

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PANAMA-BUENA VISTA UNION  
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013060838

**DECISION**

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 22 and 23, 2013, in Bakersfield, California.

Stacy L. Inman and Darren J. Bogie, Attorneys at Law, represented the Panama-Buena Vista Union School District (District). Dr. Rita A. Pierucci, the District's Director of Special Education, was present throughout the hearing on behalf of the District.

Lorie Stewart, Advocate, represented Student. Student's Mother was present for the first day of hearing but not the second. Student did not attend the hearing.

The District filed a request for due process hearing on June 20, 2013. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to August 14, 2013 for the submission of closing briefs.<sup>1</sup> On that day, the record was closed and the matter was submitted for decision.

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<sup>1</sup> The District's closing brief has been filed as District's Exhibit 23, and Student's closing brief has been filed as Student's Exhibit 41.

## ISSUE

Was the District's January-February 2013 psychoeducational assessment of Student appropriate, so that Student is not entitled to an independent educational evaluation (IEE)?<sup>2</sup>

## FACTUAL FINDINGS

### *Background and Jurisdiction*

1. Student is a six-year-old boy who lives with Mother within the boundaries of the District. He first entered public school in August 2012 in the kindergarten class at the District's Panama Elementary School and is now in first grade there. The parties dispute whether he is eligible for special education and related services.

2. On November 30, 2012, Mother asked that the District assess Student in all suspected areas of disability to determine whether he was eligible for special education. She expressed concerns that Student had difficulty concentrating and staying on task, and was easily distracted; that he bit and spit on other students and engaged in other undesirable behaviors; and that he was frequently removed from class and disciplined. In December 2012 the District proposed, and Mother consented to, an assessment plan under which the District would assess Student in the areas of academic performance; self-help, social and emotional status; motor ability; general ability; and speech and language.

3. During January and February 2013, Christine Fleishauer, a District school psychologist, assessed Student and wrote the psychoeducational assessment at issue here. That assessment included academic assessment information produced by Shelly Jensen, a District resource specialist program (RSP) teacher.

4. On March 5, 2013, the District held an individualized education program (IEP) meeting for Student at which the District members decided Student was not eligible for special education. Mother disagreed with that decision. She also disagreed with the District's psychoeducational and speech and language assessments and requested IEE's in those areas. The District declined to provide IEE's. The speech and language assessment is no longer in dispute. This Decision does not address whether Student is eligible for special education; it addresses only whether Ms. Fleishauer's psychoeducational assessment ("the assessment") was appropriate so that the District need not fund an IEE in that area.

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<sup>2</sup> The request for due process hearing set forth a second issue: whether the District's March 5, 2013 speech and language assessment of Student was appropriate, so that the District was not required to fund an IEE. The District withdrew that issue at the beginning of the hearing.

## *Appropriateness of Academic Portion of Assessment*

### *The District's Duties*

5. An assessment upon which a special education determination is based must comply with numerous legal requirements. It must be used for purposes for which it is valid and reliable; must be properly administered by trained personnel; and must accurately reflect the pupil's aptitude, achievement level and other relevant factors. It must also be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be provided and administered in the student's primary language or other mode of communication unless this is not feasible. Assessments for educational need must be done in all areas related to any suspected disability the student may have.

6. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether he is eligible for special education. Its assessments must be sufficiently comprehensive to identify all of the child's special education and related services needs.

7. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Assessment tools must be individualized; they must be tailored to assess specific areas of educational need. Assessment tools must be selected and administered to produce results that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure.

8. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. The report must be furnished to parents without cost. Districts are required to provide to parents, upon request, an explanation or interpretation of any answer sheet or other records related to the tests a student has completed.

9. The evidence showed that the District complied with several of the above requirements. For example, the assessment was provided and administered in the student's primary language; selected and administered so as not to be racially, culturally, or sexually discriminatory; and administered by adequately trained personnel. The District's compliance with several of those requirements is not further discussed here, both because the evidence showed that the District did comply, and because Mother did not challenge the District's compliance in those areas. This Decision necessarily focuses on the areas in which the evidence showed the District did not fully comply.

### *Selection of Academic and Achievement Tests and Subtests*

10. Shelly Jensen has a master's degree from California State University at Bakersfield, and multiple subject and special education credentials. She has been an RSP

teacher at the District's Panama School for three years. Before that she taught kindergarten for 22 years, 21 of them in the District, including four years of teaching at-risk kindergartners part time. Her credential training included the administration of standardized tests of academic achievement.

11. In January 2013 Ms. Jensen selected the Woodcock-Johnson III Tests of Achievement (WJ-III) to determine Student's academic abilities and achievement, which she had been trained to administer as part of the university credentialing process. At the time Student was approximately five years and 10 months old. Ms. Jensen did not use any other instrument to measure Student's abilities.

12. Ms. Jensen testified at hearing that the WJ-III is appropriate for administration to children as young as five years old, and that she generally followed the instructions of the publisher in administering the WJ-III to Student. She also testified that she believed that Student's scores on the WJ-III subtests she administered adequately represented his academic abilities and achievement. But the details of her testimony undermined the persuasiveness and accuracy of those claims. They reflect a confusion between an assessment tool that is appropriate for a five-year-old and one that is appropriate for exclusive use. There was no evidence that the publisher of the WJ-III authorizes or encourages the exclusive use of that instrument to measure the abilities of a five-year-old.

13. Ms. Jensen selected seven of the WJ-III's 22 subtests to administer to Student. She administered subtests in Letter-Word Identification, Math Calculation, Spelling, Applied Problems, Writing Samples, Picture Vocabulary and Academic Knowledge. When asked why she excluded the other 15 subtests of the WJ-III, Ms. Jensen first explained that they were "not necessarily appropriate" for a kindergartner. For example, Ms. Jensen testified that the reading fluency subtest was too difficult for Student because "he couldn't read." She pointed out that during the letter word identification subtest he was able to identify only one word relating to colors and could not identify several others. She testified that it was "normal" a kindergartner would be unable to manage the WJ-III's reading fluency subtest and would not normally be given it because "the average kindergartner cannot read."

14. However, Ms. Jensen also testified that reading is part of the kindergarten curriculum in the District. Kindergartners, she testified, are "learning to read but they can't read at the level that this test requires." There was no evidence Ms. Jensen made any effort to find an assessment tool more suitable than the WJ-III for determining Student's progress in that curriculum. Her apparent assumption was that if the WJ-III reading fluency subtest was too difficult for Student, she had no need to look further for a way to assess his reading. The District did not prove either that a better instrument was unavailable or that Ms. Jensen sought one out. The result of her failure to find another test instrument for reading was that Student's overall reading score in the assessment was left blank (see Table 1, below) even though reading was a part of his current curriculum.

15. At least one of the other subtests Ms. Jensen administered to Student, Math Calculation, was also inappropriate for his age and grade. The District introduced into evidence the test protocols, which were the scoring sheets used by Ms. Jensen, and the forms

Student filled out for each subtest. Ms. Jensen explained that each subtest has a “basal” and a “ceiling,” which set a range of subtest questions it is appropriate to ask the test subject. The basal for the math calculation subtest is six, and the ceiling is six. The 45 questions are arranged in increasing order of difficulty. If a student fails six questions in a row, he has not achieved the basal and the tester must stop. If a student correctly answers six questions in a row, achieving the basal, the tester must continue to the more difficult questions.

16. Ms. Jensen’s scoring sheet for the WJ-III math calculation subtest given Student shows that he failed all of the first six of the 45 questions, so Ms. Jensen stopped the subtest and gave him a score of 0. Student’s answer form shows the following six questions and incorrect answers: “ $1 + 3 =$  [blank];  $1 + 2 = 2$ ;  $5 + 1 = 3$ ;  $2 + 3 = 4$ ;  $6 - 2 =$  [blank];  $4 - 3 = 6$ .” At hearing Ms. Jensen attributed Student’s total failure on this subtest not to his own lack of abilities but instead to the fact that the math calculation subtest was beyond the abilities of someone in his age group and grade. His score of zero, she testified, was not below average for someone of his age. She explained that math is also part of the District’s kindergarten curriculum; by February of their kindergarten year students are taught addition and subtraction, but they use manipulatives (objects) to count. The WJ-III math calculation subtest poses addition and subtraction problems with numbers only. For a kindergarten student, therefore, a math test using numbers only calls for a new skill not yet learned. The WJ-III math calculation subtest, Ms. Jensen testified, is thus “beyond the average curriculum expectations of an average kindergartner.”

17. Ms. Jensen testified that there was no requirement in the WJ-III testing manual requiring use of manipulatives for a kindergartener taking the math calculation subtest. But she did not testify that some other test using manipulatives was or was not available, or that she had considered any such option. As she did with the WJ-III reading comprehension subtest, Ms. Jensen seemed to assume that if the WJ-III math calculation test was too hard for Student, she had no obligation to consider finding another instrument to measure his math calculation ability, even though math calculation was part of his kindergarten curriculum.

18. On cross-examination Ms. Jensen admitted that at least some of the subtests she omitted were appropriate for Student. He could, for example, have managed the story recall test, but, she testified, “I don’t give that test.” Asked whether he could have managed the subtests for understanding directions and getting measurements, she answered, “Possibly, but I am not familiar with that portion of the test.”

19. Ms. Jensen then revealed that she had not actually selected the subtests to give to Student herself; the District had selected them. She testified that the District gave her an apparently standard list (“protocols”) indicating which subtests were appropriate for Student’s age, and she followed that District direction, even though she knew she could have administered other subtests. “According to the protocols I was given by the District,” she stated, “the tests that I gave are the appropriate ones for his age.” With the exception of one year, all of Ms. Jensen’s career has been in the District. She testified that she had done approximately fifty academic performance assessments, all of them with versions of the Woodcock-Johnson. Thus the evidence was consistent with the conclusion that the District routinely uses only the WJ-III to assess kindergartners’ academic achievement, and

distributes to its assessors a standard list of appropriate subtests to be given to every student in that grade and age group without regard to the individual skills or needs of the student to be tested.

20. The evidence above showed that in testing Student's academic performance and abilities, Ms. Jensen used the WJ-III exclusively, even though the substantial majority of its subtests were inappropriate for his grade and age group. She administered the Math Calculation subtest, which was also inappropriate for his age group, because the District instructed her to use it. She declined to administer other subtests that were appropriate for Student, because the District did not instruct her to use them. There was no evidence that Ms. Jensen considered using any other tools or measures, nor was there evidence that other appropriate measures were or were not available. There was no evidence that the test and subtest selection was done individually for Student in light of his unique needs or personal characteristics; instead the subtest selection was made according to a standard District practice for students of his age and grade. As a result of these decisions and omissions, the academic and achievement testing of Student produced a "0" score for Student's math calculation, and produced no reading score at all. (See Table 1, below.)

*Calculation, Reporting and Presentation of Results*

21. Ms. Jensen entered Student's scores on the seven subtests of the WJ-III into a computer program furnished by the test publisher, and sent the results to Ms. Fleishauer. Ms. Fleishauer has a bachelor's degree in psychology from Biola University and a master's degree in education from Fresno Pacific University. She taught second, third and fourth grade classes for many years and obtained life and multiple subject teaching credentials. She obtained a school psychology credential in 2001, and has been a school psychologist for the District since 2002.

22. Ms. Fleishauer reported Ms. Jensen's academic assessment results in a separate portion of the assessment entitled "Academic Functioning." That section consists of two prose paragraphs and a table. The first paragraph of Ms. Fleishauer's summary sets forth the ranges (such as above average, average, or below average) into which Student's scores on the WJ-III fell. That statement of Ms. Jensen's results is accurate except that Ms. Fleishauer reported that Student's skills were "average" in brief mathematics, whereas Ms. Jensen had reported to her that Student's brief math skills were "below average." This admitted error gave the impression that Student's math skills were greater than they are.

23. The third paragraph of the summary states that "District probes administered by his teacher indicated that [Student] meets grade level standards in the following areas . . ." Student's levels of accomplishment in several areas are then indicated, using, for example, the following forms: "[Student] knows all his letters and sounds, recognizes 9/11 numbers, and 7/16 sight words . . ." The assessment does not explain what a District probe is, and the District introduced no evidence at hearing about it. There was no evidence that a District probe is a valid measurement of anything, or that it is a standard or accepted measurement, or is technically sound, or is particularly suited to determining Student's levels of performance.

24. In between the two prose paragraphs of the “Academic Functioning” section of the assessment, the following table appears:

Table 1

<b>Subtest</b>	<b>Standard Score</b>	<b>Subtest</b>	<b>Standard Score</b>
<b>Brief overall achievement</b>	<b>91</b>	<b>Brief Math</b>	<b>82</b>
<b>Academic Skills</b>	<b>89</b>	Calculation	<5-7 AE
<b>Academic Knowledge</b>	<b>100</b>	Applied Problems	<b>91</b>
<b>Reading Skills</b>		<b>Brief Writing</b>	<b>90</b>
L-W Identification	<b>98</b>	Spelling	<b>88</b>
Picture Vocabulary	<b>107</b>	Writing Samples	<b>94</b>

25. The categories of Reading Skills, Brief Math, and Brief Writing are presented in Ms. Fleishauer’s table in bold letters, while the two subcategories under each are not. Each bold-lettered category is apparently made up of the two subcategory scores that are below it. Brief Math, for example, is derived from the combination of Student’s scores in Calculation and Applied Problems, and Brief Writing is derived from the combination of Spelling and Writing Samples. These combinations are not mathematical averages; otherwise Brief Writing would be 91 (the mathematical average of 88 for Spelling and 94 for Writing Samples). Instead they are weighed by the publisher’s computer program in a way that no one at hearing could explain.

26. It was not made clear in the assessment or at hearing whether the bold-letter category “Reading Skills” is a weighted combination of the subtests for Letter-Word Identification and Picture Vocabulary, both of which are scored in the assessment because Student took them. Ms. Fleishauer’s presentation of the table would suggest that they are, and an IEP team member would probably make that inference. But when asked at hearing whether “Reading Skills” is made up of those two components, Mr. Jensen answered “no,” and explained that “Brief Reading” is the combination of the subtests Letter Identification and Reading Comprehension, and the latter test was not given to Student because it was inappropriate for a kindergartner. Why Ms. Jensen equated “Brief Reading” with “Reading Skills” on the WJ-III scoring table was not explained. If she was correct in doing so, the absence of an overall score for “Reading Skills” shows the consequence of her failure to seek an appropriate instrument to measure Student’s reading comprehension. If she was incorrect, the absence of a score for “Reading Skills,” when its components were available to be scored, was entirely unexplained and would indicate an error of scoring and an important flaw in the presentation of Student’s achievement. Either explanation undercuts the usefulness of the assessors’ scoring of the WJ-III in presenting Student’s reading skills.

27. No one at hearing could fully explain the entry “<5-7 AE” as Student’s score for math calculation. Ms. Jensen suggested that the entry, in standard educational jargon, would mean “less than 5 years 7 months age equivalent.” Both Ms. Jensen and Ms. Fleishauer attributed the entry to the computer program the District had obtained from the

test publisher and could not explain it further. If Ms. Jensen’s explanation is correct, then the scoring of Student’s math skills cannot be as precise as its numbers imply. If “<5-7 AE” does mean less than five years, seven months age equivalent, it does not furnish information specific enough to represent Student’s skill level. He could be three months short of that age equivalency, or three years short of it. Thus “<5-7 AE” would not be sufficiently precise to be weighed with Student’s score of 91 in Applied Problems so that it would yield exactly 82. In any event, no one at hearing (or at Student’s eligibility IEP team meeting on March 5, 2013) could adequately explain how Student’s Brief Math score had been weighed or determined, what it actually meant, or how the information it conveyed could be useful to the IEP team.

28. Student’s Brief Math score was important because of the way in which eligibility for special education is determined in the category of Specific Learning Disorder (SLD). A SLD is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. It is measured in part by determining whether there exists on standard tests a severe discrepancy between intellectual ability and achievement in one or more stated academic areas, including math. A severe discrepancy exists if there is a 1.5 standard deviation or more between a student’s ability and achievement according to a formula set forth in California by regulation. (See Legal Conclusion 16.) The score is subject to a standard measurement of error of plus or minus 4 score points.

29. In her assessment, as required by law, Ms. Fleishauer attempted to determine whether Student’s test scores revealed a severe discrepancy that might indicate a SLD. Her assessment adequately explains the formula for SLD eligibility, noting that “[a] severe discrepancy is a difference of 22 points (+ or -4) below expected level of achievement.” This table is then presented:

Table 2

Skill Area – WJ-III Ach.	Estimate of Cognitive Potential	Actual Achievement Level	Standard Score Difference
Brief Achievement	100	91	-9
Brief Math	100	82	-18
Brief Writing	100	90	-10
Academic Skills	100	89	-11
Academic Knowledge	100	100	0
Letter-Word Identification	100	98	-2
Spelling	100	88	-12
Applied Problems	100	91	-9
Writing Samples	100	94	-6
Picture Vocabulary	100	107	+7

30. The assessment's calculation of the discrepancy between Student's ability and achievement in brief math is seriously flawed in two ways.<sup>3</sup> First, the "82" score was arrived at by a computer process, mysterious to both assessors and the IEP team, including Mother, in which "<5-7 AE" was combined somehow with "91" to yield "82." Since 82 is on the borderline of a severe discrepancy, the accuracy of that calculation was important to determining Student's SLD eligibility (if any), but there was no persuasive evidence at hearing that the 82 calculation was accurate, or meaningful, or anything but a quirk in programming.

31. Second, "-18" is within the severe discrepancy range of 22 points plus or minus 4, but there is no explanation in the assessment of why that score does not constitute a severe discrepancy for the purpose of SLD eligibility, or is at least close enough to warrant further inquiry. Without referring to that particular calculation, the assessment merely concludes that Student "does not meet eligibility for special education under the criteria of severe discrepancy between achievement and ability."

32. The evidence above shows that the assessors' calculation, reporting and presentation of Student's academic achievement scores failed adequately to report his reading skills, failed to report his skills in math in any comprehensible way, and failed to calculate reliably the possible existence of a severe discrepancy between Student's ability and achievement in math, or address a discrepancy that was on the borderline of the assessment's own definition of "severe." The failings in measuring Student's skills in math made it impossible for the IEP team to make an informed and principled determination whether Student had a severe discrepancy between intellectual ability and achievement in math, and therefore to determine whether he was eligible for special education in the category of SLD.

### *Behavioral Observations*

33. A district must ensure that a child considered for special education eligibility is observed in his learning environment (including the regular classroom setting) to document his academic performance and behavior in areas of difficulty. Mother had notified the District that she was deeply concerned by Student's lack of attention in class, his occasional disruption in class or on the playground, occasional attacks on other students, and his frequent subjection to discipline. Ms. Fleishauer was aware of these concerns.

34. Student's disciplinary record shows six different incidents that occurred before his eligibility IEP meeting on March 5, 2013. The complaints were that on September 4, 2013, he touched and pushed other students and spit on a table and rubbed it in. On

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<sup>3</sup> Ms. Fleishauer estimated Student's cognitive potential by administering the Wide Range Assessment of Memory and Learning (Second Edition)(WRAML-2), a nonverbal assessment tool. She chose that instrument because the District was also conducting a speech and language assessment of Student, and she wanted assessment results that would not be affected by any defect in speech and language.

September 11, 2013, he punched a girl in the face twice while she was trying to get on the slide. On September 21, 2013, he bit a girl's finger on the playground. On October 24, 2012, he spit water at people after being put on the wall for going on the slide while doing physical education relay races. On November 28, 2012, he repeatedly got up from class and went into the bathroom for "playing around," although told several times not to. On February 22, 2013, he kicked another student for no discernible reason. He was not suspended for these events; instead he was variously counseled, advised of future adverse consequences, reported to his mother, kept in the office for the rest of the day, or sent home.

35. To assess Student's behavior, Ms. Fleishauer sent to Student's Mother and classroom teacher, Ms. Huffman, two rating scales (questionnaires) from the Behavior Assessment System for Children (Second Edition) (BASC-2). She also reviewed his educational records, including his report cards and disciplinary record, and observed him in class and on the playground.

36. In her BASC-2 rating scale Mother answered 134 specific questions about Student's behavior in 11 areas of possible concern. Her answers yielded scores considered "clinically significant" and (according to the BASC-2 form) usually warranting follow-up in six areas: hyperactivity, anxiety, depression, attention problems, adaptability, and social skills. Her answers yielded scores considered "at-risk," for which follow-up may be necessary, in three areas: aggression, withdrawal, and functional communications.

37. In her BASC-2 rating scale, Student's classroom teacher, Ms. Huffman, answered 100 questions in the same 11 areas. Her answers yielded no scores in the clinically significant range, and three scores in the at-risk range: hyperactivity, attention problems, and social skills. She wrote that Student is a nice boy who is always willing to help, although he has trouble following directions and keeping his hands to himself. She stated that when Student hit or bit another child he was "just playing." However, her specific scores indicate that Student often has a short attention span, has trouble getting seated, defies teacher or caregivers, has poor self-control and bothers other children when they are working.

38. Ms. Fleishauer did not think that the BASC-2 results warranted any further investigation. She decided that Student's disciplinary record was not of great concern because the time between incidents was lengthening, indicating to her that he was adjusting to school. She was also unconcerned about the discrepancy between Mother's ratings and Ms. Huffman's. She explained at hearing that such discrepancies were common, and decided that Ms. Huffman's ratings gave a more accurate view of Student's conduct at school. Although Ms. Fleishauer acknowledged at hearing that some of Ms. Huffman's ratings caused her "some" concern, she did not inquire further of Mother or Ms. Huffman.

39. Mother testified that during Student's kindergarten year Ms. Huffman sent her several notes indicating that Student's behavior in class was worse than described in Ms.

Fleishauer's assessment.<sup>4</sup> Ms. Fleishauer was unaware of those notes, probably because she did not inquire further of Mother or Ms. Huffman. Ms. Huffman did not testify.

40. Ms. Fleishauer conducted two observations of Student in class. During the first a substitute teacher was in charge of the class, so Ms. Fleishauer disregarded the result of the observation in forming her conclusions because a student's unfamiliarity with a substitute may have a substantial effect on his behavior.

41. Ms. Fleishauer visited Student's class once while the regular teacher was present. Her assessment does not state when or for how long she did so. At hearing she testified that the classroom visit was "a minimum of 20 minutes." and was "most likely" done in early February 2013. The absence of any known date for her classroom assessment makes it impossible to determine later whether Student's behavior was typical or unusual on the day he was assessed.

42. Ms. Fleishauer chose not to use the Student Observation System of the BASC-2 for her classroom observation; instead she used what she called "other methods." During the 20 minutes she observed Student, the students in the class were doing independent work. Student was "only disruptive once and out of his seat once." She did not observe "any behaviors that resulted in any disciplinary action." But apparently Ms. Fleishauer herself thought that her observation might not be representative, because at the end of her written description of it she added: "The results of this observation session may or may not represent [Student's] behavior under similar circumstances across time and settings."

43. Ms. Fleishauer's classroom observation was focused on testing Student's attention span. She described her method as follows: She picked a random student in the class, about whom she knew nothing, to compare to Student. Every 15 seconds she looked at both of them to see whether they were on task. She repeated this 80 times (thus consuming the 20 minutes). From this she reported that Student was on task 84% of the time, which she described at hearing as average for his age. She reported that the randomly selected student was on task 91 percent of the time.

44. The District introduced no evidence at hearing showing that this method of testing Student's attention problems had any scientific or technical validity or has ever been used by anyone else. For all the evidence showed, the method is idiosyncratic to Ms. Fleishauer. It is not a method that appears, on its face, to deserve much credence. Ms. Fleishauer did not explain why she needed to observe another randomly selected student when she could confidently testify that Student's attention was "average for his age." Nor did she explain how the random selection of another student as a comparison could be reliable, since it would produce quite different results depending upon whether she chanced to select a student who was well behaved or poorly behaved. The District failed to prove that

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<sup>4</sup> The notes themselves were not properly authenticated and are not considered here.

there was any scientific, technical, or other merit in this method of observation, which Ms. Fleishauer chose over the method offered by the BASC-2.<sup>5</sup>

45. Ms. Fleishauer's playground observation was conducted on a date in February she could not recall and did not put in her report. That made it impossible to determine later whether Student behaved typically that day. The playground observation also lasted about 20 minutes, during which time Student behaved well. He stood quietly in a line for hot chocolate, drank it peacefully, and then went to the playground, where he engaged in age-appropriate behavior and did not threaten or assault any other student. When asked whether she believed 20 minutes was enough time for a playground observation of a student with a record of hurting or threatening other students, Ms. Fleishauer did not claim it was. Instead, she testified that she relied on additional information learned in the course of her daily activities: she passes by the kindergarten playground "very often" during the day and "almost always" during kindergarten recess. If a child is involved in a current evaluation she watches that child. During those passing observations she never noticed Student involved in any type of altercation. This information was apparently unrecorded and was not included in the assessment.

46. Whether Ms. Fleishauer should have inquired further into Student's behavior out of the classroom was not clear from the evidence, in the absence of testimony from Ms. Huffman, and no finding on that question can be made here. Perhaps Ms. Fleishauer's passing observations of the playground, together with her analysis of the BASC-2 rating scales and her records review, were sufficient. Her conclusion would merit more confidence if it had been buttressed by further contact with Ms. Huffman.

47. However, Ms. Fleishauer's classroom observation of Student was, by her own admission, not sufficiently reliable to determine whether it represented his behavior under similar circumstance across time and settings. And it focused on assessing Student's attention difficulties by a method that appeared of dubious scientific validity, was apparently Ms. Fleishauer's alone, and was not shown to be scientifically or technically valid, or used by anyone else. Her classroom assessment was therefore inadequate to support her decision not to investigate further or her conclusion in the assessment that Student did not display significant behavioral difficulties at school.

48. As summarized in the Legal Conclusions, the flaws identified above in the assessment collectively undermine its reliability and make it inappropriate for the purpose of relieving the District of its obligation to fund an IEE. Because of that conclusion the other contentions made by Student need not be addressed.

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<sup>5</sup> Ms. Fleishauer erroneously reported in her assessment that she had used the BASC, not the BASC-2. This caused Mother to be concerned whether Ms. Fleishauer had used an obsolete assessment. The evidence showed that in fact Ms. Fleishauer used the BASC-2. She testified that her misidentification of the behavior assessment tool she used was not important to her.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The District, as petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

### *Independent Educational Evaluation*

2. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].)<sup>6</sup> To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1).)

3. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

### *General Requirements for Assessments*

4. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (34 C.F.R. § 300.301(a); Ed. Code, § 56320.)<sup>7</sup> No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

5. A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) 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 local educational agency." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).)

6. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

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<sup>6</sup> All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

<sup>7</sup> An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

7. The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304 (c)(6).)

#### *Selection of Assessment Instruments*

8. A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).)

9. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Tests and other assessment materials must be used “for purposes for which the assessments or measures are valid and reliable.” (20 U.S.C. § 1414(a)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessment tools must be “tailored to assess specific areas of educational need . . .” (Ed. Code, § 56320, subd. (c).) “Special attention shall be given to the [child’s] unique educational needs . . .” (*Id.*, subd. (g).)

10. Assessors 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)(C); 34 C.F.R. § 300.304 (b)(3).) 'Technically sound instruments' generally refers to assessments that have been shown through research to be valid and reliable." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug.14, 2006).)

11. Tests of a pupil with impaired sensory, manual, or speaking skills must be selected and administered to best insure results “that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure . . .” (Ed. Code, § 56320, subd. (d).)

#### *Requirement of Observation*

12. A district must ensure that the child is observed in his learning environment (including the regular classroom setting) to document his academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

#### *Assistance to IEP Team and Parents*

13. It is the duty of the IEP team, not the assessor, to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(iii)(A); 300.306(a)(1). To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

14. An assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) Districts are required to provide to parents, upon request, an explanation or interpretation of any answer sheet or other education records related to the tests a student has completed. (*Letter to MacDonald* (OSEP 1993) 20 IDELR 1159.)

#### *Eligibility in Category of SLD*

15. A SLD is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).)

16. In California a student is eligible for special education in the category of SLD if, among other things, he exhibits “a severe discrepancy between intellectual ability and achievement in one or more of the academic areas” set forth in the definition of a SLD.<sup>8</sup> A severe discrepancy exists if, on standardized tests, a student’s scores show a standard deviation of 1.5 or more between ability and achievement according to a complex mathematical formula set forth by regulation. (5 C.C.R. § 3030, subd. (j)(4)(A).) This difference must be adjusted for a standard error of measurement not to exceed 4 standard score points. (*Ibid.*) If such a discrepancy exists it must be corroborated by other data, and the IEP team determines whether the discrepancy exists. (*Ibid.*)

#### *Prejudice as a Result of Flaws in Assessments*

17. The District argues that “there must be some prejudice” resulting from flaws in an assessment “or the student is not entitled to relief.” This argument is misdirected because only the District seeks relief here. The District also cites such decisions as *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, and similar OAH decisions, which hold that minor flaws having no effect on the outcome of an assessment do not make it inappropriate. It then argues that the flaws in this assessment “were de minimus with no effect on the assessment outcome.” However, the District did not discharge its burden of proving that claim, since it cannot be told what the outcome of an appropriate assessment would have been. And if a finding of prejudice is required, that finding is made here. The flaws were not de minimus; the assessment failed to report meaningful scores in such basic areas of achievement as math and reading, and it depended upon a method of assessing behavior with no apparent scientific or technical validity. As found throughout this Decision and summarized below, the collective flaws in the assessment seriously degraded the process by which Student was found ineligible for special education.

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<sup>8</sup> A school district is not required to use the severe discrepancy model to determine eligibility in the category of SLD; it may use “response to intervention” (RTI) instead. (Ed. Code, § 56337, subds. (b), (c).) This District uses the severe discrepancy model.

*Issue: Was the District's January-February 2013 psychoeducational assessment of Student appropriate, so that Student is not entitled to an IEE?*

18. Based on Factual Findings 1-4 and 10-20, and Legal Conclusions 1, 4-11, and 14-17, the District's assessment of Student's academic achievement was not sufficiently reliable to justify its refusal to fund an IEE. The selection of the WJ-III as the only tool for measuring Student's academic achievement was not supported by any evidence. Most of its subtests had to be eliminated as inappropriate for Student's age, yet there was no inquiry made into alternative assessment tools, and the evidence did not show that appropriate alternatives were not available. Ms. Jensen's claim that she selected the subtests according to the instructions of the test publisher in order to use only those subtests appropriate to Student's age and grade was unpersuasive. At least one of the subtests selected, math calculation, was also inappropriate for Student's age, and some subtests that were eliminated were appropriate for him. The subtests themselves were selected by the District, not Ms. Jensen, according to a process and criteria not addressed at hearing. The District therefore did not prove that the WJ-III subtests which Student did take were valid and reliable for the specific purposes for which they were used, or were sufficiently comprehensive or accurate to identify his special education and related service needs, or were selected and administered to best insure results that accurately reflected his aptitude and achievement level reading and math.

19. Based on Factual Findings 1-4 and 21-32, and Legal Conclusions 1, 4-11, and 14-17, the reporting of Student's scores on the WJ-III did not adequately equip the IEP team to determine Student's eligibility for special education. The assessors' reporting left Student's basic reading skill blank and calculated his mathematical ability in a fashion no one could satisfactorily understand or explain at the May 5, 2013 IEP meeting or at hearing. The latter failing made it impossible for the IEP team to make an informed determination whether a severe discrepancy existed between his mathematical ability and achievement. The District therefore did not prove that the computation and presentation of Student's WJ-III scores were valid and reliable for the specific purpose of measuring and presenting his achievement, sufficiently comprehensive or accurate to identify his special education and related service needs, or selected and administered to best insure results that accurately reflected his aptitude and achievement level in reading and math. The District did not validate the use of the WJ-III for the specific purposes of assessing Student's aptitude and achievement in reading and math.

20. Based on Factual Findings 1-4 and 33-47, and Legal Conclusions 1 and 12-17, the District's inquiry into Student's behavioral difficulties was not sufficiently reliable to justify its refusal to fund an IEE. Ms. Fleishauer's investigation of Student's behavior was minimal overall. In the classroom she conducted it not by use of an available module of the BASC-2 but by a method of dubious merit that was apparently idiosyncratic to Ms. Fleishauer and was not shown to have any scientific or technical validity or acceptance in the educational community. By her own admission her classroom observation was not sufficiently reliable to represent Student's behavior in similar circumstances across time and settings. Ms. Fleishauer's assessment of Student's behavior on the playground rested in

important part on observations not recorded or mentioned in her report that she made while passing at random by the kindergarten playground. Her failure to specify the days on which these observations were made rendered it impossible to determine in retrospect whether Student was behaving on those days as he normally does.

21. Based on Factual Findings 1-4 and 10-48, and Legal Conclusions 1-20, the flaws in the assessment identified above, taken together, rendered it inadequate as a principal tool for determining Student's eligibility for special education and inappropriate for the purpose of denying Student's request for an IEE.

#### ORDER

The District's request for relief is denied.

#### PREVAILING PARTY

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

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a state or federal court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: August 21, 2013

/s/  
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CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings