

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

Parents, on behalf of STUDENT

v.

GLENDALE UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2008050542

GLENDALE UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2008050589

v.

Parents, on behalf of STUDENT.

DECISION

Administrative Law Judge Christine L. Harwell, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard these consolidated matters in Glendale, California, on June 16, 2008, thru June 19, 2008.

Dana M. Dorsett, Attorney at Law, represented Petitioner (Student). Student's mother (Mother) attended the hearing on the first, second, third and part of the fourth day. The hearing was interpreted into Korean for Mother by Jaeis Chon, Certified Interpreter (certificate number 301034).

Jennifer R. Rowe, Attorney at Law, represented Respondent, Glendale Unified School District (District). Lou Stewart, Assistant Superintendent, Special Education attended the hearing on all days on behalf of the District.

On May 12, 2008, Student filed his Request for Due Process Hearing, OAH Case No. 2008050542 (Student's Complaint).

On May, 15, 2008, District filed its Request for Due Process Hearing in OAH Case No. 20805089 (District's Complaint).

On June 11, 2008, District's Motion to Consolidate the District's Complaint and the Student's Complaint was granted. The timeline for Student's case were applied to the consolidated cases. Student's issues were withdrawn at hearing.

ISSUE

Did District's April 28, 2008, psycho-educational assessment properly assess Student in all areas of suspected disability prior to the April 30, 2008, IEP team meeting, such that Student is not entitled to an IEE by Claudia McCulloch, Ph.D., at public expense?

FACTUAL FINDINGS

1. Student is a 13-year, 11 month-old boy who has resided in the District at all relevant times.
2. Student attended First Lutheran School of Los Angeles in 1993 for pre-school through fifth grade (2004) when he was eleven years old. He attended New Covenant Academy in Los Angeles for sixth grade in 2005 through the end of the fall semester of the seventh grade in December 2006, when he was thirteen and a half years old. Student's home language is Korean, but he is fluent in, and prefers to speak, English.
3. Student attended Rosemont Middle School (Rosemont) in the District from February 5, 2007 to March 4, 2008, when he was suspended for disciplinary reasons. Upon enrolling at Rosemont, District administered the California English Language Development Test (CELDT). Student's scores placed him in the intermediate proficiency level for listening, and in the advanced level in speaking, reading and writing. Student failed proficiency in the Korean language. During the spring semester of 2007, he and all other seventh grade students were administered the California Standardized Test (CST) for English-Language Arts and Mathematics. The results were reported on the Standardized Testing and Reporting (STAR) Program report that was sent to parents. Student rated advanced in English-Language Arts and proficient in Mathematics. During his spring 2007 semester at Rosemont, Student received passing grades in all classes with a grade point average (GPA) of 2.666. In that spring 2007 semester, Student had two behavioral infractions for gum chewing and being tardy. In the fall 2008 semester, however, he failed two classes (English and Concert Band) and achieved D's in Introduction to Algebra and Physical Science; his cumulative GPA for fall 2008 was 1.333. In the fall 2008 semester, Student had two more behavioral infractions, one for cheating on a running activity in physical education class, and one for chewing gum. Student was not enrolled in a special education program at any time during his school career.

4. On March 4, 2008, Student's teacher found that he possessed firecrackers, a nine-inch butterfly knife, brass knuckles with an extended point, soft pellets for a soft pellet gun and a camera phone that depicted a photo of Student posing in gang attire flashing a gang sign. Student was arrested and removed from school. District convened expulsion proceedings. At the time of Student's suspension March 4, 2008, District placed Student in independent study off campus through Jewell City Community Day School (Jewell). Student had to appear weekly for an instructor at Jewell to check his progress, but otherwise Student was not attending school. He was also receiving private tutoring in math. During that time and to the present, Student has been able to complete his eighth grade assignments.

5. On March 18, 2008, Student's parents requested that District perform a special education assessment because they were concerned about Student's decline in academic achievement and his behavior. Parents requested that Student's disciplinary panel hearing be postponed, which was granted. An initial IEP eligibility meeting was scheduled for April 30, 2008. District agreed to perform a psycho-educational assessment regarding Student's eligibility for special education on an expedited basis in order to supply information to an IEP team that was created in response to parent's request.

6. On April 25, 2008, school nurse, Melinda Danlag, R.N. (Danlag), interviewed Student's mother (Mother) regarding Student's prior medical history. Mother reported to Danlag that when Student was an infant he fell on his head more than three feet to the floor, and, in a separate incident, at age one and a half, he had convulsions due to high fever. Mother also reported that when Student was both three years old and eleven years old, he had stitches to his forehead and eyebrow for injuries; he also has a history of frequent blisters on his lips. During that interview Mother advised Danlag that Student took Adderall every morning to treat his ADHD. District had twice required Mother to complete medical information cards that identified Student's condition, but Mother did not list ADHD as a pre-existing condition of Student. Mother testified that she did not list the information on the two health forms because she did not consider Student's ADHD to qualify as a "medical condition." She did not believe that the District asked whether Student had ADHD. Mother reported to Danlag that Student was unpredictable, had difficulties completing tasks, bit his nails, could not follow directions, was quick to anger, sucked his thumb, acted without thinking and had sleep problems.

7. On April 8, 22 and 27, 2008, District's school psychologist, Georgia Katelanis (Katelanis), conducted a special education assessment of Student. Katelanis arranged for a battery of tests to be administered by Student's teachers and herself. Katelanis is a credentialed school psychologist, who has been employed by District since 1990. She is experienced with the test protocols, assessment materials and procedures used for the purpose of assessment and placement of individuals with exceptional needs. The tests were selected and administered over three days so as not to fatigue Student. The tests were administered so as not to be racially, culturally, or sexually discriminatory. Katelanis considered Student's dominant language in selecting the assessment instruments, and because Student was proficient in English, determined to administer them in English. For cognitive functioning she administered the Kaufman Assessment Battery for Children – 2nd

Edition (KABC-II), and the test of Auditory Processing Skills -3 (TAPS-3). Katelanis tested Student's psycho-motor skills with the Beery Test of Visual/Motor Integration (VMI), and the Test for Visual Perceptual Skills-3 (TVPS-3). For Student's social-emotional assessments, she administered the Conners' Teacher and Parent Rating Scale Revised (Conners') and Conners-Well's Adolescent Self-Report Scale (Conners-Wells); the Piers-Harris-2 (Piers-Harris), a self-rating scale designed to measure a child's self-concept, and the Reynolds Adolescent Depression Scale-2 (RADS-2), that addresses symptomatology of depression. James Mackey (Mackey), a resource management special education teacher for the District, administered the Woodcock-Johnson III Tests of Achievement for analysis of Student's academic skills (WJIII).

8. Based on the results of the assessment, Katelanis did not find that Student was eligible for special education. Katelanis explained the standardized assessment findings as follows:

a) KABC-II: This assessment assesses cognitive abilities and processing skills.

Student's scores on the sub-tests ranged between 93 through 107; the average is from 85 to 115.

b) TAPS-3: This test addresses reasoning, memory and attention. Student's scores ranged from low of 7 in word order, to a high of 13 in block counting. The scoring average is a range of 7 to 13. Katelanis performed limits testing,¹ but Student's scores reflect only his original answers made before some questions were re-asked. Katelanis considered that if limits test scores had been recorded, Student may have done better on the test.

c) VMI: This assessment tests visual and motor skills in which Student was directed to copy designs by paper and pencil. Student obtained a score of 106, the average range is from 85 to 115. The results validate that Student should do well in math, which is a subject, except in the fifth grade and until recently, he excelled, for example, on entering Rosemont Student's overall proficiency on the STAR in mathematics was "proficient."

d) TVPS-3: This test of visual-motor processing has no motor component; it is memory of words exercise. Student did well with scaled scores of 10 to 13, while the average scaled scores are 7 to 13. His overall standard score of 112 fell within the high average range; ranking him in the 79th percentile (i.e. 79 percent of students his age scored lower than Student).

e) Conners': This is an assessment of social/emotional adjustment relevant to issues of ADHD. It involves questions submitted to teachers regarding their observations of a student's behavior in three areas: oppositional; cognitive problems/inattentive; and hyperactivity. There are two versions of the questionnaire, a short form that seeks information and ratings observations about a student's oppositional behavior, cognitive and inattention behavior and hyperactivity generally to obtain an ADHD index, and a long form

¹ Katelanis explained that it is her practice to administer a test such as the TAPS-3 or the KABC II to students according to the directions; however, she may re-administer certain questions if she suspects that a student did not understand the instructions. The re-asked questions are deemed "limits testing," which, if a student's answer is substantially different, reveal that the student has the ability to reason the correct answer but misunderstood the instructions which led to an inaccurate answer. When limits testing is used, Katelanis only records the original standardized results and not the subsequent limits testing scores. She did not make notes of her limits testing of Student.

addressed more specifically to particular ADHD symptoms. Katelanis used the short form. The results showed inconsistency of opinion wherein three of Student's teachers, Ms. Boudreau (Beaudreau), Student's math teacher, Mr. Michael Anker (Anker), history teacher, and Ms. Baldwin (Baldwin), science teacher, rated Student mostly "average" in the three areas questioned, however, each reported they observed one or more areas of mildly or slightly atypical behavior. Another teacher, Mrs. Arrow (Arrow), however, rated Student atypical in all areas, which resulted in an ADHD index of "markedly atypical." Based on the averaged responses Katelanis deemed Student to have no significant atypical behavior. Similarly, Mother rated Student with ratings from average, slightly and mildly atypical and, in one category markedly atypical, which resulted in an ADHD index score of "markedly atypical." Katelanis explained that even with the more severe rating by Arrow and Mother, Student's behavior totals were average in the categories, except for attention. Katelanis explained that she interviewed teacher Arrow who explained that Student has destructive friends in the class that cause him distraction. The other teachers described that Student would do better if he completed his homework assignments and that he has an attitude of not being interested.

f) Conners-Wells: This is a self-evaluation completed by Student regarding his own perception of his abilities. Student rated himself the lowest in the areas of attention. Student acknowledged he would make careless mistakes, or had trouble paying attention. Katelanis reported that none of Student's scores were in the significant range.

g) Piers-Harris: This is another self-report that Student completed regarding his self-concept. His overall T-score was 51 which fell within the average range. The responses revealed that Student considered himself to be in the low average range in the areas of intellectual and school status. He rated himself in the average range in the areas of behavioral adjustment, physical appearance and attributes, happiness and satisfaction. He scored himself above average range in the areas of freedom from anxiety and popularity. Katelanis did not consider that this self-test revealed any pervasive disability and that Student's responses were age-appropriate.

h) RADS-2: This is also self-administered; Student received a T-score of 41 that Katelanis explained was not significant. The test does not diagnose depression. The results did not reflect that Student suffered from depression.

9. Katelanis considered that she obtained an overall picture of Student as having some limited alertness, whether it was caused by ADHD or otherwise, that was not so severe to qualify for special education. She explained that under the IDEA the disability category to consider and test for would be that of other health impaired (OHI) which includes ADHD as a qualifying condition if it is chronic and acute. Katelanis explained that District does not test to reach of medical diagnosis for ADHD. The District tests students to determine whether a condition such as ADHD, if it exists, causes a student to have limited strength, vitality or alertness that is due to chronic or acute health problems that result in limited alertness with respect to the educational environment. She ruled out two other categories of emotionally disturbed (ED) or severe learning disability (SLD), which she considered were the only other relevant eligibility categories under the OHI category of the IDEA that may have applied to Student but which District's tests demonstrated are not applicable to him. Katelanis recommended that Student remain in the general education curricula with

interventions. She noted that one of the interventions she recommended, attendance at an after-school session, had been offered but rejected by Student. She considered that the primary reason for Student’s failing grades was his failure to do his homework, perceived unreasonably high expectations of his parents regarding his grades, and being tired from staying up too late. Her report provided accommodations to address Student’s limited attention issues.²

10. Mackey, administered the WJIII for academic achievement. Mackey has taught special education for five years; this was his first year with District. Mackey has a bachelor’s degree from San Diego State University and a Level 1 Education Specialist Credential from National University in Los Angeles; he is presently completing his Level II specialist certificate requirements. In graduate school courses he took and participated in class projects regarding the administration of the WJIII subtests. He has administered the WJIII 50 to 60 times; approximately half of the tests were for eligibility determination for special education. Mackey had not previously met Student. Mackey reported that during the two to three hour test period, Student was pleasant, proficient in conversation and typical for his age and grade. He offered Student breaks during the testing, however, Student did not want breaks. He observed that Student did not have attention problems.

11. The components of the WJIII resulted in test scores that, among other things were translated by computer scoring for age-equivalency (A/E),³ standard scores (SS),⁴ and grade-equivalency (G/E).⁵ The tests were clustered and specific sub-tests were administered with the results as follows:

| <u>Subject</u> | <u>A/E</u> | <u>SS</u> | <u>G/E</u> |
|------------------------|------------|-----------|------------|
| Oral Language (Std) | 12-4 | 96 | 7.3 |
| Broad Reading | 13-2 | 97 | 7.8 |
| Broad Math | 16-10 | 111 | 12.4 |
| Broad Written Language | 19 | 118 | 12.9 |

² Katelanis recommended fourteen interventions that included 1) preferential seating in class away from friends; 2) for the teacher to give Student reminders to stay on task; 3) reinforcement for on-task behavior and completion of assignments; 4) monitoring his understanding; 5) Student to write a daily planner for parents to initial; 6) Weekly grade check; 7) parents to use privileges as reinforcement for completion of work daily; 8) Parental praise effort rather than letter grades; 9) timed homework; 10) chunk assignments into smaller parts/steps; 11) chunk long-term projects and plot progress on a calendar; 12) earlier bedtime; 13) Student to attend after school intervention with teacher when available; and 14) Student’s private tutor to contact teacher(s).

³ Age equivalency was given by number of years and months, for instance Student was 13 years, 10 months when he took the test, if his score were exactly at his age range, it would be recorded as 13-10.

⁴ Standard scores are given in norm-referenced tests, it is a score resulting from statistical operations performed on raw scores; types include normal curve equivalent, stanine and scale scores. In the WJIII they are called “standard scores.”

⁵ Grade equivalency was recorded based on the actual school grade a Student’s achievement reached. When Student took the test he was in the 8th grade, approximately the 5th month, so a score at that level would be recorded as 8.5. Any grade over 12.9 would indicate a post graduate level score.

| | | | |
|-------------------------|------|-----|------|
| Math Calculation Skills | 19 | 119 | 13.0 |
| Written Expression | 19 | 114 | 12.9 |
| Academic Skills | 19 | 126 | 13.8 |
| Academic Fluency | 12-9 | 95 | 7.4 |
| Academic Applications | 15-0 | 105 | 10.1 |

On the specific WJIII subtests Mackey administered, Student received raw, standard, age and grade equivalents as follows:

| <u>Subject</u> | <u>Raw</u> | <u>A/E</u> | <u>SS</u> | <u>G/E</u> |
|----------------------------|------------|------------|-----------|------------|
| Word-Letter Identification | 70 | 19 | 120 | 15.4 |
| Reading Fluency | 46 | 10-0 | 87 | 5.4 |
| Story Recall | - | 13-8 | 100 | 8.9 |
| Understanding Directions | - | 11-10 | 95 | 6.7 |
| Calculation | 31 | >21 | 120 | 18.0 |
| Math Fluency | 115 | 17-1 | 110 | 11.6 |
| Spelling | 48 | 19 | 119 | 13.0 |
| Writing Fluency | 25 | 15-7 | 106 | 10.1 |
| Passage Comprehension | 34 | 12-8 | 97 | 7.7 |
| Applied Problems | 45 | 14-4 | 102 | 9.4 |
| Writing Samples | 17-E | >23 | 126 | 18.0 |

12. Student had no particular unusual behaviors or problems with taking the tests; he was focused and did not fidget. Mackey did not administer all of the subtests because the manual allows administration of only selected subtests. Mackey considered that there was no requirement to the order in which subtests are given, it is permissible to change the order in which tests and subtests are presented in the test booklet in order to give the examinee's a change of pace. He explained that he would intersperse timed tests and un-timed tests, he always adhered to the time requirements if they were required, but if no specific time was required he allowed Student time to complete the entire subtest. In regard to suggested starting points, Mackey advised he does not always give all of the questions because where one begins on a test depends upon the examinee's skill level, which is usually determined by the age and grade of the student. In regard to Student, Mackey used starting points that Mackey determined were appropriate, so Student was not required to respond to every question on every test.

13. Student's score results on the WJIII were average and high average with the exception of reading fluency at a standard score of 87, which was Student's lowest score ranking him with an age equivalency of ten years, nine months, and a fifth grade, four month equivalency. Reading fluency is a test for reading comprehension on which Student was not able to answer all the questions in the allotted time. However, Mackey explained that for the 47 questions Student did answer, 46 were correct. Mackey did not consider the reading fluency low standard score to be significant. Mackey also mis-scored three items on the passage comprehension subtest, which would have given student a lower grade. District argued that correct scoring would not have changed Student's overall standard score of 97

but no calculations were presented to substantiate the accuracy of the subtest results or that a miscalculation would not have affected the overall standard score.

14. Mackey also omitted to obtain required basal and ceiling starting and ending points on the passage comprehension and math applied problems subtests. Because the WJIII is administered to a wide range of examinees, in order to be able to start an examinee at an appropriate level of their ability, an examiner may begin a test at what appears to be an appropriate proficiency level. The WJIII scoring sheets advise the examiner of the number of correct answers an examinee should obtain to be certain that the test has not been administered at too high a level of difficulty for the examinee; that is a “*basal*” point. Similarly, in order not to require an examinee to struggle with questions beyond his testing ability, a “*ceiling*” number of incorrect answers is established. In the case of the passage comprehension subtest, the WJIII publisher established the basal as the six lowest correct answers, and the ceiling as the six highest incorrect answers. Mackey started student at question 20. Student had correct answers for numbers 20, 21, 22, 23, 24, but not 25, so no basal was established according to the test protocol. On the same test, which had 47 test items, Student ended the test at question 40, having made an incorrect answer on 40, but having made correct answers on 38 and 39. Therefore, the recommended ceiling was not established on the passage comprehension test. Mackey explained that the passage comprehension portion of the test was not a timed test and, on that sub-test, Student’s standard score of 97 was in the middle of the average range for his age, so Student was able to read as expected. The same type of flaw occurred on the applied problems test that had 63 test items. That test requires the examinee to determine the value of units of measurement, such as coins/dollars, ounces/pounds; or inches/feet. On that test, Mackey had Student start the test at problem 30 and Student missed number 35, so Student did not complete six correct answers to establish a basal. Student ended the applied problems test at number 51; however, so no ceiling was established according to the test requirement because he correctly answered number 47. Mackey also did not record all the WJIII scores on the test booklet. Rather, on the math calculation, spelling and writing subtests, he entered Student’s scores into the computer program, the result was that there was no verification that those scores were accurately transferred to the computer.

15. Katelanis reviewed the existing record of Student’s academic proficiency from the California Standards Test (CST). Katelanis also collected Student’s prior academic reports from Mother and from the District’s computerized “School max” program. Student’s academic history revealed that he performed well academically and behaviorally at First Lutheran School during the first through fourth grades. In fifth grade he earned D’s and F’s in reading, language and composition, social studies, mathematics and science, but earned A’s and B’s in Christian education, memorization, spelling, music, computer, art, and physical education. He had inconsistent academic performance in the sixth and seventh grade at New Covenant Academy. His grades ranged from A+ to F, earning a 2.97 overall GPA at the time of his transfer to District. During the fall of seventh grade he was suspended from New Covenant Academy for two days for bringing a toy BB gun to school and again suspended from that school in December 2006, following an incident of writing racial jokes in class. Once he commenced the spring 2007 semester at Rosemont, he earned

C's or better in all courses during the second semester of seventh grade. Katelanis did not consider the behavior leading to suspension from New Covenant Academy because the record noted that it was to be expunged after a year and more than a year had elapsed. She did not consider that Student's infractions for gum chewing, tardies and one time cheating on a running activity in physical education class to be significant indicators of behavioral problems.

16. On April 30, 2008, District convened an IEP meeting. District provided a Korean interpreter for parents. The IEP team members at the meeting were: parents and Student, Sally T. Buckley (Buckley), principal of Rosemont; Katelanis; Lou Stewart, Assistant Superintendent, Special Education (Stewart); Anker; and Mackey. District's Counsel, Howard Fulfrost, Esq. and parents' counsel, Dana Dorsett, Esq. were also present. Student's counsel provided the IEP team with a psychological evaluation report of Sookyung Chang, Ph.D., TEP, QME, DABS (Dr. Chang), a clinical psychologist who had assessed Student on March 21, 2008. Dr. Chang had administered subtests of the Weschler Intelligence Scales for Children IV (WISC ICV) for verbal comprehension and perception and perceptual motor skills and arithmetic; the Conner's Continuous Performance Test (CPT-II) for attention, concentration and memory, and she tested his executive functions. The report concluded that Student showed deficits in auditory memory; emotional function disorder, and attention and memory problems. Dr. Chang described Student's condition as ADHD with hyperactivity. Dr. Chang reported that she referred Student to a psychiatrist for ADHD medications because Student's behavior could have been prevented with psychopharmacological treatment.

17. The team considered the reports of Katelanis and Dr. Chang. The team had discussions with parents and their representative, having received reports from Principal Buckley that Student had been offered educational intervention of after-school tutoring, that Student had refused. Anker reported that Student did not exhibit attentional issues in his class at school. The IEP team considered the education history gathered by Katelanis, the results of her surveys and assessments and the input of the District's team members. Over the objection of parents, the IEP team determined that Student was not eligible for special education under the IDEA.

Analysis of the information considered by the IEP team

18. At hearing, District's expert Victoria McKendall (McKendall) testified in support of District's assessment. McKendall holds a bachelor of arts degree in Social Science from San Jose State College, and a master of science degree in Counseling from California State University, Los Angeles; she is licensed as an educational Psychologist with the California Board of Behavioral Examiners, and holds credentials in Clear Administrative; Pupil Personnel Services/School Psychology; Life Standard - Elementary, and Life Standard - Secondary. She presently serves as an educational consultant for districts and IEP teams, having served from May 1997 to June, 2006 with the Los Angeles Unified School District (LAUSD) as its Administrative Coordinator for LAUSD's Division of Special Education, Due Process Department. Previously, McKendall was a Senior Psychologist for the Valley

Support Center having served as a school psychologist, reading specialist, diagnostic center teacher and classroom teacher. During her tenure with LAUSD, McKendall estimated that she was involved with 1300 to 1400 special education assessments; approximately 20 percent to 30 percent involved challenges to eligibility determinations.

19. After analyzing the District's assessment scores, the standardized CST and STAR results, and review of Student's grade history, McKendall explained that, using a bell-curve, Student falls within the normal 67 percent of the population in ability. McKendall did not review the test protocols and did not consider that the protocols needed to be reviewed because she saw no discrepancies in the results; she also did not review each answer Student gave for accuracy of scoring. Based on those beliefs, she considered that Student was a student with average ability who functioned commensurate to his abilities. Based on her review she was convinced that Student has no specific processing disorders or emotional problems; he is a child who functions as an average student who does well at times and has a few bad grades at times. Additionally, McKendall did not consider Student's previous disciplinary history indicative of ADHD. She admitted that ADHD may sometimes manifest as willful noncompliance or as defiance of adult direction or similar disruptive activities. But, in Student's case, she considered the record of Student's disciplinary events of bringing a toy BB gun to school, writing racial jokes and the last incident of having firecrackers and weapons does not indicate willful noncompliance, nor was it a sign of impulsivity. She was concerned regarding the recent incident that had a photo with pictures of gang symbols and that Student brought weapons to school. However, she noted that Student had regretted this behavior. She considered that Student merely needs some interventions at school, if he did his homework. As an example, McKendall identified that in the history class where none of Student's "buddies" are present, he did very well, while he did not do well in Arrow's English class because he was more interested in his friends than the class-work. She agreed with the recommendations of Katelanis to get Student back on track at school and at home. McKendall considered that because there were no academic or behavior problems in the first through fourth grades he did not have ADHD. McKendall explained that ADHD is demonstrated in early life, and that it does not manifest later at the middle-school level as Student claims. Therefore she saw no indication that he had patterns of a chronic or acute ADHD condition from Student's history, and that the events in and of themselves were not significant enough to be eligible for special education. In her opinion, Student has mild attention problems that are not related to existing disciplinary problems. She stated that Student appears to be more focused on his friends and not focused on school this year.

20. McKendall acknowledged that there is a later edition of the Woodcock Johnson III test that is called the Woodcock Johnson "Nu" (WJIII-Nu). She opined that the WJIII is not obsolete because of the WJIII-Nu, but the older edition seems to be more inflated than the newer editions. She stated that children demonstrate increased academic ability so the newer editions are more difficult. Because Student's writing is his strength, variations such as the results regarding his increased scores for writing at age equivalent of above 23 years and grade equivalent of grade 18 (which would be six years after 12th grade) are typical, not out of the norm. She explained that the WJIII grade equivalent scores are not normed to actual performance of school grades, so that a grade of 18 does not mean at

Master's level, it is rather a comparison of other children on the test. In regard to scoring on the WJIII test, McKendall explained that, on certain subtests, the protocol of the test recommends that a basal and ceiling be established, but is not always required. She also explained that it is the better practice for an evaluator to enter scores on a computer rather than on a written form to record results.

21. In regard to the Conners' analysis by several teachers, Mother, and Student's self-report, she noted that only one teacher, Arrow, and Mother, rated Student as markedly atypical. Because teacher Arrow had explained that Student was influenced by his friends in class, McKendall considered that explained teacher Arrow's rating. McKendall considered that Mother's analysis was not relevant because Mother did not observe Student's behavior at school. She did not know why some evaluators would use the short form questionnaires versus the long form of the Conners' survey, but considered that it likely took too much time for a District to administer a longer form questionnaire to teachers. She did not know whether parental reports are more reliable than a Student's self-report. In response to whether her opinion would change if she learned that the tests were invalid, McKendall responded that she would still make the same recommendations because Katelanis's analysis was based upon behaviors, not on his completing his work or performing well on the tests.

22. McKendall was not persuasive to establish that the errors District made in Student's testing were insignificant such that no further information would be helpful for an IEP team to determine whether Student was eligible for special education. She did not have sufficient knowledge of the assessment requirements or the weight to be given the results. She rejected the impact of the assessments if they were deemed invalid for being inappropriately administered. She also minimized the possibility that Student's prior grade drops and behavior problems were significant factors for the IEP team to consider. She did not consider the IDEA criteria for eligibility under OHI of attention deficit resulting in limited alertness with respect to his educational environment.

23. Student's expert, Claudia Rodgers McCulloch, Ph.D. (Dr. McCulloch), is a licensed educational psychologist in California. She has a master's degree in Guidance and Counseling, and both a masters degree and a Ph.D. in psychology. She has been a teacher for primary grades, and educator and therapist for emotionally disturbed children in a public school housing project, and a supervisor of psychiatry and medical residents, medical and graduate students. She also was a school psychologist for Los Angeles Unified School District and the Torrance Unified School District, and a post-doctoral fellow at the South Bay Child Guidance Clinic in Torrance, California. Presently Dr. McCulloch is in private practice.

24. Dr. McCulloch reviewed Dr. Chang's report and Katelanis's psycho-educational evaluation, including Student's grade and disciplinary record provided by District. Based on her review of Student's first through fifth grade report cards from First Lutheran School, Dr. McCulloch noted that Student was struggling with attention span and impulse control from the first grade. From those reports, Dr. McCulloch found evidence that Student had some lowered cognitive functioning that impacted his achievement from as early

as the first grade when he was struggling to be attentive. The records revealed that his teachers consistently reported that he needed improvement in developing skills and completing his homework on time. That pattern continued through the fifth grade and his grades steadily declined. Dr. McCulloch considered that there was evidence that Student had serious variability. He had preferential subjects such as physical education, art and music, but, even in those subjects, he did not focus on details. She explained that difficulties with homework, organizing and working at adequate speed may indicate production deficits from ADHD. In the sixth grade, Dr. McCulloch noted extreme variability in Student's performance; he was struggling in science and English. He improved in the seventh grade but his grades demonstrated a pattern of his inability meet the demands of the classroom. She did not consider it appropriate for Katelanis to use the CST and STAR results that Student took as a group achievement testing exercise in the seventh grade to determine his eligibility for special education. She explained that those academic tests are taken by the entire student population and that the students are taught how to take the test in order to excel. She explained that frequently those types of tests do not contain enough items to achieve mastery of a subject. She considered that the STAR results often do not have a functional aspect, and because they are a test of classroom performance of students' abilities compared to one another the results are inappropriate to determine a student's individual needs for eligibility for special education. McCulloch could not find sufficient data in District's psycho-educational report to determine that Student was, or was not, eligible for special education.

25. In regard to Student's disciplinary record, Dr. McCulloch considered that Student's sixth grade incident of bringing a toy BB gun to school was significant. She explained that the incident reveals that Student had problems with planning, behavior and forethought. The same was true for the incident regarding Student's making racial jokes. Dr. McCulloch considered that those acts speak to Student's pattern of not thinking before he acts. She did not consider that Student's gum chewing infractions in the seventh grade were particularly significant, but his cheating in PE class suggested that he did not think before he acted and that the behavior is inconsistent with the apparent values of his family. However, cheating on the running exercise, if it was an isolated incident, is of no significance unless there is a pattern of similar incidents. On review of Student's entire record, including the latest incident of Student's having brought firecrackers, a knife, brass knuckles and pellets to school, Dr. McCulloch detected a pattern of deficient impulse control. Student demonstrated lack of forethought for consequences, the acts were incongruent with his family values and that his knowing the consequences of such acts did not change his behavior. She agreed with McKendall that ADHD may manifest with willful non-compliance as part of a pattern of behaviors, but disagreed with her that Student's behavior infractions did not evidence a pattern resulting from ADHD.

26. Dr. McCulloch disputed McKendall's premise that ADHD manifests at an early age in all subjects. Dr. McCulloch advised that the condition can at times be first detected at the university level. The first indications of the condition may not manifest until grades drop. She explained that ADHD occurs on a continuum; it is often activated when demands increase. In Student's case, she observed his grades dropped in the second quarter

of his third grade at First Lutheran school, in the sixth grade at New Covenant Academy, and also in the eighth grade at Rosemont. She explained that those grade drops do indicate a pattern to consider before determining whether Student is or is not eligible for special education.

27. Dr. McCulloch did not agree that Katelanis's consideration of the Conners' responses from teachers and Mother were proper. She did not consider the use of the short form questionnaire appropriate. She explained that the Conners' long form questionnaire, that takes only about ten minutes longer to answer, provides greater reliability, validity and more information specifically related to ADHD. That information allows the examiner to analyze more fully the behavior observations of others; it is also useful when considering remediation. Teacher Arrow's responses that Student was markedly atypical were significant, as were Mother's because their scores reflect that Student may not have strategies to manage distractions which indicate a possible neurological disorder. She stated that Mother's input on the Conner's evaluation was important in regard to Student's educational functioning because Mother assists him with his homework. Therefore, important symptoms Mother described in her responses to the Conners' survey were overlooked. McCulloch explained that Mother's description of Student's behavior toward homework is that he spends time getting ready to get ready to do it, has motor restlessness, frequently gets up, and shows lack of focus by asking irrelevant questions. She considered these activities to indicate that Student is not transitioning from one activity to another. These attention problems are challenging to him and cause him to be easily distracted; the disability is a cause for his not completing his homework, staying on task, listening to the teacher and following rules. McCulloch did not agree that it was appropriate to simply add together the Conners' scores from the teachers and Mother and create an average to determine that Student was not atypical. She considered that the assessment data on the Conners' was not sufficient to rule out any special education condition nor could it be used to qualify or disqualify a Student for special education.

28. In regard to the WJIII administered by Mackey, Dr. McCulloch was of the opinion that the test was superseded by the WJIII-Nu. This information is disputed by the District that submitted a declaration that established that the WJIII-Nu did not make the WJIII obsolete. District has established that the WJIII was an appropriate test to administer to Student. Dr. McCulloch did not agree that Mackey could validly record Student's scores on the computer without recording them in the test materials, nor that his conduct of subtests that called for basals and ceilings to be established were valid without his having established basals and ceilings. Dr. McCulloch did not agree that Mackey's mis-scoring of the WJIII writing samples section items 18, 21 and 24, in which Student had written sentences that were grammatically incorrect, was insignificant. Mackey scored Student the maximum of two points on those questions and Dr. McCulloch considered she would have scored at a zero. These rescored answers would have impacted on Student's overall score.

29. Dr. McCulloch considered that the District's conclusion that Student had no disability was inappropriate because there was no indication as to whether Student had taken ADHD medications when the tests were administered to him. Dr. McCulloch also stated that

Student's early closed head injuries raised the possibility of attention deficit disability arising from those traumas. She considered that Katelanis underestimated Student's mental capabilities on the mental processing band on the KABC and TAPS-3. She should have administered a comprehensive memory analysis and more tests in written expression such as the Gray Oral Reading Test, the Gray Silent Reading Test and the Nelson-Denny reading tests. She considered that Katelanis's explanation that after the test she questioned Student and determined that he understood the questionnaire and his responses were valid is not proper. Katelanis should have recorded her limits testing results.

30. Dr. McCulloch gave pertinent, educated observation regarding the insufficiency of District's assessment. District admits errors in the administration of some of the tests and subtests but argues that the few errors noted during hearing were inconsequential. Dr. McCulloch persuasively explained that she considered Student's grade history, behavior patterns and his prior head injury information to raise issues of Student having limited alertness with respect to his educational environment. She provided credible testimony that District's variance from the test protocols and failure to consider Student's atypical behavior made the psycho-educational assessment inappropriate. There was insufficient information for the IEP team to have determined that Student was ineligible for special education.

31. The parties stipulated that should District's assessment be deemed inappropriate, that District Dr. McCulloch was acceptable to perform Student's IEE.

LEGAL CONCLUSIONS

1. The District has the burden of proof that its assessment was appropriate. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. District concedes scoring omissions during the academic assessment but considers them insignificant. District argues that the scores are validated by comparison of Student's academic standardized tests, which establish that Student's academic ability as average or above average. The emphasis of Student's challenges to District's assessment related to two tests, (1) the WJIII academic test administered by Mackey, and (2) the Conners' Teacher and Parent Rating Scale Revised (Conners') that Katelanis used by gathering questionnaires and interviewing teachers and Student's parent. Student asserts that Mackey failed to correctly administer the WJIII test according to the protocols of the producers of the test on three particular sub-tests: the reading fluency, passage reading, and applied problems. Student also asserts that Katelanis improperly administered the short form Conners' questionnaire to teachers and Mother; and she also improperly averaged those score results to justify that Student's ADHD index rating was not markedly atypical. Student argues that, as related to the current perception his teachers and Mother have of his attention deficits, that condition leads toward impulsivity that cause his behavior problems. Student also contends that District improperly disregarded the combined evidence of Student's disciplinary history and his prior head injuries.

3. An initial evaluation must consist of procedures to determine whether a child is a child with a qualifying disability and to determine the educational needs of the child. (20 U.S.C. § 1414 (a)(1)(c).) In conducting the evaluation, a district must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability and the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); see also Ed. Code, § 56320.) The district may not use any single instrument as the sole criteria for determining eligibility and must use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” (20 U.S.C. § 1414(b)(2)(B), (b)(2)(C); see also Ed. Code, § 56320.) Assessments must be conducted in accordance with assessment procedures specified in the federal IDEA and state special education law. (Ed. Code, § 56381, subd. (e).) For example, tests and assessment materials must be validated for the specific purpose for which they are used; must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible; and must be administered by trained personnel in conformance with the instructions provided by the producer of the tests. (20 U.S.C. § 1414(b); 34 C.F.R. § 300.304; Ed. Code, § 56320, subds. (a), (b).) 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 also 20 U.S.C. § 1414(b)(3).) The assessors must use a variety of assessment tools and strategies to gather relevant functional and developmental information to enable the child to be involved in and progress in the general curriculum that may assist in determining whether the child is a child with a disability, and the educational needs of the child. (34 C.F.R. § 300.304 (c).) A parent, teacher, service provider or foster parent may refer a student for a special education assessment. (20 U.S.C. §§ 1414(a)(1)(A), (a)(1)(B); Ed. Code, § 56029.)

4. The IDEA was enacted to ensure that disabled students receive an appropriate education. Under the IDEA, students with disabilities have the right to a free appropriate public education (“FAPE”). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000 et seq.) FAPE is defined as special education and related services that are provided at public expense. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001 subd. (o).)

5. A child with a suspected learning disability must meet the statutory criteria for “child with a disability” to receive IDEA protection. (20 U.S.C. § 1401(3).) The term “child with a disability” means (i) with mental retardation, hearing impairments...other health impairments, or specific learning disabilities, and (ii) who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A); Ed. Code, § 56026, subd. (a).) Generally, “to qualify under IDEA, a child must satisfy three criteria: (i) he must suffer from one or more of the categories of impairments, delineated in IDEA, (ii) his impairment must adversely affect his educational performance, and (iii) his qualified impairment must require special education and related services.” (Ed. Code, § 56076 (b); *Capistrano Unified School Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 899.)

6. A student shall be eligible under the category of other health impairment if both of the following are met: (1) The student has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems or a medically fragile condition such as . . . , attention deficit disorder or attention deficit hyperactivity disorder; and (2) The health impairment adversely affects the student's academic performance. (34 C.F.R. § 300.8(c)(9)(2006); see also Ed. Code, § 56441.11, subd. (b)(1)(H).) A student whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) and who meets the eligibility criteria for other health impairment under Education Code section 56339 and California Code of Regulations, title 5, section 3030, subdivision (f) or (j) is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).) But if the student's ADD or ADHD does not adversely affect a student's performance, instruction shall be provided through the general education curricula. (Ed. Code, § 56339, subd. (b).)

7. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1414(b)(1); 34 C.F.R. § 300.502(a); Ed. Code, § 56329, subd. (c); see also 20 U.S.C. 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining and IEE].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 399.502(a)(3)(i).) To obtain an IEE, the student must disagree with the evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502, subds. (b)(1), (b)(2); 34 C.F.R. § 300.502.) The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 502(b)(2), provides, in relevant part, that following the student's request for an IEE, the public agency must, without unnecessary delay, either provide an IEE or file a due process complaint to request a hearing to show that its evaluation is appropriate. (34 C.F.R. 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

8. In this case, District, within a short amount of time it had on an expedited basis, did use a variety of assessment tools and strategies to gather functional, developmental, academic information, and some parental information, to determine whether Student may be eligible for special education. However, District's witnesses and expert, McKendall, were not able to satisfactorily explain why, in spite of Mackey's faulty WJIII test administration on the writing samples subtest that was mis-scored, and his failure to establish required basals and ceilings on the passage comprehension and applied math problems subtests, that the assessment administration was technically sound to accurately assess Student's cognitive and behavioral factors. McKendall testified that she would consider the recommendations of Katelanis, and the ultimate decision of the IEP team, that Student was not eligible for special education proper, even if it were proven that the tests were invalid. She had no data to establish that ADHD always manifests at an early age, and did not consider Mother's input on the Conner's evaluation as important. She also did not

know what weight to give to parental reports. Based on this testimony, the District did not carry its burden to establish the appropriateness of its assessment by dismissing errors as unimportant, in not giving weight to the reports of teacher Arrow, and Mother, or by considering Student's grade and behavioral history. (Factual Findings 1-17, 19-22; Legal Conclusions 3-7.)

9. In contrast, Dr. McCulloch persuasively testified that the District's test administration was invalid and that the results were unreliable. Specifically, Mackey did not follow the WJIII protocol of establishing basals and ceilings on three tests where the protocol of the publisher of the test required basals and ceilings. He also scored three written answers that were in error due to punctuation with the highest mark of two-points when the test protocol required correct punctuation. Dr. McCulloch credibly explained that those errors were significant in the ultimate scoring of Student's abilities. McCulloch credibly described Student's performance on the CST and STAR in English and math as being in a different setting and there was no relevant comparison to the WJIII because those tests are tests that the entire student population takes and that students study in order to perform well. Unlike Katelanis, Dr. McCulloch saw a potential pattern of attention deficiency in Student's grades from first through the fifth grades. She persuasively explained that ADHD may manifest at any stage of life, not only in pre-school or elementary school. She based her testimony on her experience that provided evidence she had observed and treated ADHD that first arose in graduate students. She also considered that Student's early head injuries were an issue to investigate and consider. Dr. McCulloch considered that Student's sixth grade disciplinary incident of his bringing a toy BB gun to school and writing racial jokes was significant in discerning a pattern of deficiency in impulse control. McCulloch also disagreed with the validity of Katelanis's Conners' conclusion because it was not proper to average the scores when teacher Arrow and Mother had reported Student to be markedly atypical. (Factual Findings 23-30; Legal Conclusions 3-8.)

10. In sum, the WJIII and Conners' were not validly administered to determine whether Student is a child with a qualifying disability and to determine his educational needs. Without reliable results, there is no basis to determine a qualifying disability or educational needs. District failed to meet its burden of demonstrating that Student was properly assessed. Student is entitled to have Dr. McCulloch perform Student's IEE at public expense. (Factual Findings 1-17, 19-31; Legal Conclusions 8, and 10.)

ORDER

All relief sought by District is denied. Student is entitled to an IEE at public expense, to be prepared by Dr. McCulloch.

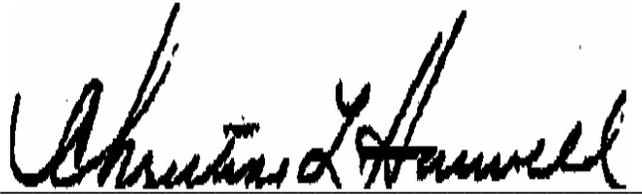
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party on the only issue presented.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. Any such appeal is made must be filed within ninety days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

DATED: July 25, 2008

A handwritten signature in black ink, reading "Christine L. Harwell", written in a cursive style. The signature is positioned above a horizontal line.

CHRISTINE L. HARWELL
Administrative Law Judge
Office of Administrative Hearings