychoeducational assessment. Student contends that annual Goal Number Three regarding social pragmatics and organization was inappropriate because it was based on an inaccurate SL assessment. Student's contentions regarding the inappropriateness of District's offer for SL consultation services are unknown, other than Parent's note on the March 2007 IEP that the services were rejected.

FACTUAL FINDINGS

Background

1. Student is fourteen years old, and resides with Parent within the boundaries of the District. Student began the 2007-2008 school year in the tenth grade at Ripon High School (Ripon High) in the District.

⁵ By letter dated March 14, 2007, (District's Exhibit 5) Parent informed District that she formally rejected District's March 8, 2007 speech report by District's speech and language pathologist, and requested an IEE in the area of speech. The letter, while hearsay, set forth Parent's reasons for her disagreement and requested an ABA assessment by an autism expert. Parent's comments were also noted in the March 2007 IEP documents.

2. For the 2005-2006 school year in eighth grade, Student attended a combined elementary-intermediate school (grades four through eight) at Weston Elementary School in the District. Student had a previous diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) Predominantly Inattentive Type. Student's ADHD deficits were noted but did not impede her education and she did not receive special education services. Student had one classroom teacher and performed well in the intermediate school. For the 2006-2007 school year in ninth grade, Student transferred to Ripon High, which involved fundamental changes, including having to adjust to seven teachers daily and the loss of a good friend who moved away. Student's self esteem suffered and much of her homework was either incomplete or missing. By December 2006, she was failing five out of seven classes.⁶

3. In December 2006, Student was referred by Parent for an initial assessment to determine eligibility for special education based on a recent medical diagnosis of Asperger's Disorder, a disability on the autism spectrum, in addition to the ADHD. Parent's referral expressed concern for suspected areas related to Student's disabilities including social, communication, attentional, and behavioral deficits. Following District's assessments, the March 2007 IEP team determined that Student was eligible for special education and related services under the primary category of autistic-like behaviors, and with a secondary disability of other health impairment (OHI) based on ADHD.

4. Parent and Student did not disagree with District's determination of eligibility for special education and related services under the above categories. However, Parent and Student objected to the assessments and services offered by the District because they believed they were deficient (see Contentions of the Parties).

Psychoeducational Assessment

5. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of educational needs must be conducted. Assessments must be conducted in all areas related to the suspected disability by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. Tests and assessment materials must be used for purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. The district cannot use any one measure as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate.

6. Sean Henry, a credentialed school psychologist with the District, conducted Student's psychoeducational assessment in early 2007, and issued a report dated March 8, 2007. Mr. Henry's testimony and report established that he assessed Student in all areas of psychoeducational functioning related to Student's suspected disabilities, except academic

⁶ A passing grade of D-minus was the equivalent of a 60 percent score. Student had a 25 percent flunking score in five classes.

achievement.⁷ Mr. Henry evaluated cognitive functioning, executive functioning, visual-motor integration, adaptive functioning, autism, social-emotional functioning, and behavior. The methods of evaluation included administration of multiple standardized tests and rating scales, and observations of Student in several school settings. Mr. Henry also relied upon an observation report by Jamie DeBruyn, Resource Specialist Program (RSP) teacher, and Mr. DeBruyn's administration of academic achievement tests. Among the tests Mr. Henry administered were the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Developmental Test of Visual-Motor Integration (VMI), the Behavior Rating Inventory of Executive Function (BRIEF), the Gilliam Asperger's Disorder Scale (GADS), the Behavior Assessment for Children (BASC), and the Adaptive Behavior Assessment System-Second Edition (ABAS-II). Mr. Henry gathered information from Parent for historical background. He also obtained information from Parent and Student's teachers in the form of interviews, questionnaires, checklists, and rating scales for the BRIEF, GADS, and ABAS-II evaluations, and a self-report from Student for the BASC evaluation. Mr. Henry administered the above standardized battery of tests in Student's primary language, English.

7. Mr. Henry obtained a Bachelor's degree from California State University, Fresno in 1998, and a Master's degree in Psychology in 2001, and has been a school psychologist since. He obtained a Pupil, Personnel and Services credential for grades kindergarten through twelfth grade. Mr. Henry does not diagnose medical disabilities but assesses psychoeducational functioning levels. He has education and training in the administration of the above and other tests and tools to evaluate a student's present levels of psychoeducational functioning, including prior experience assessing pupils with autism, autism spectrum disorders such as Asperger's, and ADHD.

8. The WISC-IV, which evaluates intellectual ability, was administered over three days in February 2007. Multiple subtests were comprised into five composite index scales, with a mean (average) standardized score of 100 and a standard deviation of 15 points, indicating the standardized range of Average to be from 85 to 115. Student scored in the Average range in all but one index: Verbal Comprehension - 99; Performance Reasoning - 108, Working Memory - 99, Processing Speed - 73, and Full Scale Intelligent Quotient - 95. Student's processing score of 73 placed her in the Borderline range of information processing. Mr. Henry testified that the low processing score was consistent with ADHD.

9. The results of the VMI, a perceptual-motor test, placed Student in the Superior range with a score of 121, showing strong visual motor integration, with good hand-eye coordination.

10. The BRIEF, a behavior rating scale, evaluated Student's executive functioning skills as rated by Parent, two of Student's teachers, and Student.⁸ Executive functioning

⁷ The academic achievement portion of the assessment was conducted by District's resource specialist, Jaime DeBruyn, and was reviewed by Mr. Henry.

⁸ The teachers were Student's general education teacher, Ms. DeBoard, and Sgt. Everett "Butch" Perry, Student's JROTC teacher.

involves “a group of processes that are responsible for guiding, directing, [and] managing cognitive, emotional, and behavioral functions in new problem solving situations.” Percentile ratings above the 90th percentile indicate extreme difficulties in those areas. Overall, Student’s ratings in most of the indexes ranged from the mid-to-high 90s, and the global composite range from 97 to 99, showed extreme difficulties with executive functioning at home and school. Mr. Henry indicated that extreme difficulty in this area is consistent both with ADHD and with Asperger’s Disorder.

11. The GADS, a behavioral checklist, was used as a tool in identifying individuals who have a high probability of Asperger’s Disorder, and Student’s scores showed such a high probability in all four subtest areas that are typically characteristic for persons with Asperger’s: social interaction, restricted patterns of behavior, cognitive patterns, and pragmatic skills.

12. The BASC, Student’s self-report regarding her emotional and behavioral functioning, showed Student to be in the lower At-Risk range (from 60 through 69) in the social maladjustment composite primarily due to Attitude to Teachers and Attitude to School, and in the Average range in the clinical maladjustment composite. However three individual clinical scales were within the lower At-Risk range: locus of control, somatization, and social stress, indicating areas of potential concern. Of most concern to Mr. Henry, Student scored in the Clinically Significant range (from 70 and higher) in the emotional symptoms index composite, showing an elevated sense of depression and inadequacy. Student correspondingly scored in the Clinically Significant range (30 and lower) in the adaptive/personal adjustment composite of the BASC, indicating her low self esteem and perceptions of having poor relationships with peers. Mr. Henry interviewed Student and heard about her emotional difficulties, lack of self esteem, and perception of difficulties with her peers, including being teased or made fun of. Mr. Henry credibly testified that Student was experiencing a difficult time adjusting to high school and was receiving outside counseling, and that, while concerned, he did not view Student to be emotionally disturbed.

13. Mr. Henry conducted the ABAS-II, a standardized comprehensive assessment of adaptive skills rated by the Parent and the same two teachers who provided the BRIEF ratings. Ms. DeBoard rated Student lower in nine skill areas than Parent and Sgt. Perry did. Mr. Henry concluded that Student’s areas to be improved were her social skills and independence or self-direction skills. Student needed to know ahead of time what was expected of her, had difficulties self-initiating, and would wait instead of asking a teacher questions. Mr. Henry concluded that this was related to Student’s executive functioning deficits.

14. Mr. Henry observed Student in her music appreciation class, where Student did not relate much to peers, appeared to be uncomfortable, and, after the teacher directed the class to break into musical groups, removed herself to the restroom for an extended period of

time (over 30 minutes).⁹ Mr. Henry also observed her in Ms. DeBoard's English class, where she appropriately participated in an oral reading.¹⁰ During timed samplings by Mr. Henry for about 15 minutes, no problem behaviors were observed. However, the English teacher reported to Mr. Henry that Student usually had a harder time staying on task in class, had organizational difficulties, did not turn in homework, and did not initiate interaction with peers.

15. Mr. DeBruyn observed Student during her lunchtime over a period of several months because his RSP classroom was used by some students as a lunch room. Beginning in December 2006, Student rarely started conversations and did not make eye contact. Mr. DeBruyn observed Student improve as she became more comfortable, and appropriately interacted with her peers, and other adults who come by, maintaining eye contact and appropriate body language. Mr. DeBruyn did not become Student's teacher until after the March 2007 IEP.

16. On January 31, 2007, Mr. DeBruyn conducted the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition (WJ-III), a standardized, norm-referenced test used to measure academic achievement in reading, writing, math, and oral language. Mr. DeBruyn obtained a Bachelor's degree in Psychology and Physical Education in Illinois in 1996, obtained a mild-moderate resource specialist credential in California in 2003, has been a resource specialist for the District for over seven years, and has prior experience as a special day class teacher. He has received education and training in conducting academic achievement tests including the WJ-III. Student scored in the Average range in broad reading (103) and broad math (92), Above Average in broad written language (113), and Low Average in oral language (89). Student's weakness was in the area of math fluency (77). Mr. DeBruyn reported that Student's conversational proficiency seemed typical for her age level, although her oral language skills were Low Average when compared to the range of scores obtained by others at her age level; her fluency with academic tasks were all within the Average range, and that her performance in reading comprehension and written language were High Average.

17. Mr. Henry compared Student's cognitive functioning (WISC-IV) with her academic achievement (WJ-III), and he found that Student's overall functioning was consistent with her abilities, and that her education was impeded by her executive functioning, information processing, organizational, and social deficits. Mr. Henry credibly testified that he found no severe autistic-like deficits that would cause him to recommend ABA services for Student. Moreover, ABA services are typically appropriate for much younger students with more severe autistic symptoms who are missing precursor skills, and are taught those skills by breaking down the components and reinforcing them by repetition. Student also did not have adverse behaviors, such as tantruming, that needed to be redirected.

⁹ Student had been taking frequent and lengthy trips to the bathroom due to reportedly severe pelvic pain on an almost daily basis. It is unknown whether Student was in pain or left to avoid the class.

¹⁰ The reading was *Romeo and Juliet*, one of Student's preferred materials, and was probably not typical of Student's participation in the class.

Special Education Director Camille Taylor credibly testified that the scientific research supporting ABA is focused on early intervention for students up to the age of seven, and that there is no research supporting the use of ABA for older students. Student is a high school student of average cognitive functioning for whom ABA services would be inappropriate.

18. During the March 2007 IEP meetings, Parent requested an ABA assessment and ABA therapy services, and the District members of the team declined the request. On March 14, 2007, Parent wrote a letter to Mr. DeBruyn in which she reiterated, among other things, her request for an “ABA assessment” by an autism expert in order to determine if Student needed ABA services. This letter constituted notice to the District that Parent impliedly disagreed with Mr. Henry’s psychoeducational assessment. On March 29, 2007, District gave Parent written notice that it declined to conduct an ABA assessment because Student did not “display the type of behaviors that would warrant providing ABA therapy to her.”

19. Both Mr. Henry and Mr. DeBruyn were trained and qualified to administer their respective test tools, used the tests for purposes for which the tests were standardized, valid and reliable, and administered them in Student’s language, English. Multiple test tools were utilized, including gathering information from Parent, teachers, observation, and interviews with Student.

Speech and Language Assessment

20. In January and February 2006, District conducted a speech and language assessment following Parent’s December 2006 request. Parent expressed concerns about the levels of Student’s speech, language, and communication skills due to difficulties with off-task behaviors and social skills deficits impeding learning. Parent informed District’s speech and language pathologists (SLPs), Karen Hansen-Rey, and Judi Gladen, that Student had recently been diagnosed with Asperger’s Disorder, and that Parent would send them a medical report for their review and consideration. The medical report, which was not delivered to the SLPs until after they had completed their assessments and were writing the report, also revealed Student’s prior diagnosis of ADHD. Karen Hansen-Rey prepared a SL report dated March 8, 2007, which reported the test tools and results each SLP administered.

21. Ms. Hansen-Rey is in her second year as an SLP with the District. She obtained a bachelor’s degree in Communication Disorders from the University of the Pacific, in 1994, and a master’s in the same area in 1995. She holds a clear SLP clinical rehabilitation credential, a California license to practice, and national certification. Ms. Hansen-Rey has over 12 years of prior experience as an SLP with another school district as well as the Stanislaus County Office of Education. Her primary duties in the District are to manage a caseload providing special education support and intervention regarding speech, language, and hearing deficits, including the administration of assessments.

22. Ms. Gladen attended undergraduate school at the University of the Pacific, and Humboldt State University, where she obtained a bachelor's degree in 1965. She obtained a master's degree in SLP from Colorado State University in 1970. She holds a clear clinical rehabilitation credential with a special class designation in Communicative Disorders. Ms. Gladen has over 17 years of experience as an SLP, and over 12 years with the District, spanning many years as she raised children, traveled, and later retired. She came back to the District within the last two years, with primary duties to train and supervise District's SLPs, and conduct diagnostic and annual assessments.

23. The SLPs agreed that standardized SL assessments did not test for the kind of social cognitive deficits associated with autism or Asperger's Disorder. Persons on the autistic spectrum, including Asperger's, often have trouble with social navigation and conversations with peers, including social language reciprocity, and reading or displaying appropriate body language and behaviors. Accordingly, Ms. Gladen and Ms. Hansen-Rey agreed that it would be important to have two experienced SLPs assess Student using a variety of tools, including informal non-standardized tools, to look at her receptive, expressive, and pragmatic language skills. Ms. Gladen conducted the Clinical Evaluation of Language Fundamentals -4 (CELF-4) Pragmatics Profile subtest, the Children's Communication Checklist-2 (CCC-2), the Comprehensive Assessment of Spoken Language (CASL) Pragmatic Judgment Expressive Test, and an observation of Student. Ms. Hansen-Rey conducted the Oral and Written Language Scales (OWLS), and three informal assessments (Social Navigation and Conversation Skills, the Double Interview; and Reading the Social Environment) which included observation of Student.

24. The OWLS is a standardized test to assess a student's comprehension or expression of language, beyond evaluating just the literal meaning of words or sentences used in conveying messages. Student scored a High Average rating of 120 on the listening comprehension subtest, an Average rating of 102 on the oral expression subtest, and an overall composite standard score of 112. The OWLS did not have a social pragmatics component to it. Because Asperger's is generally associated with higher functioning persons, the OWLS scores were not atypical.

25. The CELF-4 evaluation of language fundamentals was not conducted in full; rather the Pragmatics Profile subtest was administered. The Pragmatics Profile was used to identify verbal and nonverbal pragmatic deficits that may negatively influence social and academic communication. The profile was filled out by Student's English teacher, Ms. DeBoard. The teacher's low score indicated that Student did not exhibit adequate social skills in the classroom setting, and in particular, experienced inattention to task and inability to complete assignments. Parent was also asked to fill out a profile, but it was returned by Parent incomplete. The Parent profile was therefore invalid and was not reported or relied upon by the assessors. Hence, the teacher's score was not compared to anyone else's score. There is no evidence that the teacher's profile score was otherwise impaired, and the results were considered by the assessors.

26. The CCC-2 is a caregiver evaluation designed to assess a child's communication skills in the areas of pragmatics, syntax, morphology, semantics and speech. The Parent completed this form to rate the frequency of listed communication behaviors. The standardized score in the Low Average range was translated into a Social Interaction Difference Index score of 17, which did not reveal indicators suggestive of Autistic Spectrum disorders. Neither did the results suggest a language disorder.

27. For the CASL, only the Pragmatic Judgment Assessment subtest was administered. This pragmatic subtest examined the ability to maneuver through a series of scenarios that require the student to determine an appropriate and socially acceptable response or pragmatic skill needed to interact in each situation. Student scored a standardized score of 100, or average, when compared with national same-aged peers.

28. Three informal, non-standardized assessments were administered to supplement the above tests. The informal assessments were developed over the years by Ms. Hansen-Rey, based primarily upon training she received at conferences taught by Michelle Garcia Winter, a nationally known SLP who specializes in Autistic Spectrum therapies. For the informal Social Navigation and Conversation Skills assessment, Student was observed on January 17, 2007, over a lunch break. Student was observed to meet with three peers in a lunch room, initiate a conversation, maintain appropriate body orientation, and engage in reciprocal conversation for 10 to 12 minutes. The reported detailed observations included appropriate eye contact, etiquette, transition, reciprocal laughter, turn taking, and timely return to a classroom. These results were not typical of Asperger's and showed that Student was high functioning in a social setting, at least during a lunch break with friends.

29. For the informal Social Language Sampling assessment, the Double Interview test was conducted on February 7, 2007. It first involved Student's interview by Ms. Hansen-Rey, in which Student shared information about her family, animals, living arrangements, and other subjects. For the second interview, Student was asked to interview Ms. Hansen-Rey. Student complied, and was observed to exhibit mutual perspective taking, shifting perspective, asking organized follow up questions, displaying humor, and digressing from the topic only momentarily.

30. For the informal Reading the Social Environment assessment, Student was shown 10 different social or emotional picture cards, and asked to explain what was going on, including the actors' thoughts and feelings. Many persons on the Autistic Spectrum have difficulty understanding the "theory of mind" and how different people think and feel from different perspectives. The cards depicted different scenes, and Student was able to process and respond to multiple levels of information and tell a story using each picture to describe motives and intentions.

31. Overall, the SLP assessors did not find significant social pragmatic deficits commonly associated with Asperger's. The SLP assessors observed Student but did not observe her in a classroom setting. Ms. Gladen testified that she believed Ms. Hansen-Rey had planned to observe Student in a classroom. However, the assessors took the profile

ratings of the classroom teacher on the CELF-4 subtest into consideration. In addition, they concluded that the teacher's report of inattention to task and inability to complete assignments was suggestive of ADHD and executive functioning deficits, which can often be masked until high school, where the increasing complexity of managing a multiple-subject curriculum may reveal the deficits. As the assessors were compiling the report, they received the medical report from Parent which showed them that Student had a diagnosis of ADHD in addition to Asperger's Disorder.

32. If a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an independent educational evaluation (IEE). The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must file a due process complaint and prove at a hearing that its assessment is appropriate, prove at a hearing that an IEE obtained by the parent did not meet the agency criteria, or ensure that an IEE is provided at public expense.

33. During the March 2007 IEP meetings, Parent objected to the SL assessment. On March 14, 2007, Parent wrote a letter to Mr. DeBruyn in which she again rejected the SL assessment, and requested an IEE by a particular nonpublic speech agency, Fagundes Speech. The letter also criticized Ms. Hansen-Rey for statements attributed to her at the IEP meetings in opposition to Parent's request for an ABA assessment or ABA services. On April 18, 2007, District gave Parent written notice that it declined to provide an IEE in the area of speech because it believed that District's assessment was appropriate. District thereafter filed for a due process hearing.

34. On August 29 and September 5, 2007, Parent submitted letters withdrawing her request for the District to fund or conduct a speech IEE. However, Parent did not indicate that she withdrew her disagreement with District's SL assessment, or that she conceded that it was appropriate, and expressly called it "inaccurate." As further set forth in Parent's letter of September 13, 2007, addressed to ALJ Johnson in response to the OSC, Parent intends to present a "private pay assessment" in speech, language and communication to the District, and if District declines to follow unspecified recommendations in that assessment, Parent "reserves the right to seek reimbursement." A request for reimbursement is equivalent to a request for an IEE. Parent failed to bring her assessment to the hearing or otherwise present evidence why District's assessment was inappropriate under the law.

35. While the SLPs did not observe Student in a classroom, there is no evidence that this omission invalidated all other assessment results. Both Ms. Gladen and Ms. Hansen-Rey were trained and qualified to administer their respective test tools and used the tests for purposes for which some of the tests were standardized, valid and reliable. They administered the tests in Student's language, English. Multiple test tools were used, including observations, interviews with Student, and gathering information from Parent and a teacher. The assessors had valid reasons to select additional non-standardized or informal assessment tools to evaluate Student's social pragmatic needs.

District's March 2007 IEP Offer

36. A student is entitled to receive specially-designed instruction and related services that meet his or her unique needs and are necessary to assist in benefiting from the education. A school district is required to provide instruction and related services that are reasonably calculated to provide the student some educational benefit. The IEP must contain a statement regarding the student's present levels of academic achievement and functional performance, and a statement of the special education and related or supplementary aids and services to be provided.

37. On March 8, 2007, the IEP team convened to review the District's assessment results and determine Student's eligibility, goals, and educational placement. Student's Parent and two advocates, Mary Ann Fiedler and Shelly Natt, attended and participated in the IEP meeting. Also participating were Camille Taylor, Director of Special Education; Mr. DeBruyn, the RSP teacher; Mr. Henry, school psychologist; Chaula Badiani, occupational therapist (OT); Ms. DeBroad and Sgt. Perry, two of the general education teachers; Ms. Hansen-Rey, SLP; and school nurse Judy Anderson. All of the District's assessments were reviewed. Most teachers reported that Student had incomplete or missing homework assignments. The team ran out of time, and the meeting was continued to March 12.

38. On March 12, 2007, the IEP team reconvened to continue the meeting. The school nurse, the OT, Ms. DeBroad, and Mr. Henry did not attend but all other team members were present and participated. There was at least one general education teacher at each IEP meeting, and the team was properly constituted. All assessments and other reports were reviewed by the team. It was the consensus of the team that Student was eligible for special education services under the categories of "Autism" and OHI, and that Student needed special education services in order to obtain educational benefit.¹¹

39. The IEP team recommended that Student be placed in the general education curriculum for most of the day, supported by special education consultation services with the RSP teacher, RSP Math Lab and RSP Study Skills twice a week for 240 minutes per session of totaling 480 minutes weekly, SL consultation services for 15 minutes once a week, off-site direct OT services for 45 minutes once a week, and 60 minutes of monthly OT consultation services at school. In addition, the IEP team developed three goals, and recommended the following accommodations: extended time to complete assignments in study skills class, overhead notes and outlines from teacher, use restroom when needed, sit close to the front of the room, flexible seating for tests.

40. Parent consented to the IEP on March 14, 2007, except for three areas of concern. Parent wrote in relevant part: "I do not consent to the implementation of Goal #3 or the consultation services of Karen Hansen-Rey as these portions of the district's offer do not meet [Student's] needs. I formally requested an ABA assessment during the IEP

¹¹ The statutory category in California is "autistic-like behaviors" but District's IEP form has "Autism" listed instead.

meeting, which was immediately denied by the district. Please provide prior written notice within 5 days. No member of [Student's] IEP team is either an autism expert or an expert in ABA." Parent was concerned because the District personnel on the team disagreed that Student needed an ABA assessment and denied Parent's request for either an ABA assessment or ABA therapy services. Parent thought the District staff disregarded the reported observations of Sgt. Perry and Ms. DeBroad that Student had social skills deficits, which Parent believed could be addressed with ABA therapy. However, the evidence shows that District took the teachers' observations into consideration, along with other information, in determining that Student was eligible for special education under the primary category of autistic-like behaviors, a disability that characteristically involves social skills deficits.

Student's Unique Needs and IEP Goal Number Three

41. An IEP must include academic and functional goals and special education and related services designed to meet the child's needs that result from his or her disability so that the child may progress in the general curriculum. The goals must also be designed to meet each of the child's other educational needs resulting from his disability.

42. At the time of the March 2007 assessments, and as substantiated in the assessments, Student had unique needs related to her disabilities in the areas of math fluency, social pragmatic skills, processing, executive functioning, organization skills, and independent initiation.

43. The March 2007 IEP team initially developed two annual goals for Student, Goal No. 1 for Math Fluency, and what became labeled Goal Number Three for Social Pragmatics. Parent and Student's Advocate wanted a goal to address Student's social pragmatic needs, which they thought were being ignored. After Parent declined to consent to Goal Number Three, what became labeled Goal No. 2 for Organization was drafted by Mr. DeBruyn and the IEP team. Parent consented to Goal No. 1 and Goal No. 2 and they are not at issue in this proceeding.

44. Annual Goal Number Three, written by District's team members during the meeting and rejected by Parent, is called Social Pragmatics. It addressed both social pragmatics and organization, and provided the following goal to be accomplished by March 2008: "Per California State Standard 1.9 modified, [Student] will demonstrate the social pragmatic and executive functioning: 1) complete assignments in class, 2) address questions, 3) prepared for class, 4) participate in class discussions, and 5) complete homework and turn in with 80% efficiency as determined by a daily check list from teachers in collaboration with LSH [language, speech and hearing] and staff." Responsibility for the goal was placed with the general education classroom teacher, special education teacher, and SLP specialist. The goal was broken down into four quarterly benchmarks that started in the last quarter of the 2006-2007 school year, to meet all five items with 40 percent efficiency, and increased in subsequent quarters of the 2007-2008 school year to 50, 60, and then 80 percent efficiency. The goal is measured by the use of a daily checklist. Because Parent did not consent to Goal Number Three, it was never implemented.

45. Instead, the team took some of the elements contained in Goal Number Three and developed annual Goal No. 2, a dedicated organization goal focused on a binder technique. It dealt with the specific mechanics of keeping track of each assignment, project, quiz or test and addressed some of Student's processing and executive functioning needs. Ms. DeBroad reported to the IEP team and testified that Student generally performed well on assignments in class. However, Student's organizational skill deficits interfered with her ability to keep track of, complete, and turn in homework assignments. Ms. DeBroad observed over several months that Student had problems locating her homework, and finding her binder, pencil or pen. Goal No. 2 provided that by March 2008, "when given an assignment, project, quiz or test, [Student] will record the information in her daily assignment sheet, get teacher initial and parent signature with 100 percent compliance in 5 of 5 days of the week as assessed by teacher collections of assignment sheets." Quarterly benchmarks were provided.

46. By comparison, proposed Goal Number Three expanded from the mechanics of completing an assignment, project, quiz or test, to Student's overall classroom performance, addressing Student's social pragmatics needs in addition to executive functioning, including asking questions, being prepared for class, participating in the classroom, and completing both assignments in class and homework assignments. Under Goal No. 2, Student herself must record the assignment on a daily assignment sheet, and then get both teacher initials and parent signature when the assignment is completed. Student's responsibility is specific and focused, using an organizational binder. Under Goal Number Three, the teachers and SLP staff were to develop a checklist, and actively use that checklist every day to keep track of Student's verbal class participation as well as assignment completion, and then work with Student to support her progress.

47. District staff, including Ms. DeBroad, Mr. DeBruyn, and Ms. Hensen-Rey testified that Goal Number Three was realistic and achievable. While the goal may not directly appear to address Student's social pragmatic needs with her peers, it does address Student's pragmatic weaknesses regarding participating and initiating questions and communicating with both peers and teachers in the context of the academic classroom, and addresses her processing, executive functioning, and organizational needs as well.

48. Mr. DeBruyn, Student's RSP case manager, established in his testimony that the two goals and other special education services that were implemented, including his study skills class, had a dramatic impact on Student's progress. By the end of the last quarter of the 2006-2007 school year, after the March 2007 IEPs, Student had reversed course. Instead of flunking five out of seven classes, Student passed all but one class. The assignment log and binder organization, along with other supports, made a significant difference. Ms. DeBroad found that as Student's grades improved, she seemed happier in class. Mr. DeBruyn observed that the binder helped Student organize, and the assignment log supported communication between Parent and the teachers. Based on the testimony of both teachers, the study skills class and other RSP support provided Student with educational benefit as she made swift academic progress in the last eight weeks of the 2006-2007 school year.

49. The teachers did not observe Student's verbal communication skills to increase much after the IEP. Even though the SLP specialists did not find social pragmatics to be an area of need for Student, the IEP team as a whole determined that social pragmatics was an area of need for her, consistent with the psychoeducational assessment, teacher observations, the Asperger's diagnosis, and Parent's request. The District's team members combined social pragmatics with Student's organization and executive functioning needs to create Goal Number Three, to encourage Student's active participation in class. While "participate" is not defined in the goal, because it is followed by the phrase "in class discussions," it is reasonable to conclude that it means verbal participation. Goal Number Three was measurable and the staff would use a checklist.

50. The District was required to develop goals to address all of Student's unique needs. Goal Number Three was appropriate to address Student's social pragmatic and independence needs, along with her processing, executive functioning and organization needs.

Speech And Language Consultation Services

51. SLPs Hansen-Rey and Gladen recommended that the IEP team should focus on addressing Student's executive functioning deficits related to her ADHD disability. However, Mr. Henry found, and credibly testified that Student's executive functioning deficits were related to both ADHD and Asperger's. From his interview with Student, Mr. Henry also observed her emotional difficulties, lack of self esteem, and perceptions of difficulties with her peers, including being teased or made fun of. Ms. DeBroad consistently reported that Student did not participate verbally much in her class.

52. The March 2007 IEP team offered Student speech and language services on a consultation basis once a week for fifteen minutes. The Comments section for the March 12 IEP meeting stated: "District offer included consultation by speech therapist one time each week working in collaboration on social pragmatic and executive functioning with resource specialist and other teachers. Will be measured by progress reports."

53. There is no direct evidence about why Parent refused to consent to the speech consultation services. The record shows that Ms. Hansen-Rey did not find Student had any social pragmatic deficits that needed to be addressed, but Parent disagreed with that opinion and thought Student's pragmatic needs were being ignored. Parent also objected to Ms. Hansen-Rey's opinion that Student did not need an ABA assessment or ABA therapy. It is unknown whether Parent would have accepted the speech consultation services if they were provided by another person.

54. Nevertheless, as set forth in Factual Finding 49, the IEP team's conclusion that Student had social pragmatic and executive functioning deficits to be addressed was appropriate. The District's team members designed the speech consultation services so that any District SLP would work in collaboration with Mr. DeBruyn and Student's other teachers, so that Student's teachers would be aware of her areas of weakness and be more

readily able to help her access communication with her peers and teachers in the classrooms. Given Student's emotional fragility, academic failure, and unique needs, the weekly speech consultation for Student's teachers was an appropriate service to help Student access her education.

LEGAL CONCLUSIONS

1. Under *Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. District filed for a due process hearing and bears the burden of persuasion.

2. Under California law and the federal Individuals with Disabilities Education Improvement Act (IDEA 2004, effective July 1, 2005), children with disabilities have the right to a free, appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(a)(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

Were the District's psychoeducational and speech and language (SL) assessments conducted in early 2007 appropriate, such that no further assessments, including an ABA assessment, were necessary?

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b).)

4. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (Ed. Code, § 56320, subds. (a), (b); 20 U.S.C. § 1414(b)(2), (3).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally

or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication, unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(a)(2), (3).)

5. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an independent educational evaluation (IEE) under certain circumstances. (See also 34 C.F.R. § 300.502.) The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense. (Ed. Code, § 56329.)

6. Based on Factual Findings 5 through 19, District's psychoeducational assessment of Student was appropriate and in compliance with the law. District's psychoeducational assessment did not indicate, and the evidence does not support a determination that Student's unique needs related to her disabilities required an ABA assessment.

7. Based on Factual Findings 20 through 35, District's speech and language assessment was appropriate and in compliance with the law. Because Parent disagreed with the assessment, Parent's withdrawal of a request for an IEE shortly before hearing did not eliminate the issue of the appropriateness of the assessment from being litigated in this proceeding.

Did the District's March 8 and March 12, 2007 IEP offer Student a FAPE because annual Goal Number Three and consultation services for speech and language addressed Student's unique needs?

8. School districts receiving federal funds under IDEA 2004 are required pursuant to title 20 of the United States Code section 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

9. There are two parts to the legal analysis of whether a school district or a local educational agency (LEA) offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

10. There is no allegation or evidence of any procedural violations in this case.

11. For a school district's IEP to offer a student a FAPE under the substantive component of the analysis, the proposed program must be specially designed to address the student's unique needs, and reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) According to the United States Supreme Court, a FAPE must meet a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Rowley*, 458 U.S. at 189.) The *Rowley* court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (*Ibid* at pp.198-200.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

12. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) The Ninth Circuit refers to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or at least "meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

13. An IEP is to be evaluated in light of the information available at the time it was developed (referred to as a "snapshot"); it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹² It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.)

¹² Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeal has applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.)

14. The statement of measurable annual goals, including academic and functional goals, must be designed to: (a) meet the individual's needs that result from the disability to enable the student to be involved in and make progress in the general curriculum, and (b) meet each of the student's other educational needs that result from the disability. (Ed. Code § 56345, subd. (a)(2).)

15. Based on Factual Findings 36 through 50, the only annual goal at issue in this case is annual Goal Number Three, labeled Social Pragmatics. Goal Number Three was appropriate to address Student's social pragmatics needs, along with her processing, executive functioning, independence and organization needs, and was designed to help her be involved in and progress in the general curriculum.

16. Based on Factual Findings 42, and 51 through 54, District's offer to provide speech and language consultation services for fifteen minutes once a week was appropriately designed to meet Student's unique needs in the areas of social pragmatics and executive functioning, and was reasonably calculated to provide Student educational benefit by improving her access to communication with peers and teachers in the classroom. As set forth in Factual Finding 40, Parent consented to all other aspects of the IEP.

ORDER

1. District's psychoeducational and speech and language assessments were appropriate.

2. District's March 2007 IEP provided a FAPE because Goal Number Three and the speech and language consultation services addressed Student's unique needs.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on the sole issue for hearing in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: October 9, 2007



DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division