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

STUDENT, Petitioner, vs. BARSTOW UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2005070531

DECISION

Administrative Law Judge Deborah Myers (ALJ), Office of Administrative Hearings, heard this matter in Barstow, California on August 2, 2005.

Student was represented by her mother.

Maria E. Gless, Attorney at Law, represented the Barstow Unified School District (District).

Oral and documentary evidence was received. The record was held open until August 15, 2005 to allow the parties to submit written closing briefs. On August 5, 2005, Student's mother submitted her closing statement and two additional exhibits which were not introduced at the hearing. These documents consisted of a medical examination and a psychological examination performed on Student. On August 31, 2005, a notice of ex parte communication was given and an order reopening the record was made. The exhibits were collectively marked for identification as Student's Exhibit 3. The District was given until September 7, 2005, to object to the new evidence. The District made a timely objection to Exhibit 3. The ALJ sustained the objection. The medical records contained in Exhibit 3 are not admitted into evidence. The closing statements were received, read, and considered; and the matter was deemed submitted on September 7, 2005.

On October 5, 2005, the ALJ re-opened the record to mark Student's October 10, 2003 Individualized Education Plan (2003 IEP) for identification as Respondent's Exhibit J. This document was originally in District's trial notebook as Exhibit 2, but the record was not clear whether the document had been admitted into evidence during trial. District was given until October 24, 2005, to file and serve any written objections to the introduction of Exhibit J.

Student was allowed until November 14, 2005 to file and serve a response to District's objection. No objection was received. Exhibit J is admitted into evidence. On January 10, 2006, the parties stipulated to admit into evidence the Due Process Request and District's Statement of Issues. The record was closed on January 10, 2006. The parties had previously stipulated to allow the ALJ 30 days to write the decision once the record was closed.

ISSUES

Student's Due Process Request[1] indicated that Student was suspected to have Attention Deficit Hyperactivity Disorder (ADHD) and learning disabilities. The request also noted that Student confused numbers and letters. The District's Statement of Issues[2] served on OAH on July 22, 2005, identified Issue No. One as, "Whether [Student] is eligible for special education services?" The Proposed Resolution stated, "No. [Student] has been tested and the results do not support eligibility for special education under any category." (emphasis added)

At the administrative hearing, the ALJ framed the issues. Student sought eligibility for special education under three categories: speech and language impairments; other health impairments (ADHD); and specific learning disability.[3] District did not object to those issues being framed at the outset at the hearing. District thus waived any objection to the issue of student's continued eligibility under the category of speech and language impairments being addressed at the hearing.

Although not initially specifically anticipated by the parties, documentary evidence and witness testimony revealed additional violations of the Individuals with Disabilities Education Act and the California Education Code by the District. Specifically, District did not provide Student with required speech therapy services and then exited Student from those services. The District allowed this evidence to come in. District addressed and fully litigated these issues and was not prejudiced by including those violations as additional issues to be resolved in the due process hearing. The District thus waived any objection to these issues being resolved in this Decision. These issues are so closely intertwined with the issues in the Due Process Request that it is impossible to separate them.

For these aforementioned reasons, and in the interests of judicial economy, the following issues will therefore be addressed:

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[1] Marked for identification and admitted into evidence as Student's Exhibit 4 by stipulation of the parties on January 10, 2006.

[2] Marked for identification and admitted into evidence as Respondent's Exhibit L by stipulation of the parties on January 10, 2006.

[3] District has the burden of proof in establishing whether Student's eligibility for special education speech and language therapy should be terminated. Student has the burden of proof of establishing that she is eligible for special education services under the categories of specific learning disability and other health impairment.

1. Is Student eligible for special education services under the categories of speech and language impairment, specific learning disability, and/or other health impairment?

2. Did District deprive Student of a Free and Appropriate Public Education (FAPE) during the 2004-2005 school year when it failed to provide her with the speech therapy services authorized in her May 2004 IEP?

3. Did the District deprive Student of a FAPE during the 2004-2005 school year when, in December 2004, it conducted an IEP, failed to implement procedural safeguards, and terminated the speech therapy services?

4. If a FAPE has been denied, are compensatory speech therapy services an appropriate remedy?

In its closing brief (marked for identification as Respondent's Exhibit K) submitted five weeks after the hearing, District objected to Student's seeking eligibility under the category of speech and language impairment on the theory that the issue was not included in the Due Process Request. That claim is not well taken. District had a duty to evaluate, assess, and address all areas of suspected eligibility for Student. Student's eligibility under speech and language impairment category is not a new issue. Student is entitled to challenge the District's "exiting" her from speech and language services. The speech and language issue was fully litigated and defended by District. District was aware of Student's recent eligibility of speech and language impairment and introduced into evidence three pre-school and kindergarten IEPs in which District agreed to provide Student with speech therapy. It introduced a speech and language assessment into evidence and presented witness testimony by the language, speech and hearing specialist who authored the report. District therefore had an opportunity to present a defense and was not prejudiced by including eligibility for speech and language services in the issues to be resolved in the due process hearing. Moreover, District's objection, having been first raised in its closing statement, was not timely.

FACTUAL FINDINGS

Background

1. Student is a six year-old female who seeks a determination of eligibility for special education services. She has attended Montara School in the District during kindergarten. She is now in the first grade in the District. Her primary language is Spanish. English is her second language.

2. While Student was in pre-school, she was provided special education services for two years under the category of speech and language impairment. She received additional supportive services for two years through the HeadStart Program, and the Inland Regional Center's early intervention program.

3. Student's October 10, 2003 pre-school IEP, (Exhibit J) identified Student as being eligible to receive special education services because of her speech and language impairments.[4] The 2003 IEP noted she demonstrated severe problems with semantics, syntax and morphology. Prior to holding the 2003 IEP meeting, Student was given a Test of Early Language Development and a Clinical Evaluation of Language Fundamentals. The results showed that Student was one and a half years behind normal language development for children her age. In order to address her speech and language deficiencies, the IEP team established annual goals, objectives, and benchmarks. In particular, the 2003 IEP stated that Student needed and was to receive 30 minutes a week of speech therapy services. Student's mother was a participating member of the IEP team.

4. In May 2004, District conducted a "transition IEP" (transition IEP) for Student. The purpose was to provide services to address Student's speech and language deficiencies after her transition from pre-school to kindergarten. The members of the IEP team were Student's mother; Steve Wheeler (Wheeler), the District's witness and language, speech and hearing specialist; Ken Bird, another District language, speech and hearing specialist; and an unidentified representative of the Special Education Local Plan Agency (SELPA). When District agreed in the IEP to continue providing speech therapy for the 2004-2005 school year, it acknowledged Student's continuing speech and language deficiencies.

5. However, during the 2004-2005 school year, when Student was in kindergarten at Montara School, District failed to provide any speech therapy services to her. This failure constituted a denial of Student's right to a FAPE. At the instant hearing, Wheeler explained that Student was "not on his list" of students to be provided with speech therapy. This is an insufficient explanation as to why the services had not been provided.

6. In September 2004, because Student was not receiving speech services, Student's mother went to the District to request implementation of the transition IEP. Thereafter, District did not provide any services pursuant to the transition IEP. Instead, District re-assessed Student for eligibility for special education services. Wheeler, a member of the transition IEP team, performed a speech and language assessment on October 13, October 20, and December 9, 2004. Spencer O'Neal (O'Neal), a school psychologist, prepared an Initial Evaluation Multi-Disciplinary Report on an unspecified date following December 6, 2004[5].

7. Thereafter, District held an "exit IEP" for Student on December 16, 2004 (2004 IEP). Significantly, two members of the IEP team were not present: Student's mother and

[4] Student's September 11, 2002 pre-school Individual Program Plan (IEP) was not presented at the hearing.

[5] The Assessment is discussed in greater detail in paragraphs 13, 15, and 16.

Student's general education teacher, Terese Dorr (Dorr). Student's Spanish-speaking grandmother did attend. In that 2004 IEP, based on the findings of the most recent evaluations, District determined that Student was no longer eligible for speech and language services, even though there was substantial evidence that Student's need was ongoing, discussed at length in Finding 14. District "exited" Student from special education services at that time, thereby denying the Student's right to a FAPE.

8. Wheeler's Speech and Language Assessment[6] inaccurately stated that Student had been exited from speech therapy at the transition IEP meeting held earlier that year. This error occurred in spite of Wheeler's participation in that transition IEP in which District had agreed to provide 20 minutes of speech therapy a week to Student during the 2004-2005 school year[7]. This error adversely affects his credibility, as further discussed in Findings 11 and 12.

Speech and Language Impairment

9. For the 2004 Speech and Language Assessment, Wheeler administered a total of eight tests and one Oral-Motor examination. On seven of the eight tests, Student scored from below average to very poor. Taken collectively, the tests established that Student continued to exhibit significant impairment in her speech and language skills.

10. Wheeler testified that Student had a problem with the language sub-test of the Speech and Language Sample. Student had a hard time answering questions and had only 81% fluency. He believed this demonstrated speech and language impairments. He noted that she had difficulties with her language sample in the areas of syntax, semantics, morphology and pragmatics. Her chief difficulty was sentence repetition, and she scored low on the TOLD, the Joliet, the CELF and the Carrow.[8]

11. Wheeler concluded that all of Student's impairments could be corrected with regular classroom instruction or modifications to the regular classroom program. Wheeler acknowledged in his report that Student scored below the 7th percentile on the syntax and articulation portions of the TOLD. However, he discounted these facts since she scored above 7th percentile on her other standardized tests, and he believed she was progressing normally in her general education curriculum. Wheeler recommended that Student remain in regular education with modifications to the curriculum. Wheeler did not believe Student needed speech therapy because most of her test results were in the average range. However, this assertion was not accurate, as evidenced by Student's test scores in which she scored below average in seven of eight tests. Wheeler believed that Student's fluency errors were normal

[6] The Assessment is discussed in greater detail in the Speech and Language Impairment section of this Decision in paragraphs 9 through 12, inclusive.

[7] Student was to be re-evaluated in December 2004 after the provision of at least five months of speech therapy.

[8] Portions of the Carrow were administered as part of the Speech and Language Sample.

and that her specific errors did not adversely affect her performance in the classroom. This conclusion is inconsistent with the objective test results and is not persuasive.

12. Wheeler's position vis-à-vis assessing Student, is somewhat problematic. He was a member of the transition IEP team that agreed to provide Student with speech therapy services; and thereafter, he failed to ensure that those services were provided to her. He inaccurately stated in his assessment that Student had been exited out of speech therapy services before entering kindergarten. His conclusion that Student no longer needed speech therapy, in spite of her substandard test results, is unsupported. His determination that she was performing academically at grade level was not accurate. Student's Progress Reports and Student Data Analysis report established that her speech and language skills were consistently below grade level throughout the school year.[9] Thus, it appears that Wheeler's conclusions regarding Student's eligibility may have been colored by his desire to avoid censure for his past errors. All of his conclusions about Student are questionable and not entitled to substantial weight.

13. O'Neal tested Student and also found deficits in her speech and language skills. In the Multi-Disciplinary Assessment, he found there was a significant statistical difference between Student's Verbal and Performance IQs on the Kaufman Brief Intelligence Test. Her Verbal IQ was 83, while her Performance IQ was 112.[10] The Verbal IQ measured Student's ability to process verbal information and to think, comprehend, and problem solve with words. He believed this discrepancy was most likely due to her prior speech and language difficulties. O'Neal believed that the discrepancy indicated Student's ability to express or utilize accumulated knowledge in a nonverbal environment was better developed than her ability to express or to utilize such knowledge through the use of language.

14. Student's general education kindergarten teacher, Dorr, explained that Student performed at grade level according to state standards, with the exception of her language arts reading, word analysis, vocabulary and fluency. Dorr used no curriculum modifications for student, even though they had been recommended by Wheeler in his assessment. Student's kindergarten progress reports established that Student had difficulty throughout the entire school year hearing and manipulating sounds in words (phoneme awareness). She had trouble reading and writing sight words. She was confused about the difference between numbers and words. By the second trimester, she was still below grade level in her reading and writing. Dorr recommended Student practice orally rhyming words and practice the beginning sounds in words. By the end of the year, Student still needed to work on segmenting sound in words. The Student Data Analysis showed that by the end of the school year, Student was still below grade level in six out of 12 areas involving speech and language: Rhyme; Segmenting Onsets and Rimes; Phoneme Segmentation; High Frequency Words; and Sentence Dictation. Dorr recommended Student attend summer school. Significantly, Student's kindergarten experience demonstrated that District's theory that

[9] This is explained in further detail in the paragraphs that follow.

[10] Mr. O'Neal concluded these scores were valid and reliable measures of her level of intellectual functioning.

Student's impairments would be corrected in a general education setting without the additional support of speech therapy did not work. Their experiment with that procedure failed.

Specific Learning Disability

15. From the Initial Assessment Multi-Disciplinary Report, O'Neal concluded that Student did not appear to meet the criteria of eligibility for special education services under the categories of Specific Learning Disabilities, Emotionally Disturbed, Mental Retardation, Other Health Impaired, or Speech/Language Impaired. He did note that there was a significant statistical difference of 29 points between her Verbal and Performance IQs on the Kaufman Brief Intelligence Test, which he ascribed as most likely being due to Student's prior speech and language difficulties.

16. O'Neal performed several tests on Student which did not indicate she suffered from specific learning disabilities. These tests documented little discrepancy between her general knowledge and her application of skills. In fact, Student was actually achieving at or above her ability. The Kaufman Brief Intelligence Test showed Student had a Verbal IQ of 83, a Performance IQ of 112, and a Full Scale IQ of 97. The Woodcock/Johnson Test of Achievement (Woodcock/Johnson) showed Student's academic achievement had standard scores ranging from 95 in Broad Math, to 107 in Broad Reading. This is further supported by the Wide Range Achievement Test- Revision 3 (WRAT-3), in which she achieved standard scores from 97 in Spelling, to 110 in Reading, with an average standard score of 102.

Other Health Impairment

17. Student had been diagnosed with ADHD (a subcategory of "other health impairment") and was taking medication for that disorder. She was able to focus in her kindergarten class. Her general education teacher, Dorr, described Student as "average" in terms of paying attention in class. While Student may have had some daydreams in class, she did not get up and wander around the classroom. Dorr believed Student was "good at following directions." Student performed at grade level according to state standards, with the exception of her language arts, reading, word analysis vocabulary and fluency skills. Thus, it did not appear that Student's ADHD limited her strength, vitality or alertness.

LEGAL CONCLUSIONS

1. The Individuals with Disability Education Act, Title 20 U.S.C. section 1401, sets forth the categories for special education eligibility.

(3) Child with a disability

(A) In general

The term "child with a disability" means a child—

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

2. 34 Code of Federal Regulations (C.F.R.) section 300.7, subdivision (a)(1), defines a child with a disability to mean a child evaluated . . . as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance…, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities. . .

If a child has one of the disabilities identified in subdivision (a)(1) but only needs a related service and not special education, the child is not "a child with a disability" under subdivision (2)(i). If the related service required by the child is considered special education rather than a related service under State standards, the child will be determined to be "a child with a disability" under subdivision (2)(ii).

3. 34 CFR section 300.7, subdivision (c) (11) defines speech and language impairment as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance."

4. The California Education Code section 56333 sets forth the criteria of eligibility for language and speech disorders.

A pupil shall be assessed as having a language or speech disorder which makes him or her eligible for special education and

related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. In order to be eligible for special education and related services, difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from any of the following disorders:

(a) Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.

(b) Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. An appropriate medical examination shall be conducted, where appropriate.

(c) Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.

(d) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.

(e) Hearing loss which results in a language or speech disorder and significantly affects educational performance.

5. California Code of Regulations (CCR), title 5, section 3030, subdivision (c) defines a “language or speech disorder” as:

(c) A pupil has a language or speech disorder as defined in Section 56333 of the Education Code, and it is determined that the pupil's disorder meets one or more of the following criteria:

(1) Articulation disorder.

(A) The pupil displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention. Significant interference in communication occurs when the pupil's production of single or multiple speech sounds on a developmental scale of articulation competency is below that expected for his or her chronological age or developmental level, and which adversely affects educational performance.

(B) A pupil does not meet the criteria for an articulation disorder if the sole assessed disability is an abnormal swallowing pattern.

(2) Abnormal Voice. A pupil has an abnormal voice which is characterized by persistent, defective voice quality, pitch, or loudness.

(3) Fluency Disorders. A pupil has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener.

(4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria:

(A) The pupil scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified on the assessment plan, or

(B) The pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subsection (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. If the pupil is unable to produce this sample, the language, speech, and hearing specialist shall document why a fifty utterance sample was not obtainable and the contexts in which attempts were made to elicit the sample. When standardized tests are considered to be invalid for the specific pupil, the expected language performance level shall be determined by alternative means as specified in the assessment plan.

6. Student is still eligible to receive special education under the category of speech and language impairment as set forth in Findings 2 through 14, inclusive. Moreover, when District failed to provide Student with the speech and language services called for in the transition IEP, District denied Student a FAPE, as set forth in Findings 2 through 16, inclusive. Therefore, compensatory services are an appropriate remedy. (*Burlington v. DOE*, (1985) 471 U.S. 359, *White v. State of California*, (1987) 195 Cal. App. 3d 452.)

7. By improperly terminating Student's eligibility, District denied Student a FAPE, as set forth in Findings 2 through 14, inclusive. Student was not properly "exited" from speech therapy services on December 16, 2004 because the IEP team was not properly constituted in that her general education teacher were not present as a necessary member of the IEP team. This was particularly important as the general education teacher had progress reports containing vital

information to share with the IEP team. Wheeler's conclusions about Student's needs were inconsistent with objective test scores and her progress reports. (*M.L. v Federal Way School District*, (2004) 394 F.3d 634, *Shapiro v. Paradise Valley Unified School District* (2003) 317 F.3d 1072.) This procedural failure was a substantive denial of a FAPE because it resulted in the loss of educational opportunity to Student. It further infringed on the parent's opportunity to participate in the IEP process. Compensatory services are an appropriate remedy. (*Burlington v. DOE*, (1985) 471 U.S. 359, *White v. State of California*, (1987) 195 Cal. App. 3d 452.)

8. Student was improperly exited from eligibility under the category of speech and language impairment, as set forth in Findings 2 through 14, inclusive. Wheeler's Speech and Language Assessment, which was used at the exit IEP, was flawed. Therefore it is not reliable, particularly when used to exit Student from special education. Moreover, just six months earlier, Student was found eligible for special education under the speech and language criteria. Substantial evidence presented at the hearing demonstrated that Student continued to experience speech and language difficulties, by way of Student's Kindergarten Progress Reports and her Student Data Analysis. Those reports demonstrated Student was still below grade level in six out of twelve areas involving speech and language. However, those vital reports were not reviewed by the IEP team since Student's general education teacher was not present at the IEP. Therefore, exiting Student from special education based on Wheeler's report was improper.

9. 34 C.F.R. section 300.7, subdivision (10)(i) defines a specific learning disability as "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 an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia."

10. The California Education Code sections 56337sets forth the criteria of eligibility for specific learning disabilities.

> A pupil shall be assessed as having a specific learning disability which makes him or her eligible for special education and related services when it is determined that all the following exist:
>
> (a) A severe discrepancy exists between the intellectual ability and achievements in one or more of the following academic areas:
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> (1) Oral expression.
> (2) Listening comprehension.
> (3) Written expression.
> (4) Basic reading skills.
> (5) Reading comprehension.
> (6) Mathematics calculation.
> (7) Mathematics reasoning.

(b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages.

(c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program.

11. CCR, title 5, section 3030, subdivision (j), defines “specific learning disability”:

A pupil has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and has a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in Section 56337(a) of the Education Code. For the purpose of section 3030 (j):

(1) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.

(2) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning.

(3) The level of achievement includes the pupil's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests.

(4) The decision as to whether or not a severe discrepancy exists shall be made by the individualized education program team, including assessment personnel in accordance with Section 56341(d), which takes into account all relevant material which is available on the pupil. No single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the individualized education program team as to the pupil's eligibility for special education. In determining the existence of a severe discrepancy, the individualized education program team shall use the following procedures:

(A) When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed

difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of Students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score points, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate.

(B) When standardized tests are considered to be invalid for a specific pupil, the discrepancy shall be measured by alternative means as specified on the assessment plan.

(C) If the standardized tests do not reveal a severe discrepancy as defined in subparagraphs (A) or (B) above, the individualized education program team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not be limited to:

1. Data obtained from standardized assessment instruments;
2. Information provided by the parent;
3. Information provided by the pupil's present teacher;
4. Evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores;
5. Consideration of the pupil's age, particularly for young children; and
6. Any additional relevant information.

12. Student has not met the criteria for eligibility under the category of specific learning disability, as set forth in Findings 2 through 16, inclusive. The evidence established that Student has little discrepancy between her intellectual ability and her achievement. Her achievement scores on the Woodcock-Johnson and the WRAT-3 are at or above her ability. She does not meet the criteria of eligibility under CCR, title 5, section 3030, subdivision (j).

13. 34 C.F.R. section 300.7, subdivision defines “other health impairment” as:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that-
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder,

diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

14. The California Education Code section 56339 sets forth the criteria of eligibility for attention deficit and hyperactivity disorders.

> (a) A pupil whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder and demonstrates a need for special education and related services by meeting eligibility criteria specified in subdivision (f) or (i) of Section 3030 of Title 5 of the California Code of Regulations or Section 56337 and subdivision (j) of Section 3030 of Title 5 of the California Code of Regulations for the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following) categories of "other health impairments," "serious emotional disturbance," or "specific learning disabilities," is entitled to special education and related services.
>
> (b) If a pupil with an attention deficit disorder or attention deficit hyperactivity disorder is not found to be eligible for special education and related services pursuant to subdivision (a), the pupil's instructional program shall be provided in the regular education program.

15. CCR, title 5, section 3030, subdivision (f) defines "other health impairments:"

> A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poising, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 5626(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001 (v).

16. The evidence did not establish that Student met the criteria for eligibility under the category of Other Health Impairment, as set forth in Findings 2 through 17, inclusive. The evidence established that Student had been diagnosed with ADHD and was taking medication for that disorder. However, the evidence did not establish that she had limited strength, vitality or alertness due to this condition. Student was able to focus during her Excel reading program, and moved up one grade level in kindergarten. She was able to

focus in her kindergarten class. Her general education teacher described Student as "average" in terms of paying attention in class. While Student may have had some daydreams in class, she did not get up and wander around the classroom. Her teacher described Student as "good at following directions." She performed at grade level according to state standards, with the exception of her language arts, reading, word analysis vocabulary and fluency skills. Therefore, she does not meet the criteria for eligibility under CCR, title 5, section 3030, subdivision (f).

PREVAILING PARTIES

Pursuant to Education Code section 56507, subdivision (d), the following parties are identified as the prevailing parties:

1. Is Student eligible for special education services under the categories of speech and language impairment, specific learning disability, and/or other health impairment? Student prevailed to the extent that she is eligible for special education services under the category of speech and language disability. District prevailed to the extent that Student is not eligible for special education services under the category of specific learning disability or other health impaired.

2. Did District deprive Student of a Free and Appropriate Public Education (FAPE) during the 2004-2005 school year when it failed to provide her with the speech therapy services authorized in her May 2004 IEP? Student prevailed as she was denied a FAPE under those circumstances.

3. Did the District deprive Student of a FAPE during the 2004-2005 school year when, in December 2004, it conducted an IEP, failed to implement procedural safeguards, and terminated the speech therapy services? Student prevailed as she was denied a FAPE under those circumstances.

4. If a FAPE has been denied, are compensatory speech therapy services an appropriate remedy? Student prevailed as she is entitled to compensatory services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Student's petition is granted. She remains eligible for special education services under the category of Speech and Language Impairment. She is further entitled to compensatory services.

2. As compensatory services, District shall provide 1:1 speech and language therapy to Student once weekly for 20 minutes per session beginning forthwith and continuing to the end of June, 2006.

3. As further compensatory services, District shall fund an independent speech and language assessment, to be performed by a qualified language, speech and hearing specialist other than Ken Bird or Steven Wheeler. The assessment shall determine Student's current level of need and make recommendations as to the level of compensatory and/or current services required to assess Student's needs. The assessment will also include a review of Student's general education Student Data Analysis and Progress Reports for kindergarten and first grade.

4. District shall arrange for the assessment to be completed and an IEP meeting held to discuss the assessment within 60 calendar days of this decision.

5. During the pendency of the assessment, District shall provide Student with an additional 30 minutes of 1:1 speech and language services per week, in addition to the 20 minutes ordered above.

Dated: February 9, 2006

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DEBORAH MYERS
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.