

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SIMI VALLEY UNIFIED SCHOOL
DISTRICT,

OAH NO. 2007120726

v.

PARENT, ON BEHALF OF STUDENT.

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 24, 2008, through April 25, 2008, in Simi Valley, California.

Simi Valley Unified School District (District) was represented by Andrew Arcynzski, Attorney at Law. Dennis Carter, Director of Special Education was also present each day of the hearing.

Student, in pro se, did not participate in the hearing, despite having Notice and the opportunity to appear. District filed a Request or Due Process Hearing on December 28, 2007. OAH timely served Student with the Notice of Due Process Hearing and Mediation on December 31, 2007. Mother appeared at an initial prehearing conference on March 26, 2008.

Mother notified OAH in writing on April 7, 2008, that Student would no longer participate in the due process proceedings. Student failed to appear at the second prehearing conference held on April 11, 2008.

The due process hearing commenced on April 24, 2008, and concluded on April 25, 2008. Student was not represented at the hearing nor did Student's parent (Mother) appear on Student's behalf.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of hearing, the record remained open for District to file a closing brief on or before May 5, 2008. District timely filed its closing brief. The record closed and the matter was submitted on May 5, 2008.

ISSUES¹

1. Was the District's comprehensive psychoeducational assessment of Student appropriate such that District need not provide Student with an independent educational evaluation (IEE) at public expense?
2. Did the District deny Student a free appropriate public education (FAPE) in the September 17, 2007, initial Individualized Education Program (IEP) which determined that Student was not eligible for special education services?

FACTUAL FINDINGS

Jurisdiction

1. Student, born on October 3, 1990, is 17 and one-half years of age. He currently lives with his mother within the jurisdictional boundaries of the District. He attends Santa Susana High School Magnet (Santa Susana) in the eleventh grade. District has determined Student to be ineligible for special education services.

Classroom Performance

2. Student initially enrolled in the District on November 12, 2003, and attended Valley Middle School in the 2003-2004 school year in the seventh grade as a general education student. While in the seventh grade Student earned a 0.6 grade point average the first semester and a 1.3 grade point average the second semester. His grade point average for both semesters was brought up by a B in Physical Education (PE). Student's teachers noted he turned in incomplete homework and made poor use of his time to do assignments in class. During the school year Student was absent eight days and tardy to class 18 times.

3. Student and his mother reported to District that, in 1996 Student was privately diagnosed by Dr. Mary Barman with Attention Deficit Disorder (ADD) and Dysgraphia. Neither Student nor his mother has provided medical records to District or consented to District's access to Student's medical records regarding the diagnoses of attention deficit

¹ The ALJ has revised the issues without changing their substance, for purposes of organizing this Decision. The issues were derived from the Prehearing Conference Order as further clarified by the District's evidence at the due process hearing and in District's closing brief.

disorder (ADD) and dysgraphia. Dysgraphia is generally a condition marked by the inability to remember how to form letters rapidly and automatically. It causes writing fatigue and interferes with composition creativity. The condition is often associated with Students with ADD.

4. Student took the California Standards Test or STAR in the spring semester 2004. Student's scores of 375 in English-language arts and 392 in mathematics indicated Student was at grade-level proficiency.

5. Student's classroom performance further declined in the eighth grade in the 2004-2005 school year. Except for a B in PE he failed all academic classes. School records indicate that Student did not complete his homework and was unreceptive to help. Student was absent for 28 days and tardy to class 27 times in the school year.

6. On October 11, 2004, prompted by Mother's report that Student had ADD and dysgraphia, Student's poor performance in the seventh grade, and his declining performance in the eighth grade, District established a 504 Accommodation Plan (section 504 plan).² Under the section 504 plan District provided Student with accommodations including: the use of a computer to complete assignments and exams; permission to obtain copies of other students' class notes; extended time to complete classroom exams on request; an additional set of textbooks; and use of an agenda book to record and monitor assignments to completion.

7. Student's overall scores and performance levels in spring semester 2005 on the STAR test established Student was grade-level proficient in English-language arts with a score of 387, basic in Algebra 1 with a score of 310, and advanced in history-social science with a score of 413.

8. Student enrolled at Santa Susana High School in the 2005-2006 school year in the ninth grade. Student took courses in English, CP Science, PE II, Theater Arts II, Algebra 1, Computer Application, and TAP 9 or home room. The District continued Student's 504 plan. Notwithstanding the accommodations provided in the 504 Plan, Student's classroom performance, his grades, and class attendance continued to decline. As in the two prior school years, Student consistently received failing grades in his academic subjects and consistently passed PE. Except for PE he received F's in all of his classes. His report card noted he failed the academic classes for untimely assignments, incomplete homework, poor study habits and poor participation.

9. During the 2006-2007 school year, Student's tenth grade curriculum included World History II, Algebra I, General Biology, English, Theater Arts II, and PE. Student received F's in the academic courses and a passing grade of D in Theater Arts and C in PE. The grade report noted the same reasons for Student's failing grades as the previous year.

² Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

10. Mr. Doug Freed (Freed), Student's tenth grade world history teacher, testified that when Student attended his classes he sat and read novels he brought with him or he would play computer games on the laptop computer that had been provided by District to assist him in note taking. Student sat quietly and refused to participate in classroom work or homework assignments, and rarely participated in classroom group projects. Student received an F in the class. Freed testified credibly that Student was highly intelligent. Freed had also proctored the STAR taken by Student. Based upon his years of teaching experience and his observations, Freed believed Student was capable of producing work at grade level. He further testified that Student had the ability to obtain a passing grade if he had made an effort to do the assignments, participate in class, and turn in his work.

11. Student's tenth grade Algebra 1 teacher, Dr. Craig Levy (Dr. Levy), also reported Student's nonparticipation in class. Dr. Levy gave Student failing grades because of his failure to turn in homework assignments, failure to participate in class projects, frequent absences, and overall apparent disinterest in general class participation. Dr. Levy testified credibly that while he did not have specific data or indicators of Student's abilities, there was no evidence that Student could not do the work. Dr. Levy believed that Student could have passed his class if he had turned in his homework assignments and participated in class.

12. Student did not utilize the 504 plan accommodations for his class work. As a result District removed the laptop provided to Student under the 504 Plan in the spring semester of the 2006-2007 school year. The laptop was removed because Student used the equipment to access inappropriate web sites and play games during classroom time.

13. Student's academic abilities were apparent when he took the California High School Exit Examination (CAHSEE) in English-language arts on March 20, 2007 and mathematics on March 21, 2007. An overall score of 350 was required to pass each subject matter area. Student took the examination without special accommodations. Student scored 372 in English-language arts and 387 in mathematics.

Comprehensive Psychoeducational Assessments

14. In the spring semester of the 2006-2007 school year, Mother expressed concerns to District about Student's failing grades. A Student Study Team (SST) meeting was held on April 19, 2007. The SST was concerned that the 504 plan accommodations did not seem to remediate Student's failing grades in the core academic subjects. Mother also insisted that Student's inability to pass his academic courses was because of the alleged clinical diagnosis of ADD and dysgraphia. Mother requested an assessment to determine whether Student had a specific learning disability (SLD).

15. The District SST referred Student for an initial comprehensive psychoeducational assessment to determine whether Student was eligible for special education services under the category of other health impairment (OHI). Student was also referred for evaluation of eligibility under the categories of SLD, emotional disturbance (ED)

and autism. Student's Mother signed an assessment plan and also requested further evaluation of Student's adaptive behavior and his vocational interests.

16. District school psychologist Linda I. Vandaveer, Ph.D., NCSP (Dr. Vandaveer), in collaboration with District resource specialist/special education teacher Claudia Echavarria (Ms. Echavarria) assessed student on several dates between May 11, 2007 and June 6, 2007. Student was 16.7 years of age at the time of the assessments.

17. Dr. Vandaveer obtained a Bachelor of Arts Degree in child development, and two Masters of Art Degrees in counseling and guidance and in educational psychology, and a Ph.D. Degree in education administration. She also had a basic pupil personnel services school psychology credential and a preliminary administrative services credential. Dr. Vandaveer had been employed by District for more than 23 years as a school psychologist. She also had more than 20 years of experience in administering psychoeducational assessments to students within the District.

18. Ms. Echavarria is currently employed by District as a resource specialist/special education teacher at Santa Susana High School. Ms. Echavarria obtained a Bachelor of Arts Degree and a Master's of Education Degree. She obtained credentials in special education and had more than 20 years of experience in the field of special education. Ms. Echavarria also had extensive experience in the administration of assessments, including the assessment tools she used in her evaluation of Student.

19. Dr. Vandaveer reviewed the District's records and reports of Student's prior academic performance. She interviewed Mother and Student and obtained a family and social history. Dr. Vandaveer did not have Student's medical history, and thus there were no medical reports confirming a diagnosis of Student's purported ADD and dysgraphia. Dr. Vandaveer noted in the psychoeducational report that "Mother reported Student had diagnoses of ADD and Dysgraphia." Mother reported that the ADD was diagnosed by Dr. Mary Barmann in 1996. "The name and profession of the person making the diagnosis of Dysgraphia was not reported and Mother declined to provide this information. Mother also reported that Student was in counseling with Dr. Barmann every other week from 1994 through 2006 for issues related to ADD and divorce." At the time of the assessments Dr. Vandaveer had worked closely with Student in designing accommodations for Student's 504 Plan in the 2005-2006 and 2006-2007 school years. She also participated as a District IEP team member in the initial IEP of September 10, 2007, and presented the psychoeducational evaluation report.

20. Dr. Vandaveer selected and administered the following assessment tools: Wechsler Intelligence Scale for Children IV (WISC-IV), on May 11, 2007; Das-Naglieri Cognitive Assessment System (CAS) on May 31, 2007; Wechsler Individual Achievement Test II (WIAT-II) on May 31, 2007; Reynolds Adolescent Depression Scale (RADS-2), Second Edition on May 31, 2007; Behavior Assessment System for Children (BASC) on May 31, 2007; Gilliam Asperger's Disorder Scale-Teacher(GADS), on May 10, 2007; Gilliam Autism Rating Scale-2, on May 10, 2007; Gilliam Autism Rating Scale-Second

Edition (GARS-2)(teacher), on May 10, 2007; Vineland Adaptive Behavior Scales-II-Teacher Rating Form, on May 10, 2007; Vineland Adaptive Behavior Scales-II-Survey Interview Form, on May 25, 2007; Bender Visual-Motor Gestalt , Second Edition, on May 11, 2007; Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI), Fifth Edition, on May 31, 2007. The Oscar Interest Profiler was administered by resource specialist Mrs. Claunch on May 24, 2007. A vision and hearing screening was also administered on May 14, 2007.

21. Ms. Echavarria selected and administered the Woodcock-Johnson Tests of Achievement III (WJ-III) on June 5, 2007, and the Wide Range Achievement Test-Third Edition (WRAT-3) on June 6, 2007. Prior to administration of the WJ-III and the WRAT-3 Ms. Echavarria participated in Student's 504 Plan implementation meetings. She reviewed data she requested from Student's teachers, and reviewed Student's scores on the STAR and CAHSEE. She also interviewed Student, observed Student's classroom performance, and observed Student during the administration of the standardized tests. She provided the test results and other data to Dr. Vandaveer who reviewed and interpreted the data and wrote the report.

22. Both Dr. Vandaveer and Ms. Echavarria were trained and knowledgeable in the administration of the assessments and test materials. Both Dr. Vandaveer and Ms. Echavarria were qualified to administer the psychoeducational assessment.

Intellectual and Cognitive Assessments

23. The WISC-IV is a comprehensive measurement of general intellectual functioning. Student obtained the following subtest scores: 106 in verbal comprehension; 117 in perceptual reasoning; 104 in working memory; and 80 in processing speed. Student's verbal reasoning, comprehension and conceptualization was in the average range. His perceptual reasoning and organization was in the high average range. His overall attention, concentration and working memory was in the average range. His processing speed of mental and fine-motor processing were in the low average range. Overall, Student obtained a full scale IQ score of 105 which is in the average range for general intellectual functioning.

24. The CAS is a test designed to measure intelligence as a group of cognitive processes. The test had various subtests, all of which Dr. Vandaveer administered to Student. These subtests fell under the categories of planning, attention, simultaneous processing, and successive processing. Student obtained a planning standard score of 77, which was within the borderline range. He obtained an attention standard score of 103 placing him in the average range. In the simultaneous and successive processing subtests Student's standard scores were 109 and 105 respectively, which was in the average range.

25. Dr. Vandaveer testified, consistent with her September 10, 2007, report that Student's overall intellectual abilities were in the average range. Student's strengths lay in his perceptual reasoning. His non-verbal, conceptualization, and visual-spatial problem solving were measured to be in the high average range. Student's weaknesses were apparent

in his speed when working on paper and pencil tasks. His speed was below average. Dr. Vandaveer noted that this was not an indication of an intellectual deficit in Student. She indicated that Student only needed effective strategies in his approach to working tasks where he was required to use paper and pencil to complete the task.

Academic Achievement Assessments

26. The WRAT-3, WIAT II, and the WJ-III were administered to determine Student's basic skill level in core academic subjects as compared with his same aged peers, and to determine whether Student may have a specific learning disability.

27. The WRAT-3 measured Student's knowledge in reading, spelling and mathematics. Student obtained a standard score of 114 in reading placing Student in the 82nd percentile indicating Student performed at or better than 82 percent of his same aged peers. In the spelling test Student was required to spell out words dictated to him by the assessor. Student obtained a standard score of 90 in spelling placing him in the 25th percentile. The mathematics test required Student to perform mathematical computations. Student obtained a score of 100 placing him in the 50th percentile.

28. The WIAT II also measured Student's knowledge and skills in reading, mathematics, and spelling. Student obtained a standard score of 116 in reading comprehension (high average range), a standard score of 104 in mathematical calculations and scored 108 in mathematical reasoning (average range), and a standard score of 90 in spelling (average range).

29. The WJ-III administered to Student contained up to 22 subtests measuring achievement in mathematics, written language oral language and academic knowledge. Student received the following scores: letter word identification 108; reading fluency 91; reading comprehension 114; math calculation 106; math fluency 80; math reasoning 101; basic writing skills 105; writing fluency 91; and written expression 111. When the subtests were clustered together, Student obtained standard scores of 99 in broad reading; 98 in broad math; 96 in mathematical computation skills; 100 in broad written language; and 96 in written expression. Student's scores were all in the average range.

30. Overall the academic achievement test results indicated Student's academic skills scores were within the average to above average range with no statistically significant academic deficits. Dr. Vandaveer concluded that overall, based upon a comparison of the assessment of Student's intellectual functioning and the standardized achievement tests there was no evidence of a severe discrepancy between Student's intellectual functioning and his achievement. In addition, both Ms. Echavarria and Dr. Vandaveer concluded that based upon the assessment results, Student had the academic skills necessary to succeed in his grade level assignments.

Processing Assessments

31. The BVMG, Second Edition and the Beery-VMI, 5th Edition were the tools used to assess Student's psychomotor functioning. The BVMG was a timed test. The purpose of the test was to determine whether Student had a visual motor impairment. The test required Student to look at and copy 12 geometric designs of increasing difficulty within a specified period of time. The average completion time for a pupil Student's age was 11 minutes and 42 seconds. Student completed this test in 10 minutes and 32 seconds. Student obtained a standard score of 106, which placed him at the 66th percentile of his age peers. Student's time completion of this test was average. He scored above average on the memory portion of the test indicating no visual motor impairment. The Beery-VMI tested Student's visual motor integration skills. This test required Student to imitate a variety of geometric lines and angles designs of increasing difficulty. The overall test results indicated that Student's visual motor perceptual skills were average to low average range. However, the assessor noted there were no statistically significant deficits in Student's visual motor perceptual skills.

Adaptive Behavior Assessments

32. The Vineland adaptive behavior scales were used to assess Student's adaptive functioning. This tool is used to assess an individual's personal and social sufficiency in all areas from birth through adulthood based upon third party report. The Vineland: survey edition was completed by Student's Mother. The adaptive behavior composite was made up of three domain scores in communication, daily living skills and socialization. Based upon Mother's responses, Student scored in the average range for adaptive functioning. Mother reported Student had reading skills at the 12th grade level, excellent creative writing skills, age appropriate social skills, was competitive, able to care for his basic needs, and had post-high school academic and career goals. The Vineland: classroom edition was completed by Mr. Karl Thieme, Student's 10th grade Biology teacher. Mr. Thieme reported that Student displayed age appropriate classroom communication skills. However, Student made no attempt to interact with adults or peers in class, and did not bring required books or materials to class, did not turn in homework, did not attempt to improve study habits or quality of his work, and did not cooperate with teachers.

33. Dr. Vandaveer noted in the report summary that Student's general adaptive behavior, daily living skills, and socialization skills in the classroom setting were in the moderately low range. Dr. Vandaveer testified that these deficits were not evident in a one-on-one interaction with Student. She found him to be pleasant and engaging and showed no hesitation to interact with adults. Dr. Vandaveer further testified consistent with her report that, these deficits were due solely to Student's lack of interest in engaging and interacting with his classmates, his decision not to do the required classroom assignments and his persistent non-participation in class activities.

Social-Emotional Assessments

34. The BASC-2, self report of personality, BASC-2 teacher rating scale and parent rating scale, RADS-2, GARS-2, and personal interviews were used to evaluate Student's social-emotional functioning.

35. The BASC-2 Self Report of Personality–Adolescent is designed to aid in the evaluation of emotional and behavioral disorders, and consists of rating scales by which the assessor may gather information from a variety of individuals. The report consists of four composite scales or categories including school problems, internalizing problems, personal adjustment, and emotional symptoms index. Dr. Vandaveer administered these scales with Student to determine his view of his social, emotional, and behavioral functioning in the areas of attitude, school problems, internalizing problems, inattention/hyperactivity, and personal adjustment. Overall, Student found himself to be within the average range in most areas. However, Student reported that his attitude to school, his relationships with his parents and interpersonal relations were in the at-risk range; specifically, his responses indicated he had a pervasive discomfort with school and his teachers, and that he disliked having to attend school.

36. The BASC-2 teacher rating scales was completed by Dr. Levy and Mr. Freed. The scale requires the respondent to rate the child on 148 behaviors that are grouped in domains. The rating scales produce composite scores for three categories, externalizing problems (comprised of hyperactivity, aggression and conduct problem scales), internalizing problems (comprised of anxiety, depression and somatization scales), and school problems (comprised of the attention and learning problems scales). A high score suggests the teacher views the child's behavior as interfering with the child's achievement. Dr. Levy's responses in the externalizing and internalizing scales rated Student in the low average range. His responses to school problems resulted in a composite score of 53. Mr. Freed's responses placed Student in the average range for externalizing and internalizing problems, but Student obtained a composite score of 68 in the school problem category, rating him in the at-risk range. Mr. Freed believed Student's classroom conduct hindered his ability to achieve passing grades. These scores were consistent with the teachers' reports that Student displayed excellent focus and concentration on activities that interested him but he was inattentive to classroom activities and class work, that he brought novels to class of his own choosing and read his novels during classroom activity, and that Student was not compliant with class or teacher instructions essentially doing what he wished.

37. The BASC-2 Parent rating scale was completed by Mother. Student obtained composite scores in the average range.

38. The RADS-2 was completed by Student. The RADS-2 consists of a questionnaire containing a number of sentences commonly used to describe a person's feelings. The respondent is required to read the sentence and indicate how often the respondent experiences the feelings described in the sentence. Student's responses to the subtests were scored under the categories of dysphoric mood, negative affect, negative self-

evaluation, and somatic complaints. The depression total score obtained was 61 for mild depression. Dr. Vandaveer reported that no significant levels of depression were apparent.

39. The GARS-2 was completed by teachers Mr. Freed and Mr. Thieme. The autism index in this rating scale ranges from a score of 85 or higher, with the probability of autism very likely, to 69 or less with the probability of autism unlikely. As measured on this scale Student obtained autism index scores of 61 and 68 respectively, indicating the probability that Student was a child with autistic-like behaviors was unlikely.

40. The GADS was completed by Mrs. Albertson, Student's theater arts teacher. The scale consisted of subtests in social interaction, restricted patterns of behavior, cognitive patterns, pragmatic skills, and Asperger's disorder quotient. An Asperger's disorder quotient of 80 results in a high probability of the disorder. An Asperger's disorder quotient of 70-79 borderline, and 69 or less indicates that the disorder is not probable. Student obtained a score of 77 in the borderline range.

41. During the interview portions of the assessment, Student reported having friends at school. He reported that he was satisfied with his peer relationships. There was no evidence that Student was verbally defiant or aggressive at school. Student reported a strained relationship with his father, from whom his mother was divorced and with whom he did not live. Mother reported no significant behavioral problems or emotional concerns.

42. Finally, the OSCAR interest profiler was administered to determine Student's interests in pursuing vocational goals and work. The profiler results indicated Student did not like following convention where he was required to comply with guidelines and rules. He had a preference for artistic expression and an interest in teaching and serving others.

43. The assessment tools were standardized tests that were selected Dr. Vandaveer and Ms. Echavarria and administered so as not to be racially, culturally or sexually discriminatory, and were administered in English, Student's primary language. The tests were selected by and administered to ensure accurate results. The tests and assessment materials were used for purposes for which the assessments or measures are valid and reliable. The initial assessment was administered by trained and knowledgeable personnel and administered in accordance with the test instructions. The tests and evaluation materials were tailored to assess Student's specific areas of educational need and not merely to those designed to provide a single general intelligence quotient. No single criterion was used to determine that Student was not eligible for special education services. The psychoeducational assessment was appropriate.

September 10, 2007, Psychoeducational Evaluation Report

44. Dr. Vandaveer issued a psychoeducational evaluation report dated September 10, 2007. Based upon the assessment results, input from and collaboration with Ms. Echavarria, review of records, interview and observation of Student, Dr. Vandaveer concluded that Student's academic skills were commensurate with his intellectual ability.

She further concluded that Student did not meet the criteria for special education under the category of specific learning disability, other health impairment, emotional disturbance, and autism, nor any other handicapping condition.

45. To address Student's classroom performance Dr. Vandaveer recommended the use of a daily agenda book to record and monitor assignment completion, increased compliance with teacher expectations, as well as completion of class and homework assignments, provision of additional time, as needed, by Student to complete paper and pencil tasks, and consultation with the school psychologist on an as needed basis for Student's parents.

The September 17, 2007, IEP Meeting

46. District convened an initial IEP team meeting on September 17, 2007, to discuss the September 10, 2007, psychoeducational evaluation report. Student's Mother and advocate Allison Stockton attended on his behalf. The District team included Ms. Echavarria, Dr. Vandaveer, John Kohlmeier, general education teacher, Paula McCormack, counselor, and Susan Roberts, program specialist. The IEP team discussed the assessments as presented by Dr. Vandaveer and Ms. Echavarria. The IEP team reviewed and considered the assessment results. The District IEP team members adopted the report recommendations and concluded that Student was not eligible for special education services. The IEP team discussed the accommodations recommended to improve Student's grades. Mother did not consent to the IEP. Mother objected to the assessment findings and recommendations and requested an independent educational evaluation (IEE) at District expense.

47. District denied Mother's request for an IEE and filed a due process hearing request on December 28, 2007, for a determination that District's comprehensive psychoeducational assessment was appropriate.

LEGAL CONCLUSIONS

1. As the petitioning party, District has the burden of persuasion on all issues (*Schaffer vs. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Issue One: Was District's Psychoeducational Assessment Appropriate?

2. District contends that the comprehensive psychoeducational assessment conducted on May 3, 10, 11, 14, 24, 25 and 31, 2007 and June 5-6, 2007, met all of the requirements under the Individuals with Disabilities in Education Act (IDEA) and was appropriate.

Assessment

3. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) School districts must perform assessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student's native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

4. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an IEE under certain circumstances. The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must, within a reasonable time: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense. (See also Code of Federal Regulations, title 34, part 300.502(b)(2), §§ 300.507 through 300.513; Ed. Code, § 56329, subd. (c).)

5. Here, District's comprehensive psychoeducational and academic assessment conducted by Dr. Vandaveer and Ms. Echavarria was appropriate. Both Dr. Vandaveer and Ms. Echavarria testified to their expertise in the administration of the assessment. Their uncontroverted and credible testimony established that they were qualified to conduct the assessments, they used multiple and validated assessment tools, the tools selected assessed generally in all areas of suspected disability, the assessment was not administered in a discriminatory manner, and was in Student's principal language, English. They did not rely on any one test or tool to make their determinations. They established that the standardized tests were reliable indicators of Student's levels of functioning. Both Dr. Vandaveer and Ms. Echavarria were trained and knowledgeable in the administration of the assessment tests.

6. Accordingly, the assessments met all of the requirements under the IDEA and District's psychoeducational assessment was appropriate. District need not provide Student with an IEE at public expense. (Factual Findings 14 to 45; Legal Conclusions 1, and 3 to 4.)

Issue Two: Did District's determination in the September 17, 2007, IEP that Student was not eligible for special education and related services, deny Student a FAPE?

7. District contends that the determination of the District IEP team that Student was not eligible for special education services was correct. Specifically, District contends that the assessment test results demonstrate Student did not meet the criteria for special education services as a child with a specific learning disability, other health impairment, emotional disturbance, or as a child with autistic-like behaviors.

8. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).)

Eligibility

9. A Student is eligible for special education if the student is a "child with a disability." Federal law defines a "child with a disability" as a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subs. (a) & (b).) Notwithstanding a determination that a child has one of the aforementioned disabilities, a child is not considered a "child with a disability" under the IDEA if it is determined that the child only needs a "related service and not special education." (34 C.F.R. § 300.8(a)(2)(i).)

Specific Learning Disability

10. A student is eligible for special education under the category of "specific learning disability" if: 1) the student 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 speak, listen, think, read, write, spell, or do mathematical calculations, and; 2) based on a comparison of "a systematic assessment of intellectual functioning" and standardized achievement test" has a severe discrepancy between intellectual ability and achievement. (34 C.F.R. § 300.8(c)(1)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030. subd. (j).) Alternatively, if standardized tests do not reveal a severe discrepancy between intellectual ability and achievement, a severe discrepancy may still be found to exist as a result of a disorder in a basic psychological process based on: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the student's present teacher; 4) evidence of the student'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. California law permits two methods for determining a specific learning disability: 1) the severe discrepancy method; and 2) the “response to intervention” (RTI) method.³ (Ed. Code, § 56337, subd. (c).)

11. The first prong of the “severe discrepancy” test cannot be met. The results of the BVMG, Second Edition and the Beery-VMI established Student’s visual motor perceptual skills were average to low average range. Dr. Vandaveer found overall, there were no statistically significant deficits in Student’s visual motor perceptual skills. Moreover, there was no evidence Student was impaired in his ability to speak, listen, think, read, write, spell, or do mathematical calculations. Student’s test scores were commensurate with his overall cognitive functioning and Student did not have either an auditory processing or a visual processing disorder or a qualifying diagnosis of a disorder in a psychological process.

12. The second prong of the “severe discrepancy” test cannot be met here either. Student scored on the standardized tests consistently in the average range for intellectual ability and for all academic areas, and was above average in reading. Student also scored well above passing on the CAHSEE. The assessments adequately established no “severe discrepancy” exists between Student’s intellectual ability and his academic achievement based upon the results of the standardized tests.

13. Because the first and second prong of the severe discrepancy test was not met the analysis should end here. However, District evaluated Student’s educational circumstances based on: 1) data obtained from standardized assessment instruments, which showed Student to be average in academic and intellectual abilities; 2) information provided by Mother in the assessment process; and 3) information provided by the student’s 10th grade general education teachers, Mr. Freed, and Dr. Levy, who testified credibly that Student was a bright, capable Student who chose not to involve himself in his academic classes or the subject matter. The evidence established that no “severe discrepancy” exists based upon Student’s educational circumstances. Moreover, even if a discrepancy was found to exist the evidence established that the discrepancy could be corrected in the regular classroom through Student’s cooperation and with the supports and assistance recommended to Student in the assessment.

14. The District has met its burden of persuasion that Student was not eligible for special education as a child with a SLD. (Factual Findings 2 to 13; 23 to 31, and 44 to 45; Legal Conclusions 1 and 8 to 13.)

Emotional Disturbance

15. A student is eligible for special education as a child with emotional disturbance if the child has emotional disturbance and as a result of this condition manifests the following: 1) an inability to learn, which cannot be explained by intellectual, sensory or

³ The RTI method is not at issue in this case.

other health factors; 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; 4) a general pervasive mood of unhappiness or depression; and 5) a tendency to develop physical symptoms or fears associated with personal or school problems. (34 C.F.R. § 300.5(b)(8); Cal. Code Regs., tit 5, § 3030, subds. (i)(1-5).)

16. Here, the results of the adaptive behavior and social-emotional assessments establish there was no evidence Student was unable to learn. The evidence suggests that Student did not like attending school. He did not respect his teachers because he was not challenged by the curriculum and the classroom assignments. Student was bored with school. According to Student's own self report in the assessment he had established satisfactory interpersonal relationships and had friends at school and outside of school. Dr. Vandaveer testified that Student was pleasant and engaging in one-on-one contact with adults during the assessment process. The assessment noted that there was no evidence Student was verbally defiant or exhibited aggressive behaviors at school. These findings were confirmed by Mother who reported no significant behavioral problems or emotional concerns in Student. There was no evidence of a general pervasive mood of depression or unhappiness, and there is no evidence Student had any physical symptoms or significant fears associated with personal or school problems. (Factual Findings 7 to 13; 23 to 45; Legal Conclusions 1 and 14 to 16.)

17. Based upon the assessment results, the uncontroverted testimony, and documentary evidence there is no basis for the IEP team to find Student eligible for special education services as a child with an emotional disturbance. (Factual Findings 7 to 13; 23 to 45; Legal Conclusions 1 and 14 to 16.)

Other Health Impairment

18. A student is eligible for special education as a child with other health impairments if the child 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 poisoning, 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. (Cal. Code Regs., tit 5, § 3030(f); Ed. Code, §§ 5626, subd. (f), 56339.)

19. The District never received any of Student's medical records supporting Mother's assertion that Student had ADD and Dysgraphia. Accordingly, any accommodation District provided to Student was based solely on Mother's unsupported representations that Student had one or both of these conditions. There is no evidence that Student met the criteria for ADD or Dysgraphia or any other health impairment. Even the results of the CAHSEE, WJ-III and the WRAT all show Student was at grade level academically. There is no evidence Student had any of the aforescribed conditions that

may have adversely affected his educational performance. There was no basis for a determination that Student is eligible for special education services under the OHI category. (Factual Findings 3 to 13; 23 to 45; Legal Conclusions 1 and 18 to 19.)

Autism

20. A child meets the the eligibility criteria for Autistic-Like Behaviors if he or she has a history of developmental delay and exhibits any combination of the following autistic-like behaviors, including but not limited to: (1) an inability to use oral language for appropriate communication, (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, (3) an obsession to maintain sameness, (4) extreme preoccupation with objects or inappropriate use of objects or both, (5) extreme resistance to controls, (6) displays peculiar motoric mannerisms and motility patterns, and (7) self-stimulating, ritualistic behavior. (Cal. Code Regs., tit. 5, § 3030, subd. (g).) In addition, the autistic disorder must adversely affect his or her educational performance to the extent that his or her needs cannot be met solely within the general education setting, with or without modifications. Only if both components are met does the pupil meet the eligibility criteria for Autistic-Like Behaviors. (20 U.S.C. § 1402; 34 C.F.R. § 300.8(c)(1)(i)-(iii); Cal. Code Regs., tit. 5, § 3030, subd. (g).)

21. Student was assessed for autism and Asperger's disorder. Based upon the results of the GARS-2 and the GADS the evidence established that while Student's scores on the GADS were borderline for Asperger's disorder the probability that Student was a child with autism was unlikely. The assessment results established Student had appropriate communication skills and no deficits in his use of oral language. There is no evidence Student exhibited any of the peculiar motoric mannerisms or social withdrawal characteristic of a child with autistic-like behaviors. Based on Student's self-report he had friends at school, and he enjoyed good peer relationships. According to Dr. Vandaveer, Student had strong one-on one socialization skills. Student's mother also reported no significant behavioral problems or emotional concerns. Student's 10th grade teachers did not report evidence of autistic like behaviors in the classroom. (Factual Findings 8 to 13; 23 to 45; Legal Conclusions 1, and 20 to 21.)

22. There is no evidence that Student met the eligibility criteria for special education services as a child with autistic like behavior. There is no basis for a determination that Student is eligible for special education services under the category of autism. (Factual Findings 8 to 13; 23 to 45; Legal Conclusions 1, and 20 to 21.)

23. In sum, the IEP team properly considered the assessments, historical information gleaned from Student's school records, information from Student, Mother, and Student's teachers. District's determination that Student was not eligible for special education and related services under the categories of SLD, OHI, ED and autism was appropriate. District has met the burden of persuasion on all issues. (Factual Findings 2 to 45; Legal Conclusions 1 to 22.)

ORDER

1. District's comprehensive psychoeducational assessment conducted on May 3, 10, 11, 14, 24, 25 and 31, 2007 and June 5-6, 2007, met all of the requirements under the IDEA and was appropriate; thus District need not provide Student an IEE at public expense.

2. As of September 17, 2007, the IEP team properly determined that Student was not eligible for special education services under the disability categories of SLD, OHI, ED and Autism.

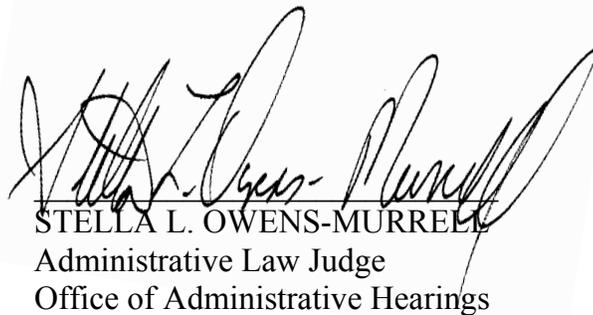
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction, within ninety (90) days of receipt.

DATED: June 4, 2008



STELLA L. OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings