

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

In the Matter of:

SAN DIEGO UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007060523

**DECISION**

Timothy L. Newlove, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on August 23, 2007, in San Diego, California.

Attorney Amy Bozone, Assistant General Counsel for the Office of the Deputy Superintendent of the San Diego City Schools, represented the San Diego Unified School District (District). Peter R. Penman, Ph.D., Representative, also appeared for the District.

Student's mother appeared on behalf of Student. Michael Janusek, Conduit Language Services, appeared and acted as a Spanish and English translator for Student's mother.

On June 14, 2007, District filed with OAH a Mediation and Due Process Hearing Request Form. On July 18, 2007, OAH continued the initial due process hearing scheduled in the matter. The parties presented oral and documentary evidence, made closing argument, and submitted the matter on August 23, 2007.

## ISSUES

1. Is the District entitled to reassess Student based upon an assessment plan dated March 22, 2007?
2. Can the District implement the June 8, 2007 speech and language IEP for Student without the consent of his parent?

## CONTENTIONS OF THE PARTIES

The District contends that Student is struggling academically and requires a full psychoeducational reassessment which will allow the District to take a closer look at his needs and design a more comprehensive educational plan for Student. Until the psychoeducational reassessment is completed, the District seeks to provide the speech and language services set forth in the June 8, 2007 Individual Education Program created for Student. Student's mother contends that the District should not be allowed to conduct a comprehensive reassessment until such time as Student shows progress in school.

## FACTUAL FINDINGS

### *Reassessment*

1. A school district must conduct reassessments of a child with a disability after the initial assessment establishing eligibility for special education and related services. Such reassessments need not occur more frequently than once a year, but must be done at least once every three years (generally referred to as the "triennial reassessment"). A district may perform a reassessment if the district determines that the educational or related services needs of the student warrant it.
2. A district that seeks to reassess a special education student must give proper notice of the intent to reassess. The notice must include the assessment plan that describes the proposed assessments. The proposed assessments must meet statutory guidelines for valid assessments and the proposed assessors must be trained, knowledgeable and competent to perform the assessments. In addition, for a reassessment, the district must review existing information and develop current data in order to determine the educational needs of the student.
3. Student was born in May 1993. He is now 14 years and four months old. Student resides with his mother and two brothers within the geographical boundaries of the District. Student is bilingual: he speaks Spanish and English. His primary language at present is English. For the 2006-2007 school year, Student finished sixth grade. He is two to three years older than the other pupils in his class.

4. From 1999 to 2004, Student attended public school in different districts. In June 1999, Student's mother consented to an Individual Education Program (IEP) developed by the Los Angeles Unified School District (LAUSD). Under this IEP, LAUSD agreed to provide Student with speech and language services. For the 2000-2001 school year, LAUSD retained Student who repeated the first grade. In December 2001, LAUSD stopped providing Student with speech and language services because his mother did not consent to an IEP. During the 2001-2002 school year, Student attended second grade within the Downey Unified School District and the Norwalk-La Mirada Unified School District. Student's mother also informed the District that Student attended a school in Tijuana, Mexico for seven or eight months.

5. In February 2004, Student enrolled at Perkins Elementary School where he attended third grade. Perkins Elementary is a District school. Upon his enrollment, the District did not know that previously Student had been found eligible for special education and had received speech and language services.

6. For the 2004-2005 school year, Student attended fourth grade at Perkins Elementary. In November 2004, the District gave Student the California English Language Development Test (CELDT), a state mandated test for pupils whose primary language is other than English.<sup>1</sup> Student's results on the CELDT showed low scores in the areas of reading and writing, and regression in the areas of listening and speaking.

7. On May 12, 2005, after receiving consent from Student's mother, a District Speech and Language Pathologist prepared an Assessment Report concerning Student. For this report, the assessors performed a speech-language pathology assessment. The assessors conducted the assessment in English and Spanish. The assessors utilized the following evaluation tools: the Clinical Evaluation of Language Fundamentals (CLEF-3 Spanish and English), the Assessment of Phonological Processes (APP-R Spanish and English), an Informal Speech-Language Sample and Story Recall (Spanish and English) and a review of pertinent records. The Assessment Report found that Student had a moderate articulation delay, a moderate expressive language delay and a significant expressive language delay in Spanish which affected his development in English. The Assessment Report further found that such delays affected Student's communication with teachers and peers, and impacted his academic performance. The Assessment Report concluded that Student qualified for special education speech and language services.

8. On May 31, 2005, the District held an IEP meeting with Student's mother in attendance. The IEP team found Student eligible for special education and related services under the disabling condition of speech or language impairment (SLI). In this IEP, the District recommended placement of Student in the general education classroom with 60 minutes per week of speech and language services. Student's mother gave consent to the IEP.

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<sup>1</sup> See Education Code section 313, subdivision (a), and California Code of Regulations, title 5, section 11310, subdivision (u).

9. For the 2005-2006 school year, Student attended fifth grade at Perkins Elementary. Student continued to display weakness in the basic academic areas of reading, writing and math. Degrees of Power (DRP) is a state mandated test that measures a pupil's ability to read for content. For fifth grade students, a score of 50 or above on the DRP reaches or exceeds expectations. In October 2005, Student scored a 17 on the DRP. This score is far below expectations. In May 2006, Student scored a 15 on the DRP, showing a regression in his abilities and placing him at the first grade level. The California Standards Test (CST) is a state mandated test that measures a pupil's overall academic performance. In May 2005, during the latter part of his fourth grade year, Student scored 303 (basic) in English/language arts on the CST. A year later, in May 2006, Student regressed, scoring a 255 in English/language arts on the CST, which is far below average.

10. On February 6, 2006, the District held a Student Study Team (SST) meeting at Perkins Elementary. The purpose of the SST was to review Student's progress under the May 31, 2005 IEP, and discuss the need for a more comprehensive assessment of Student's academic needs. The SST members noted that Student had met his goals for articulation, but that he continued to display the receptive and expressive language skills of a five year old, and continued to read at the level of late kindergarten to first grade. The SST members also discussed possible classroom interventions. Student's mother did not attend this SST meeting.

11. On May 16, 2006, the District held an IEP meeting with Student's mother in attendance. The IEP team continued to find Student eligible for special education under the category of SLI. The team determined that Student was below grade level in reading, writing and math. The team also determined that Student had unique needs in the areas of receptive and expressive language skills. Receptive language refers to the ability to understand language in spoken and written form. Expressive language refers to the ability to express oneself in speaking and writing. The team again recommended a placement of Student in the general education classroom with 60 minutes of speech and language services. The team also presented an Assessment Plan to Student's mother. The purpose of the Assessment Plan was to more fully explore Student's limited progress in the areas of language. The Assessment Plan proposed to test Student in the areas of academic achievement, intellectual development and processing, and health. The Assessment Plan proposed to utilize well-known standardized tests, as well as observations of Student. Student's mother did not consent to the Assessment Plan and did not sign the May 16, 2006 IEP.

12. For the 2006-2007 school year, Student attended sixth grade at Memorial Academy, a District charter school. Elizabeth Calvin Smith was Student's English/language arts and history teacher. Ms. Smith has a M.A. in Education and seven years of experience as a teacher. According to Ms. Smith, Student was well-behaved, tried hard in class, carried a good attitude, attended school on a regular basis, and performed his homework. Student did not complete school work and performed poorly on tests, primarily due to his below average speaking and reading abilities. Student's test scores and grades support this testimony. For sixth grade students, a DRP score of 54 or above reaches or exceeds expectations. On June 19, 2007, Student tested with a DRP score of 40 which is far below

expectations and indicates that Student reads at a first or second grade level. In mathematics, Student does not know the multiplication tables and has difficulty reading and solving problems. At the conclusion of sixth grade, Student's teachers gave him an "F" grade in both English/language arts and mathematics. Student is significantly behind in these academic subjects and Ms. Smith expressed great concern that Student is not ready to enter seventh grade for the 2007-2008 school year.

13. Alana Plair served as a Speech and Language Pathologist for the District. Ms. Plair has earned a bachelor's degree in Communications and Spanish. In 2004, she earned a master's degree in Speech and Language Pathology. Ms. Plair was the Speech and Language Pathologist who provided Student with speech and language services for the 2006-2007 school year. Ms. Plair also acted as Student's special education Case Manager. Ms. Plair provided speech and language services to Student twice a week for 45 minutes. She helped Student with language sequencing, vocabulary and receptive and expressive language needs. Student made minimal to no progress on the speech and language goals set forth in his May 2005 and May 2006 IEPs. Ms. Plair predicted that Student will not do well in seventh grade because he is "not prepared."

14. On March 22, 2007, Alana Plair organized an SST meeting which Student and his mother attended. District personnel who attended this SST were Ms. Plair, Susan Nguyen and Elizabeth Smith (Student's sixth grade teachers at Memorial Academy), Dina Galvin (a Counselor at Memorial Academy) and Joseph Gama (the Vice-Principal at Memorial Academy). The SST members noted that Student is a "great student," helpful, organized, well-behaved and a hard worker. The SST members also noted many concerns: Student has trouble expressing himself; he is confused when asked questions; he communicates like a seven-year old; and he has a hard time reading, spelling and understanding directions.

15. At the March 22, 2007 SST meeting, Ms. Plair gave Student's mother an Assessment Plan which is the subject of this due process proceeding. Ms. Plair provided to Student's mother the Assessment Plan in both English and Spanish. Ms. Plair also provided to Student's mother a Notice of Procedural Safeguards in conjunction with the Assessment Plan. The purpose of the Assessment Plan was to perform a triennial assessment of Student. The Assessment Plan proposed to test Student in the areas of academic achievement, language/speech communication development, intellectual development and processing, social/emotional/adaptive behavior, and health. The Assessment Plan proposed a full psychoeducational evaluation with the use of well-known standardized tests,<sup>2</sup> together with observations and a record review. Ms. Plair testified that the proposed assessment tools have

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<sup>2</sup> In the area of academic achievement, the District proposed to test Student with the Woodcock-Johnson Psycho-Educational Battery. In the area of language/speech communication development, the District proposed to test Student with the Comprehensive Assessment of Spoken Language and the Comprehensive Receptive and Expressive Vocabulary. In the area of intellectual development and processing, the District proposed to use the Wechsler Intelligence Scale for Children (English) and the Test of Auditory Perceptual Skills-Revised. In the area of social/emotional/adaptive behavioral, the District proposed to test Student with the Behavioral Assessment System for Children.

been validated for the specific purpose for which such tests will be used, and that the tests do not discriminate on the basis of race, sex or culture. The Assessment Plan proposed that a Resource Specialist in Special Education will administer the test of academic achievement, that a Speech and Language Pathologist will administer the test of language/speech communication development, that a School Psychologist will administer the tests of intellectual development and social/emotional/adaptive behavior, and that a School Nurse will perform the health assessment. Ms. Plair testified that each proposed assessor is credentialed, qualified and competent to perform such assessments.

16. At the March 22, 2007 SST meeting, Student's mother informed the District that she wanted to exit Student from the speech and language services that the District was providing. She informed the SST members that Student very much disliked receiving such services. In contrast, Ms. Plair testified that Student never complained to her about the speech and language sessions. The SST members suggested interventions to help Student with his schoolwork, including after-school tutoring and further special education services. Student's mother declined such suggestions. Ms. Plair testified that she attempted to gain the informed consent of Student's mother for the Assessment Plan by explaining to her in detail the different aspects of the plan. The District also mailed the Assessment Plan to Student's mother. Student's mother did not give her consent to the March 22, 2007 Assessment Plan.

17. Student's mother did not give consent to the March 22, 2007 reassessment because the District already had an opportunity to assess her son in May 2005, and because Student was not making progress at school. In a written document, Student's mother also indicates that she has not given consent to the proposed Assessment Plan because the District denied her request for a tutor for her son. Student's mother stated that the May 2005 assessment greatly affected her son and she expressed concern that Student would feel abused and troubled if the District were allowed to conduct the proposed psychoeducational reassessment. Student's mother expressed concern that, in the past, District personnel have asked Student sensitive questions relating to the lives of his parents, and that the same indiscretion might happen in the course of the proposed reassessment.

18. The District must be allowed to perform the proposed psychoeducational reevaluation set forth in the March 22, 2007 Assessment Plan. The Assessment Plan is necessary to determine the educational needs of Student. At present, the only assessment that the District has performed for Student is the speech-language pathology Assessment Report completed in May 2005, and described in paragraph 8 above. The information in the May 2005 assessment must be updated. The March 22, 2007 Assessment Plan is appropriate and will provide information necessary for the District to develop a more comprehensive and helpful education plan for Student. Student has great difficulties with receptive and expressive language skills which have caused him to fall far behind in the basic academic areas of reading, writing and mathematics. He failed these courses in the sixth grade. Student's mother testified that she wants the District to provide specialized services that her son needs. She wants her son to show progress, to become a good student and a productive citizen. The District cannot help Student achieve the goals that his mother has for him unless the District is allowed to perform the proposed psychoeducational reassessment.

*Implementation of the June 8, 2007 IEP*

19. A school district that is responsible for providing a free appropriate public education (FAPE) to a child with a disability must seek to obtain the informed consent of the child's parent before providing special education and related services to the child. If the child's parent previously has provided such consent, but refuses the special education program in a current IEP, then the district must bring a due process complaint seeking an order that the IEP offered the child a FAPE.

20. In determining whether an IEP offered a FAPE, the school district must meet a two-part test. First, the district must satisfy procedural requirements in the development of the IEP. Second, the IEP must satisfy a substantive standard: (1) the district must design the IEP to meet the unique needs of the student, and (2) the special education program in the IEP must be reasonably calculated to provide the student with some educational benefit.

21. Starting in late April 2007, the District attempted to schedule Student's annual IEP meeting. On May 10, 2007, the District mailed to Student's mother an IEP Notice that scheduled a meeting on May 18, 2007. The District did not receive a response to this notice. On May 24, 2007, the District mailed to Student's mother an IEP Notice that scheduled a meeting on June 1, 2007. Student's mother appeared at the June 1, 2007 IEP meeting, but left after a short time, stating that she could not stay for an entire session. On June 1, 2007, the District mailed to Student's mother an IEP Notice that scheduled a meeting for June 8, 2007. This IEP proceeded as scheduled.

22. On June 8, 2007, the District held the annual IEP for Student. The following persons attended this IEP meeting: Student's mother, Alanna Plair, Elizabeth Smith and Susan Nguyen, Dina Galvin, Joseph Gama and Peter Penman. The District provided a Spanish-English translator for Student's mother. Student's mother stated her concerns that her son was doing poorly in school and not bringing home his homework. District personnel discussed Student's difficulties in school. Alana Plair stated that Student made little progress on the goals in previous IEPs. District personnel suggested the same interventions that were discussed at the March 22, 2007 SST meeting. District personnel once again urged Student's mother to agree to permit the District to conduct the psychoeducational reassessment set forth in the March 22, 2007 Assessment Plan. During the IEP meeting, District personnel gave to Student's mother a Notice of Procedural Safeguards.

23. At the time of the June 8, 2007 IEP meeting, Student had unique needs in the areas of expressive and receptive language skills. These needs manifest in all areas of Student's ability to communicate. Student's speaking skills are far below average. He has a limited vocabulary and speaks in fragments. Student's listening skills are limited. He has difficulty understanding instructions and making inferences or predictions from what he has heard. He struggles to answer basic questions concerning events and factual information. Student's reading abilities are also very limited. He reads at a first grade level and has difficulty understanding instructions. Overall, Student has difficulty retaining and applying information that he has learned. The end result is that Student does not understand concepts,

cannot complete his work, and performs poorly in class and on standardized academic tests. Student has shown increasing frustration because his unique needs prevent him from working independently in the classroom.

24. At the June 8, 2007 meeting, Alana Plair prepared the IEP. According to Ms. Plair, the team discussed Student's unique needs during the meeting and the IEP document recognizes such needs in the areas of receptive and expressive language skills. The District continued to find Student eligible for special education under the disabling condition of SLI. The IEP contains statements of Student's present levels of educational performance. The IEP contains two measurable annual goals. In the first goal, Student "will show growing abilities in communication and language by asking/answering at least 10 different questions on 8 of 10 occasions to get or provide information as measured by SLP logs and observations." In the second goal, Student "will name at least 6 items in at least 7 different categories with 80% accuracy as measured by SLP logs and observations." The IEP contains descriptions of how Student's progress on the two goals will be measured. The IEP contains a description of the special education and related services that the District wants to provide Student: speech-language pathology for a total of 27 hours during the 2007-2008 school year in a small group outside the general education classroom. Otherwise, the IEP places Student in the general education classroom. The IEP contains a statement that, for program modifications, the Speech and Language Pathologist who provides the speech and language services will consult with Student's teachers to discuss supports for instruction and progress. The IEP reflects that the team considered Student's strengths, his mother's concerns, the May 31, 2005 speech-language pathology assessment, and Student's academic, developmental and functional needs.

25. Student's mother did not sign the IEP. She also did not give consent for the implementation of the IEP. During the due process hearing, Student's mother stated that she understands that her son needs speech and language services. She indicated that she did not sign the June 8, 2007 IEP because Student did not make progress in school and did not like the speech and language services that he received.

26. The District described the June 8, 2007 meeting as a "speech only" IEP. The District concentrated on Student's expressive and receptive language skills because it did not have an opportunity to conduct the psychoeducational reassessment set forth in the March 22, 2007 Assessment Plan. In terms of Student's communication deficits, the June 8, 2007 IEP is designed to meet his unique needs. This IEP is also reasonably calculated to provide Student with educational benefit. The June 8, 2007 IEP offers Student two new goals in the area of communication skills. These goals are designed to build Student's vocabulary and improve his skills in asking and answering questions. The IEP also offers Student speech and language services from a Speech and Language Pathologist in a small group setting. These services will further help Student in his receptive and expressive language skills. Although Student's mother has not given consent to the June 8, 2007 IEP, she must allow the District to implement this IEP, until such time as the District can perform a full psychoeducational reassessment of Student and prepare a more comprehensive educational plan for him.

## LEGAL CONCLUSIONS

1. District has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528] (*Schaffer*).

*Is the District entitled to reassess Student based upon the March 22, 2007 Assessment Plan?*

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the child with a disability at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006),<sup>3</sup> Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. The District has determined that Student is a child with a disability in that he has a speech or language impairment which is a recognized disabling condition under IDEA. (34 C.F.R. § 300.8(a)(1), (c)(1); Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (c).)

4. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, renewed and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592]; see also *Roxanne J. v. Nevada County Human Services Agency* (E.D.Cal. Nov. 2006) 46 IDELR 280 [the IEP is the road map for the student’s special education].)

5. In order to meet the continuing duty to develop and maintain an appropriate IEP, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) In addition, the school district must conduct a reassessment of the child with a disability not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The district must conduct a reassessment if the district “determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.” (20 U.S.C. § 1414(a)(2)(A)(i); see also 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a).)

6. School districts must perform assessments and reassessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor. (34 C.F.R. § 300.303(a); Ed. Code, § 56381, subs. (a), (e).) The district must select and administer assessment materials that appear in the student’s native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. §

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<sup>3</sup> All references to the Code of Federal Regulations are to regulations promulgated by the United States Department of Education, effective October 13, 2006.

1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1)(ii); Ed. Code, § 56320, subd. (a).) The district must administer assessment materials that are valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) The district must administer assessment materials that are sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

7. In addition, to perform a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the child with a disability and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subs. (b)(2)(B) & (D).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); 34 C.F.R. § 300.304(c)(7); Ed. Code, § 56381, subd. (c).)

8. In order to start the process of assessment or reassessment, the school district must provide proper notice to the student and his/her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and companion state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. Normally, before a school district performs an assessment of a child with a disability, the district must obtain informed parental consent for the assessment. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(c)(1)(i); Ed. Code, § 56321, subd. (c).) However, the district need not obtain informed consent if the district can demonstrate that it took reasonable measures to obtain such consent and the student and/or the child's parents failed to respond. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f).) Instead, in the event that a parent or disabled student does not provide consent, the district may bring a due process complaint seeking an order that requires the child to present for the reassessment. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, § 56501, subd. (a)(3); *Schaffer*,

*supra*, 546 U.S. at p. 53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”].)

10. School districts have the right to conduct assessments and reassessments of students who request and receive special education and related services. A student who does not permit such testing is not entitled to receive benefits under IDEA and related state law. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315 (*Gregory K.*); *Wesley Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.)

11. Based upon Factual Findings 3 through 18 and Applicable Law 2 through 10, the District is entitled to reassess Student based upon the March 22, 2007 Assessment Plan. The proposed Assessment Plan meets the standards set forth in federal and state law. The proposed standardized tests are in Student’s native language and free of racial, cultural and sexual bias. The proposed standardized tests are valid and reliable for the purposes for which they are used. The proposed reassessment is sufficiently comprehensive and tailored to evaluate specific areas of Student’s educational needs. Trained, knowledgeable, competent and credentialed personnel will administer the reassessment. As part of the Assessment Plan, the District will consider existing evaluation data, including the comments of Student’s mother and classroom-based observations of Student.

Most importantly, the improved academic achievement of Student warrants the proposed reassessment. Student’s receptive and expressive language skills remain far below average. As a result, though he works hard and has a good attitude, Student continues to struggle in the basic academic areas of reading, writing and mathematics. The District needs further information concerning Student’s strengths and weaknesses in order to develop a more comprehensive educational program for him. Student’s mother must realize that the proposed reassessment will not harm her son and that, if she does not provide consent for the reassessment, he likely will fall hopelessly behind his peers in school.

*Can the District implement the June 8, 2007 IEP?*

12. The definition of free appropriate public education (FAPE) includes special education and related services that a school district provides to a child with a disability. (20 U.S.C. § 1401(a)(9).) “Related services” within the meaning of this definition include developmental, corrective or other supportive services designed to enable a child with a disability to receive a FAPE. (20 U.S.C. § 1401(a)(26)(A).) “Related services” include speech-pathology services. (20 U.S.C. § 1401(a)(26)(A); Ed. Code, § 56363, subd. (a).)

13. A school district that is responsible for providing FAPE to a child with a disability must seek to obtain the informed consent of the parents of the student before providing special education and related services to the child. (Ed. Code, § 56346, subd. (a).) If the parents of the child with a disability refuse the services set forth in an IEP after having consented to such services in the past, then the school district must file a request for due process seeking confirmation that the IEP provided FAPE for the child. (Ed. Code, §§ 56346, subd. (d), 56501, subd. (a)(1).)

14. There is a two-part test for evaluating whether an IEP provides an “appropriate” education within the meaning of FAPE. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034] (*Rowley*).) First, the court must determine whether the school district complied with the procedural requirements set forth in IDEA . (*Ibid.*) Second, the court must determine whether the IEP was designed to meet the unique needs of the student and reasonably calculated to provide the student with some educational benefit. (*Ibid.*; *Van Duyn. v Baker Sch. Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 776.)

15. There are numerous procedural requirements in IDEA and companion state law. The more important requirements relate to the development of the IEP for the child with a disability. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 882 [“Among the most important procedural safeguards are those that protect the parent’s right to be involved in the development of their child’s IEP developmental process.”] (*Amanda J.*.) The IEP team must consist of (1) the parents of the child with a disability, (2) at least one regular education teacher of the child, (3) at least one special education teacher or provider for the child, (4) a district representative who is knowledgeable about the provision of special education, (5) a person who can interpret the instructional implications of assessment results, and (6) whenever appropriate, the child with a disability. (34 C.F.R. § 300.321(a); Ed. Code, § 56342, subd. (b).)

16. In developing an IEP, the school district, together with the parents of a child with a disability, must consider the strengths of the child, the concerns of the parents, the results of initial and recent assessments, the academic, developmental and functional needs of the student, and special factors including whether the child needs assistive technology. (34 C.F.R. § 300.324(a); Ed. Code, § 56341.1, subsd. (a), (b).)

17. In the IEP meeting, the school district must also ensure that the parent of the child with a disability participates in an informed and meaningful manner. (34 C.F.R. § 300.322; Ed. Code, § 56341.4; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484-1485.)

18. A school district must review the IEP of a child with a disability at least once a year in order to determine whether the annual educational goals are being achieved, and make revisions if necessary. (34 C.F.R. § 300.324(b)(i); Ed. Code, § 56341.1, subd. (d).) In addition, the district must have an IEP in effect for a child with a disability at the beginning of each school year. (34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (b).)

19. A school district must provide to the parents of a child with a disability a Notice of Procedural Safeguards at each IEP meeting that the district convenes for the child. (Ed. Code, § 56500.1.)

20. Substantively, a school district must design the IEP for a child with a disability to meet the unique needs of the child. (*Capistrano Unified Sch. Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 893.) This requires the district to meet the content standards for an IEP

which are both procedural and substantive requirements. (*Ojai Unified Sch. Dist. v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1469; *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078, fn. 6.) An appropriate IEP must contain (1) a statement of the special education student's present levels of academic achievement and functional performance, (2) a statement of measurable annual goals designed to meet the student's unique needs and afford progress, (3) a description of how the student's progress on the goals will be measured, (4) a statement of the specialized instruction and related services that the district will provide to enable the student to attain the annual goals, (5) an explanation of the extent to which the student will not participate with nondisabled pupils, (6) a statement of accommodations, if needed, and (7) the beginning date, frequency, location and duration of the special education and related services that the district will provide. (34 C.F.R. § 300.321(a)(1)-(7); Ed. Code, § 56345, subd. (a)(1)-(7).)

21. In addition, substantively, a school district must design and offer an IEP that is reasonably calculated to provide the student with some educational benefit. (*Rowley, supra*, 458 U.S. at pp. 198-201; *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) In this regard, providing an appropriate education does not require a district to offer an education which is the absolute best, the most potentially maximizing, or a program preferred by the child's parents. (*Gregory K., supra*, 811 F.2d at p. 1314; *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.) Rather, the district must furnish a "basic floor of opportunity" that provides specialized instruction and related services individually designed to provide educational benefit. (*Rowley, supra*, 458 U.S. at pp. 200-201; *E.W. v. Rocklin Unified Sch. Dist.* (E.D.Cal. Sept. 2006) 46 IDELR 192.)

22. Based upon Factual Findings 3 through 26 and Legal Conclusions 12 through 21, the District may implement the June 8, 2007 IEP for Student. In this IEP, the District offered a free appropriate public education to Student in the area of speech and language. The District satisfied procedural requirements relating to the IEP. The District gave Student's mother adequate notice of the IEP and permitted her to participate in a meaningful manner at the meeting. The IEP participants satisfied the applicable legal standard for the composition of the team and included District personnel with the most knowledge of Student's unique needs, including his sixth grade teachers and speech and language service provider. The June 8, 2007 IEP reflects that the team took into consideration Student's strengths, his mother's concerns, the results of the May 2005 Assessment Report, and Student's academic, developmental and functional needs. During the IEP meeting, District personnel gave to Student's mother a Notice of Procedural Safeguards.

The determination that the IEP is substantively appropriate is an issue that, more than most, involves "educational policy." (*Gregory K., supra*, 811 F.2d at p. 1314.) In this case, the District must have an IEP in place for Student at the beginning of the 2007-2008 school year. Student's mother has not provided consent to the May 2006 and June 2007 IEPs developed by the District for her son. Technically, this means that the District must provide the special education program set forth in the May 2005 IEP for which Student's mother did give consent. (20 U.S.C. § 1415(j).) However, Alana Plair testified that Student has made little progress on the goals set forth in this IEP. In terms of providing

a comprehensive special education program for Student, the District is further disadvantaged because Student's mother will not agree to allow the District to perform a full psychoeducational reassessment of her son.

Until such time as the District can fully reassess Student, the June 8, 2007 IEP must suffice. This IEP satisfies the content standards for IEP documents. This IEP is designed to meet Student's unique needs in the areas of receptive and expressive language abilities. This IEP is also reasonably calculated to provide Student with some educational benefit. The IEP offers two new goals to build Student's communication skills, and offers related services in the form of speech and language classes that the District will provide through a Speech and Language Pathologist in a small group environment.

### ORDER

1. The District may conduct a reassessment of Student according to the Assessment Plan dated March 22, 2007. Student's mother shall make Student available for the proposed reassessment.
2. The District may implement the June 8, 2007 IEP for Student.

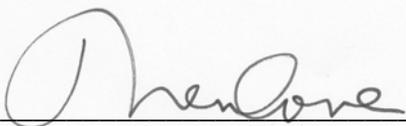
### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on the two issues presented for decision in this case.

### RIGHT TO APPEAL DECISION

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 90 days of the receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: September 4, 2007



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TIMOTHY L. NEWLOVE  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division