

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

REDWOOD CITY SCHOOL DISTRICT.

OAH CASE NO. 2012060426

DECISION

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 11, 12, and 14, 2013, in Redwood City, California.

Attorney Susan Foley represented Student and was assisted by Advocate Linda Hughes. Student's Father was present throughout the hearing. Student did not attend the hearing.

Attorney Claire A. Cunningham represented the Redwood City School District (District). Director of Special Education Terese Talmage was present throughout the hearing on behalf of the District.

Student filed a request for a due process hearing (complaint) on June 7, 2012. At the request of the parties, the matter was continued on July 10, 2012. Student filed an amended complaint on November 20, 2012. At the request of the parties, the matter was continued on December 21, 2012. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to March 25, 2013 for the submission of declarations and closing briefs.¹ On that day, the record was closed and the matter was submitted for decision.

¹ Student's Closing Brief has been filed as Student's Exhibit J, and the District's Closing Brief has been filed as District's Exhibit 15.

ISSUES²

1. Did the District deny Student a free appropriate public education (FAPE) from June 7, 2010, to June 7, 2012³ by failing to identify her as eligible for special education and related services in the categories of:

- A. Emotional disturbance (ED);
- B. Speech and language impairment (SLI);⁴
- C. Specific learning disability (SLD); and/or
- D. Other health impaired (OHI)?

2. Should any award of reimbursement to Parents for educational expenses incurred as the result of the District's alleged denial of FAPE be reduced or denied because Parents behaved unreasonably in giving notice of the private placement and in other ways concerning it?

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a seven-year-old girl who resides with Parents within the geographical boundaries of the District. The District has twice decided that she is not eligible for special education and related services.

2. During the 2008-2009 and 2009-2010 school years (SY's), Student attended preschool at the Peninsula Covenant Preschool (Preschool), a project of the Peninsula Covenant Church. During SY 2009-2010 she was given psychological and speech and language (S/L) assessments by staff of the Children's Health Council (CHC) of Palo Alto.

² The first issue identified in the Order Following Prehearing Conference has been slightly reordered for clarity, and the second issue reframed in light of the evidence introduced at hearing. (See *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

³ Student's amended complaint requests a determination whether she was eligible for special education and related services from June 7, 2010, to June 7, 2012, the day the original complaint was filed. No opinion is expressed herein about Student's eligibility after that time.

⁴ For clarity, speech and language impairment (sometimes called speech and language disorder) is referred to herein as SLI, and specific learning disability as SLD.

3. In March 2010, while Student was still in Preschool, Parents enrolled her in kindergarten for SY 2010-2011 at the Stanbridge Academy (Stanbridge), a private school in San Mateo for students with disabilities. On June 26, 2010, Parents requested that the District assess Student for special education eligibility and on July 31, 2010, gave the District notice of Student's placement in Stanbridge and requested reimbursement. The District assessed Student during fall 2010 and held an Individualized Education Program (IEP) team meeting for Student on November 10, 2010 (which was concluded on January 18, 2011), at which it determined that Student was not eligible for special education.

4. For SY 2011-2012 Parents again enrolled Student in Stanbridge for the first grade. During fall 2011 the District again assessed Student. It held another IEP team meeting on October 24, 2011, at which it again determined that Student was not eligible for special education. No other IEP team meeting has been held for Student since then.

5. Student was successful in kindergarten and first grade at Stanbridge and is now in the second grade there for SY 2012-2013. She has never been enrolled in a public school.

Student's Eligibility for Special Education in the Categories Identified by Parents

6. In California, a student is eligible for special education and related services if assessment results demonstrate that she has an impairment described in one or more of the 10 categories set forth in the governing statutes and regulation, and that the degree of that impairment requires special education. Whether Student is eligible thus depends first on whether she has an impairment as defined by any of the eligibility categories, and second on whether that impairment is serious enough that she needs special education.

Emotional Disturbance (ED)

7. A child's impairment meets the eligibility criteria for a serious emotional disturbance when she exhibits one or more of five characteristics over a long period of time, and to a marked degree, which adversely affect educational performance. Student claims she exhibits one of those characteristics: "Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations." (Cal. Code Regs., tit. 5, § 3030, subd. (i).)

Dr. Klaiman's Report

8. Student's claim that she exhibits ED is based primarily on an evaluation at her Preschool in 2009 by Dr. Cheryl Klaiman, a psychologist then employed by CHC. Dr. Klaiman received a Ph.D degree in School and Applied Child Psychology from McGill University in Quebec in 2003 and worked as a research scientist for the next three years. Beginning in 2006, she was employed as a staff psychologist for CHC and was licensed as a psychologist in California. She is now an assistant professor at Emory University. She

specializes in autism spectrum disorders. In 2009 Dr. Klaiman wrote a report on Student that was made available to the District for its IEP team meetings, and she testified at hearing.

9. In fall 2009 Parents requested evaluations by CHC because the staff at the Preschool had told them they should have Student “checked out.” The staff told Parents they were having difficulty controlling Student’s behavior, she was acting up and was a flight risk. Dr. Klaiman reported that Preschool staff told her Student’s “tantrums can reportedly destroy the classroom.” They also told her that Student had a tendency to cling to a security object (a duck) and to hoard other toys.

10. Dr. Klaiman observed Student in her preschool classroom for about an hour on November 10, 2009. She did not observe any disruptive behavior by Student. She did observe that, after participating well during a counting exercise in circle time, Student lay down on her side and pushed a toy train until the teacher told her to sit back up. She insisted on retrieving and playing with her duck. She fidgeted frequently, although she participated well with other children in art and music activities.

11. During story time, Dr. Klaiman reported, Student paid attention and interacted well with the teacher, but began to roll on the floor again. Dr. Klaiman noticed she hoarded markers and reportedly had difficulty sharing objects. She sat in her seat during snack time but asked the teacher questions in a loud voice and then she participated in a group prayer.

12. Dr. Klaiman interviewed the Preschool teacher for 10 minutes during her visit. In reaching her conclusions she also interviewed Parents and solicited rating scales (questionnaires with checklists) from Parents and the Preschool teachers.

13. Preschool teacher Brandy Johnson and Director of the Preschool Terry Boudreau jointly filled out a rating scale that described the behaviors noted in Dr. Klaiman’s report. On it they commented that Student was extremely defiant when asked to do something that did not match what she wanted to do, and was very determined to have her way. They rated Student in the clinically significant range in the categories of emotionally reactive, withdrawn, aggressive behavior, affective problems, social problems, and oppositional defiant problems. Their ratings in six other categories fell below the level of clinical significance. Neither Ms. Johnson nor Mr. Boudreau testified, nor did any other representative of the Preschool.

14. Mother told Dr. Klaiman that Student is oversensitive to external stimuli, particularly noise (which distracts her); seeks movement activities that interfere with her other activities; avoids playground equipment; does not like riding in a car; and is anxious in many situations. On her checklist, she rated Student in the clinically significant range in 10 of the 12 categories listed. Mother did not testify.

15. Dr. Klaiman concluded in her report that Student frequently engaged in power struggles, tantrums, and conflicts at school. She reported that the teachers were concerned about their ability “to keep her safe at school as when she gets angry she tends to run off, hit

and kick and throw objects.” She concluded that Student was overly focused on her own desires, unduly attached to her duck, hoarded objects, fiddled, fidgeted, rolled on the floor and became distracted.

16. Dr. Klaiman did not address whether Student is ED. Instead, she attributed most of Student’s difficulties to anxiety, and diagnosed her as having Anxiety Disorder Not Otherwise Specified (NOS), a diagnosis she testified was a catchall category for those who did not meet the criteria for more serious anxiety disorders. She concluded that Student’s anxiety “is clearly impacting her development.” She made numerous recommendations to Parents that included seeking good peer models, arranging play dates, individual therapy for her anxiety, and social skills training. She found safety issues “of concern” and recommended placement in a classroom with as high a teacher-student ratio as possible, and predicted that if Student did not learn better coping skills, “a larger Kindergarten classroom would be overwhelming to her.” She recommended a sensory diet. Noticing an articulation delay, she also recommended a S/L assessment.

Father’s Testimony

17. Father testified that once, when he picked Student up at school, the staff told him she had run out of the classroom and “around the corner,” though staff had brought her back.

18. Father also testified about Student’s behavior at home. He stated that she does not like to be touched around the arms; has panic attacks at television commercials and runs off to hide, sometimes under her bed; and screams and wails at the mention, or sight on television, of blood or violence or injury. He testified this behavior was ongoing and had recurred the night before his testimony at hearing: he heard her screaming upstairs because of something she saw briefly on television. He testified this was a “common occurrence.”

Testimony of Stanbridge’s Witnesses

19. Student’s teachers at Stanbridge described Student’s emotional condition in a less alarming light. Lisa Parnello taught Student in kindergarten during the SY 2010-2011, in summer school in 2011, and in first grade in SY 2011-2012.⁵ She testified that Student had “a lot of concerns emotionally and behaviorally” when she arrived in kindergarten at Stanbridge in fall 2010; that she was frequently agitated; and that she would try to run away often enough that the classroom door or the gate to the street had to be shut to prevent it. She

⁵ Ms. Parnello has a California K-8 multiple subject teaching credential and six years of experience teaching in primary grades. She has a master’s degree in special education from the University of Phoenix, and Arizona general and special education teaching credentials. From 2006 to 2009 she was a general education teacher in an Arizona elementary school, though her class contained many children with disabilities. She began teaching children with mild to moderate disabilities at Stanbridge in 2009.

also complained about noise. However, these concerns abated as Student progressed through kindergarten and first grade. Academically, she made considerable progress from the beginning and was well ahead of her classmates.

20. By the time Student reached second grade at Stanbridge, her emotional difficulties in school were relatively minor. Kari Raymer, Student's second grade teacher, testified that Student is sometimes a little anxious at the start of the day but usually settles down.⁶ Small things can upset her and she sometimes feels overwhelmed. She sometimes needs, and takes, breaks in a quiet room. But in general she is friendly, social and outgoing, and does well academically. Ms. Raymer did not claim that Student posed any behavioral difficulties in her class.

Testimony of District's Witnesses

21. The District's witnesses who evaluated Student saw nothing that could be described as emotional disturbance. In fall 2010, Student was evaluated by a team of District personnel. Mary Gutierrez, a District school psychologist, coordinated the assessment and conducted the psychoeducational portion of it.⁷ She and her colleagues administered several standardized tests to Student, including the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-2), the Test of Auditory Processing Skills (TAPS), the Fifth Edition of the Berry Visual Motor Integration test (VMI) and the Behavior Assessment Scale for Children – Second Edition (BASC-2). They concluded that Student's general cognitive ability, nonverbal reasoning ability, and other abilities are in the low average range, though her verbal reasoning abilities are average. They emphasized that her scores may not reflect her true abilities because her attention span was quite limited during testing. They were unable to reach a conclusion about Student's behavior using the BASC-2 because Mother declined to respond to a number of questions on the rating scale she was given. They agreed that Student was not eligible for special education in any category.

22. As part of the fall 2010 assessment, Ms. Gutierrez observed Student at recess and in her kindergarten class at Stanbridge for about an hour. She testified that at recess Student engaged quickly with other children, and although she had a brief conflict with her brother, who is her classmate, she was able to work through it. Student followed well in

⁶ Ms. Raymer received a master's degree in elementary education from the University of California at Santa Barbara two years ago. She has a general education multiple subject credential; was a student teacher for a year and is in her first year at Stanbridge.

⁷ Ms. Gutierrez has a master's degree in education from San Jose State University and another master's degree in counseling, with a clinical child/school psychology option, from California State University at Hayward. She has a clear pupil personnel services credential and is credentialed as a school psychologist. She has worked for the District as a school psychologist since 2003.

class, participated in class discussion, was relaxed, stayed on task and interacted appropriately with peers and teachers. She was not disruptive. Ms. Gutierrez also interviewed the teacher, Ms. Parnello, who told her that Student was “doing great” in class, although she was “wiggly,” was bright and understood the materials.

23. In her classroom observation, Ms. Gutierrez did not see any sign of the behavioral concerns Mother had rated as clinically significant on the portions of the BASC-2 rating scale she did complete. Nor did she see any sign of the anxiety diagnosed by Dr. Klaiman in 2009. She did not agree with Dr. Klaiman’s anxiety diagnosis. In her testing and observation she found no data that would support the conclusion that Student was emotionally disturbed.

24. A year later Kathryn Kiethly, another District school psychologist, coordinated another assessment of Student.⁸ She and her colleagues administered the Woodcock-Johnson Achievement Test – Third Edition (WJ-III), the Conner’s Rating Scale (CONNOR’S), and the BASC-2. From the results of the WJ-III, Ms. Keithly and her colleagues concluded that Student “is a bright, intelligen[t] girl that appears to be at or above grade level.”

25. During a telephone interview with Ms. Keithly, Mother made some of the same observations about Student’s behavior she had made to Dr. Klaiman and Ms. Gutierrez. Ms. Keithly asked how Student behaved in such public settings as stores and banks, and Mother responded she was fine in those settings. Ms. Keithly found this important, because a student with anxiety would generally have difficulty in such settings. Mother declined to complete her CONNOR’S rating scale, but Student’s teacher, Ms. Parnello, did complete one. She rated Student’s oppositional behavior as “mildly atypical” and rated her in the clinically significant range for internalizing behaviors, anxiety and depression, but otherwise provided ratings in the average range. Ms. Parnello stated that Student “seems to worry quite a bit about both social and academic issues, but she can be redirected with verbal prompting.”

26. Ms. Keithly observed Student in her class at Stanbridge in August 2011 for a little over an hour. At one point Student put her head down on the table, but brought it up again when the teacher asked her to, and otherwise participated well in the class. She was able to continue working during the misbehavior of another student. Student was friendly with other students, had a lot of respect for the teacher, followed directions and stood out behaviorally “because she was doing so well.” She saw no evidence of the behavioral

⁸ Ms. Keithly has a master’s degree in counseling psychology from Saint Mary’s College, and a bachelor’s degree in social and behavioral science from California State University at Monterey Bay. She is working toward a doctorate degree in clinical psychology. Before she came to the District in 2010, Ms. Keithly was a school psychologist for the Monterey Peninsula Unified School District, and interned in that role at the West Contra Costa Unified School District. She has a credential in school psychology and is also a Behavioral Intervention Case Manager (BICM).

concerns mentioned by Mother in their telephone interview. Ms. Keithly considered whether Student was emotionally disturbed and saw no signs of it. She did not agree with Dr. Klaiman's anxiety diagnosis, and concluded that none of Student's behaviors adversely affected her educational performance.

27. Doctor Scott Yarbrough is the District's lead school psychologist and is responsible for collaboratively supervising its nine other school psychologists, including Ms. Gutierrez and Ms. Keithly. He has substantial experience as a school psychologist.⁹ He knows of Student indirectly, having participated in her fall 2010 IEP team meeting, and reviewed her District evaluations as well as the reports from CHC. He has never evaluated Student and did not offer an opinion on her emotional condition. He did, however, carefully evaluate Dr. Klaiman's report, and was asked whether, assuming the facts stated in it were true, it supported her conclusions and diagnosis.

28. Dr. Yarbrough was particularly well equipped by experience to evaluate Student's preschool conduct because he took a year off between undergraduate and graduate schools to participate in a research experiment involving interventions on phobic behaviors in preschool children with developmental disabilities. He also has several years of experience in the District supporting its preschool team by doing behavioral assessment, behavioral intervention and consultation. Last year he was responsible for consultation and training in the development of intervention services for autistic preschool children. Dr. Yarbrough's testimony was well-informed, detailed, and consistent, and cross-examination revealed no weaknesses in it. His testimony effectively undermined Dr. Klaiman's report and testimony.

29. Dr. Yarbrough was sharply critical of the methodology by which Dr. Klaiman arrived at her diagnosis of Anxiety Disorder NOS, and did not agree with it. He persuasively testified that Dr. Klaiman omitted many of the steps required for a valid diagnosis of Anxiety Disorder. Except for her one-hour observation, her measurements were all indirect and dependent on the views of others. Dr. Yarbrough testified that a single hour of observation was typically not enough to support such a diagnosis, which would normally be made only after multiple observations in several settings. Such a limited observation might not be a representative sample of Student's behaviors.

30. Dr. Yarbrough also established that Dr. Klaiman's diagnosis was flawed because it reflected none of the standardized testing or other objective data that would permit comparing Student to others and that would typically support an anxiety diagnosis. Such a

⁹ Dr. Yarbrough has a doctoral degree in clinical psychology and is a Board Certified Behavior Analyst (BCBA). He has been a school psychologist in the District since 2000 and its lead school psychologist since 2005. Before that he was a school psychologist for the San Francisco Unified School District, and a program coordinator and behavioral specialist for the Children's Day Services Division of the Developmental Disabilities Institute in New York, where he is also certified as a school psychologist. He has published several academic papers and made numerous professional presentations.

diagnosis would normally be made by testing in three different domains. First, it is necessary to investigate the physiological symptoms of anxiety, such as accelerated heartbeat breathing blood pressure and sweating. Second, analysis must be conducted of emotional responses including crying, upset facial expressions, rapid eye tracking, and the like. Third, attention must be paid to the subject's behavioral responses, typically including physical movement away from triggering events. Dr. Klaiman examined none of these domains.

31. Dr. Yarbrough did not believe that Student's conduct, as reported by Dr. Klaiman during her observation, was consistent with a diagnosis of anxiety. To Dr. Yarbrough, the reported behavior appeared to indicate instead a relatively high activity level. Some of that behavior even indicated some comfort in the preschool setting. For example, Student's orientation and response to the presence of a stranger in the classroom (Dr. Klaiman) showed no avoidance or anxiety.

32. Dr. Yarbrough testified persuasively that Student's occasional behavior in running away does not by itself establish anxiety. There can be many causes of that behavior, and a functional assessment would have to be conducted to identify the actual causes. Like the other behavior reported by Dr. Klaiman, running away is frequently a tactic to get adult attention and interaction. It can be no more than a game in which the child turns around to see if an adult is following. Student's running away as reported by Dr. Klaiman could also merely indicate avoidance of undesired tasks.

33. Student did not recall Dr. Klaiman to defend the methodology of her report, nor did Student present the testimony of any other professional to contradict Dr. Yarbrough.

34. On balance, the opinions summarized above did not show that, from June 7, 2010 to June 7, 2012, Student is or was eligible for special education as ED. Most important is the fact that no professional, not even Dr. Klaiman, testified that Student met the criteria for ED. Dr. Yarbrough (based on his record review), and Ms. Gutierrez and Ms. Keithly (based on their assessments and observations) testified persuasively that she did not. Below are additional reasons Student failed to establish eligibility in the ED category.

Predictive Value of Student's Preschool Experience

35. Student did not prove that her preschool experience was a reliable indicator of her likely behavior in kindergarten or first grade, or that the District's IEP teams in fall 2010 or fall 2011 should have so regarded it. The record does not reveal anything about the Preschool's program or show whether it was actually an academic environment or more akin to child care. The qualifications of the instructors (and therefore their abilities to control children as a professional teacher could) are unknown because no one from the preschool testified.¹⁰ The fact that Student calmed considerably when she began attending Stanbridge suggests that her preschool experience had little predictive value for her later education.

¹⁰ The teacher and Director of the Preschool jointly filled out the caregiver report form they gave to Dr. Klaiman. They listed their training as "Bachelor Degree in Child

Absence of Direct Evidence of Student's Behaviors in Preschool

36. The lack of any testimony by Preschool staff made it impossible to measure the accuracy or seriousness of the factual claims they made to Dr. Klaiman. For example, they reported to Dr. Klaiman that when Student was angry she “runs off” (“elopes” in educational jargon). There was no way to tell how often this occurred or how serious it was. Dr. Klaiman did not witness it herself, nor did Father.¹¹ Whether the single incident Father described was serious, whether it compromised Student’s safety, or whether it was only a reaction to a particular event or incident is unknown. Ms. Parnello testified that Student showed some tendency to run out of class when she first arrived at Stanbridge, but also testified that she solved that problem by the simple expedient of closing the classroom door and the gate to the street.

37. Dr. Klaiman’s statement in her report that “Student’s tantrums can reportedly destroy the classroom” was also impossible to evaluate in the absence of any testimony from anyone who actually witnessed any such event.

Absence of Evidence of Educational Consequence

38. Dr. Klaiman did not describe anything in her observation that would support a finding that Student’s behaviors interfered with her education in preschool. Instead, based on her one hour observation, she testified that Student benefitted from the class. Dr. Klaiman was asked whether Student’s undesirable behaviors had adversely affected her educational performance, and she answered “yes,” but she gave no details, did not describe her source of information, and had no personal knowledge on which to rely. No one who was in a position to know whether Student’s preschool behaviors interfered with her education testified, and the record contains no substantial evidence that they did interfere.

39. None of the District’ witnesses who observed Student at Stanbridge saw any sign of behaviors that might interfere with her education. Neither of Student’s teachers at Stanbridge described any behaviors that have interfered with her education there. Both Ms. Parnello and Ms. Raymer testified that Student’s academic performance and social adjustment in their classes has been excellent.

Disputed Character of Student's Behaviors

40. In disputing whether Student has displayed inappropriate types of behavior, the parties dispute whether Student’s preschool behavior was anything out of the ordinary for her age group. Dr. Klaiman testified that the behavior she witnessed in her one hour visit to

Development, Teaching Credential,” and their experience in “child care or early education” as “10+ years.” They did not specify which of them held the un-described teaching credential.

¹¹ Father wrote on a form provided to Dr. Klaiman that Student “will run away.”

the preschool was not typical of preschool children. She testified that Student was more “fidgety” than other children, paid less attention, was more attached to objects, and that “hoarding was also a concern.” Father testified that the behavior he noticed at home was not typical of Student’s age group.

41. Dr. Klaiman’s qualifications to make a judgment about the typical behavior of preschool students were modest. Dr. Klaiman received her degree in child psychology in 2003 and worked as a research scientist until 2006. By 2009, when she wrote her report, she had three years’ experience at CHC. She has never taught or worked in a school, and nothing in her background reveals any experience with children in groups, so nothing in the record shows that she was well equipped by training or experience to express an opinion on how preschool children behave when they are together. Dr. Klaiman based her diagnosis solely on her one hour visit to the Preschool and what Mother and Preschool staff told her. She conducted no standardized tests because Parents were concerned about the costs of doing so.

42. Dr. Klaiman did not have extensive experience with anxiety disorders. When asked at hearing what qualified her to make such a diagnosis, she responded that it was part of her post-doctoral training at school. There was no evidence that she had any substantial experience in her career studying or diagnosing children with anxiety disturbances. Her expertise is with children who are autistic.

43. Dr. Yarbrough, as noted above, was very well qualified to address the subject of the typical behaviors of children in preschool. He testified that the behaviors observed by Dr. Klaiman, as described in her report, were typical of the behaviors he sees in a lot of children in preschool settings. He often saw student interaction in preschools that look very similar to Student’s reported behaviors in terms of engagement, attention, and participation. Some of her reported behaviors showed the existence of a “power struggle,” like holding on to preferred items, but also showed she responded “really well” to redirection from staff.

44. Ms. Keithly, who also has significantly more experience with school children than Dr. Klaiman, agreed with Dr. Yarbrough. She testified credibly that it is normal for children in that age group to whine, stamp their feet, and sometimes hit other children.

45. The more persuasive evidence therefore showed that the behavior noted by Dr. Klaiman in her own observation was not atypical or alarming; it was instead the sort of behavior that is common among preschool-age children. This conclusion precludes any finding that Student’s behavior was inappropriate within the meaning of the ED eligibility requirements, or that any abnormal behavior existed to a marked degree.

Duration of Student’s Behaviors

46. Eligibility as ED also requires that the student’s inappropriate behaviors exist for a long period of time. By fall 2009, when Parents hired Dr. Klaiman to examine Student’s behavior, Student had already been in the Preschool for a year. According to Dr.

Klaiman, Preschool staff told her that they had requested an assessment in September 2009, and that her problem behaviors had been occurring for “a period of time,” which might or might not have been from the beginning of the school year. Dr. Klaiman was not more specific about the duration of Student’s problem behaviors, and since Preschool staff did not testify, there was no clear evidence that the behavior they described had existed in the previous school year.

47. There was also no evidence that the behaviors of concern to Dr. Klaiman persisted to any significant degree beyond November 2009, the date of her report. The record contains nothing about Student’s behavior during the rest of preschool. According to Ms. Parnello, Student’s first teacher at Stanbridge, Student arrived there having “a lot of concerns, both emotional and behavioral,” that she was agitated a lot, and that she would on occasion try to run away. But Ms. Parnello testified that these difficulties lessened as the year went by. She also testified that it is common for students entering kindergarten to have these sorts of adjustment difficulties. And nothing in the testimony of Ms. Raymer, Student’s current teacher at Stanbridge, suggested serious behavioral difficulties of any kind. The evidence thus did not show that Student’s relevant behaviors existed for a long period of time.

48. For the reasons above, Student did not discharge her burden of proving that she was eligible for special education in the category of ED.

Speech and Language Impairment

49. A student is eligible for special education if she has difficulty understanding or using spoken language, under specified criteria, and that difficulty both adversely affects her educational performance and cannot be corrected without special education services. Student claims eligibility under the criteria for an articulation disorder, which are that she must display reduced intelligibility, or an inability to use the speech mechanism, which significantly interferes with communication and attracts adverse attention.

50. Three speech and language assessments have determined that Student has, or at least had, somewhat impaired articulation. The parties dispute whether the impairment is so serious that it adversely affects her educational performance and requires special education services to be corrected.

2010 Assessment by B. Carlin Graveline of CHC

51. Dr. Klaiman noticed that Student had an apparent articulation difficulty and suggested an S/L evaluation. The evaluation was performed and reported on in February and March 2010, when Student was five years old and in Preschool, by a CHC S/L pathologist named B. Carlin Graveline. Ms. Graveline did not testify, and nothing is known of her training or experience except that her report states her credentials as: “M.S., CCC-SLP.”

52. Ms. Graveline found that Student had “a mild expressive language delay” due to her articulation difficulties. On the Goldman-Fristoe Test of Articulation, 2nd Edition (GFTA-2), Student achieved a standard score of 83, which put her in the 6th percentile of her age group. This measurement may not have been accurate because Ms. Graveline reported that she was unable to complete several subtests of formal assessments “due to reported fatigue and non-compliance,” and as a result rated her own report as having only “fair-good validity.”

53. Ms. Graveline found that Student’s articulation was imperfect because she had difficulty pronouncing certain words. For example, for “frog” she said “fwog,” for “watches” she said “wah-tiz,” and for “pencils” she said “pen-tulz.” Ms. Graveline also noted a hyponasal vocal quality probably related to the fact that Student had enlarged tonsils and adenoids when she was tested, and a glottal fry at the end of her phrases. These difficulties were not typical for her age.

54. Ms. Graveline diagnosed Student as having an expressive language disorder, a phonological disorder, and a voice disturbance.¹² She made several recommendations for improving Student’s speech, but did not assess Student outside of her office and did not address any educational consequences of her delays.

2010 Assessment by Beatriz Canoy

55. District S/L pathologist Beatriz Canoy assessed Student in October and early November 2010.¹³ She observed Student at Stanbridge and administered a number of standardized tests, on which Student scored in the average range on nearly all measures. She administered the Photo Articulation Test, 3rd Ed. (PAT-3), on which Student earned a standard score of 100, which placed her in the 50th percentile of her age group. Ms. Canoy did notice that Student sometimes had difficulty pronouncing words containing the letters “l” (“el”), “r,” and “s”. She concluded that Student’s “overall speech intelligibility is . . . mildly affected partly due to distortion” of those sounds. Ms. Canoy made several recommendations for improving Student’s speech, but told Student’s November 2010 IEP team she did not believe Student was eligible for special education due to any S/L impairment.

56. Ms. Canoy examined Ms. Graveline’s report, noted her failure to complete certain subtests, and pointed out that, apparently because of that failure, the report contains

¹² Student makes no argument in her closing brief that she had a voice disturbance that would support SLI eligibility.

¹³ Ms. Canoy has a master’s degree in communicative disorders. She has been an S/L pathologist for the District since 2003 and previously worked in that role for the Oakland and San Francisco Unified School Districts. She also maintains a private practice.

no index score. Ms. Canoy testified without contradiction that the absence of an index score rendered Ms. Graveline's report invalid.

2011 Assessment by Jessie Blois

57. District S/L pathologist Jessie Blois assessed Student in fall 2011. She did not testify, but her report shows she administered the GFTA-2, as Ms. Graveline had done. Student scored in the 18th percentile of her age group. Ms. Blois observed Student at Stanbridge and noticed that she inconsistently displayed distortions of "r," "s," and "th" sounds. During her assessment, however, she noted that Student had been taught and understood the correct way to articulate those sounds, and was able independently to correct them. She concluded, and reported to Student's fall 2011 IEP team, that Student was not eligible for special education in the SLI category, and did not meet the criteria for eligibility due to an articulation disorder.

Adverse Educational Effect of Student's Articulation Delay

58. The above assessments agree, and the District does not dispute, that Student has a mild articulation disorder in pronunciation of the letters "l," "r," "s," and the "th" sound. Ms. Canoy testified that her difficulty with these sounds is inconsistent and that her ability in pronouncing them is improving.

59. None of the above assessors found that there were any adverse educational consequences of Student's articulation delay and no professional testified that there were any such consequences. Most of Student's witnesses testified that she had an articulation delay, but none of them testified it caused any significant educational problem.

60. Student's preschool teachers indicated on the caregiver form they provided to Dr. Klaiman that Student had a "speech problem" but left blank the space next to that description. Although they wrote several comments about Student's stubbornness and behavior, they wrote nothing about any educational effects of Student's speech problem.

61. Father testified that, between ages three and five, Student had difficulty at home putting words together correctly and saying them properly. It was hard for her to get out what she needed to say. But Father did not claim to have observed Student in class at Preschool and did not mention any adverse effect her speech problem might have caused there.

62. Dr. Klaiman did not address the possible effect of Student's articulation disorder on her education, either in her report or in her testimony. Her report states only that Student "spoke out easily and readily when asked a question" and that her "[a]cademics reportedly have been developing within normal limits, or are even advanced for her age." In her description of her visit to the preschool, Dr. Klaiman noted that, during story time, Student "commented about the story, asked for clarification, and responded to questions."

Then, in an art project involving two other children, Dr. Klaiman reported that Student “was nicely able to engage in conversation with the other children.”

63. In her 2010 S/L assessment, Ms. Graveline devoted several paragraphs to Student’s articulation deficit but made no mention of its effect in school. None of her recommendations for improving Student’s speech was related to school.

64. Ms. Parnello testified that when Student arrived at Stanbridge she needed articulation speech therapy and received it. Then she started speaking more clearly, which made it easier for her to read and spell. However, those early difficulties appear to have had no impact on Student’s academic achievement. Ms. Parnello’s grades for Student in her first year at Stanbridge were almost all “E” for excellent, the highest available grade. In her first quarter, when Student had just arrived and had not yet received much S/L therapy, she received an E in language arts/writing, reading, math, social studies, science, art, technology and music. Ms. Parnello gave her only two grades that were less than excellent that quarter: “Satisfactory” in physical education (PE) and music. Student maintained those same high grades for the second, third, and fourth quarters of her first year at Stanbridge. Ms. Parnello’s comments on the bottom of the report card were all praise; there was no mention of academic difficulty. She testified that Student received the highest grades in her kindergarten class except for PE.

65. The speech therapist who worked with Student during her kindergarten year at Stanbridge did not testify. Kari Schaiman is the S/L pathologist who provided direct speech therapy to Student in the first grade at Stanbridge, in SY 2011-2012.¹⁴ When she first met Student in fall 2011 she did not perceive any significant delay in her expressive language skills. She worked directly with Student for 30 minutes once a week, mainly on her “s” and “t” sounds. Student also had a goal involving past tense verbs, but she had already met that goal. When Ms. Schaiman first met Student her speech deficit was not normal for her age, but she made very good progress during first grade. At the start of the second grade Ms. Schaiman agreed with Ms. Raymer that Student was generalizing her progress in articulation and no longer needed direct therapy, and reduced her participation to consultation. Ms. Schaiman testified that the speech therapy Student received benefited her, but she might have made progress anyway. Ms. Schaiman did not assess Student, and she did not testify that Student’s articulation delay had any effect on her educational performance at any time during their relationship, or that special education was required for her to receive educational benefit.

66. None of the several District observers at Stanbridge in either fall 2010 or fall 2011 reported noticing any adverse consequences from Student’s articulation difficulties. All of them reported or testified that Student’s verbal interactions with adults and peers were

¹⁴ Ms. Schaiman has a master’s degree in speech and language from San Francisco State University. She has worked as a speech therapist at Stanbridge for one and a half years and before that worked in hospitals and clinics. She is licensed as a speech and language pathologist by the State and by the American Speech-Language-Hearing Association.

good and appropriate. Ms. Canoy testified that in her Stanbridge classes in fall 2010 Student's speech was age-appropriate, she exhibited no speech impairment, and no one asked to have her speech clarified. Ms. Blois concluded in 2011 that "[Student's] speech distortions do not negatively impact her ability to convey her thoughts to peers or adults or her ability to get her message across to a known or unknown listener."

67. As the evidence summarized above showed, there was no evidence that Student's articulation delay has adversely affected her educational performance.

Adverse Attention

68. In her closing brief Student does not argue that her articulation delay resulted in any adverse attention to her, and the record does not disclose any evidence that would support such a claim.

69. In sum, Student did not discharge her burden of proving that her mild articulation delay has interfered with her education or brought adverse attention to her, and therefore did not establish that, during the time addressed here, she was eligible for special education in the category of SLI.

Specific Learning Disorder

70. Eligibility for special education in the category of SLD requires proof of the existence of two things. First, the student must have a specific learning disability, which is 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 the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The eligibility requirements use, as examples of such a disability, conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

71. Second, SLD eligibility requires a showing that there is a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified above. The existence of such a discrepancy must be determined by a complicated formula and process set forth in detail in the Legal Conclusions. Among other things, the process forbids making an eligibility determination based on a single test score and requires instead the consideration of all relevant material that is available on the pupil.

72. Student argues that she is eligible in the SLD category because she has a processing deficit revealed by a very low score she received on two subtests of a single memory test administered by Ms. Gutierrez, and because she has "a weakness" in writing. Neither argument is persuasive.

Memory

73. As part of her psychoeducational assessment in fall 2010, Ms. Gutierrez administered to Student the WRAML-2, which is used to assess memory skills. Student's performance on two subtests relating to design memory and picture memory produced a "visual memory index" score of 55, which is in the .01 percentile among her age group. Student's other scores on the WRAML-2 were not nearly that low.

74. Ms. Gutierrez noted in her assessment that Student's "assessment span on tasks in assessment setting was about three minutes." Under the reported WRAML-2 scores, she noted: "Due to attention span during assessment, this may not be [Student's] true ability skill." She testified at hearing that numerically, Student's score on the WRAML-2 was not divergent enough from her other scores to prove the required severe discrepancy, was contradicted by her other scores, and probably underestimated her abilities. The subtest for processing was not a preferred activity for her, and was likely affected by a lack of focus and attention. Ms. Gutierrez noted that Student, when observed at Stanbridge, was much more focused in class.

75. Ms. Gutierrez's assessment included the entire WRAML-2, the VMI, the WISC-4, the TAPS, and the BASC-2. She concluded that, considering the totality of scores achieved by Student on those measures, Student did not have the severe discrepancy between ability and achievement required for SLD eligibility.

76. In her psychoeducational evaluation in fall 2011, Ms. Keithly considered whether Student suffered from SLD and decided she did not. As the law requires, she did not just consider two subtests of a single assessment; she considered her test data, other available data and her personal observation of Student as a whole. Neither Ms. Gutierrez nor Ms. Keithly found the existence of any of the requirements for eligibility in the SLD category. Student does not directly challenge their assessments.

77. There was thus no evidence that Student has a substantial deficit in memory or that any such deficit interfered with Student's education in kindergarten or first grade. Student's academic and social achievements in those grades have been so consistently good that they make the existence of any weakness in her memory highly unlikely.

Writing Ability

78. Neither of Student's IEP teams had any substantial information in fall 2010 nor fall 2011 that Student might have a substantial deficit in writing. In September 2010, District occupational therapist Annie Sein conducted an occupational therapy (OT) assessment of Student and found that her writing was generally competent, with minor problems like inconsistent spacing and reversal of two numbers.¹⁵ Ms. Sein found that these

¹⁵ Ms. Sein received her master's degree in OT in 2002 and has been delivering OT to students in schools since 2003. She also has experience working in a number of hospitals.

problems were within the acceptable age range. She did not find that Student needed special education.

79. In her second OT assessment in September 2011, Ms. Sein found Student was proficient in fine motor skills and was able to form all her uppercase and lowercase letters. She recommended assisting Student in her writing by improving her pencil grip and having her use a slant board and a 3-lined composition book. Again she found no reason to recommend eligibility.

80. Ms. Parnello graded Student's writing as excellent throughout her kindergarten year, and testified credibly that her writing was at grade level in first grade. The most recent information the fall 2011 IEP team had at its meeting in October 2011, while Student was in first grade, was a portion of Ms. Keithly's psychoeducational evaluation showing that Student's brief writing on the WJ-III produced a standard score of 88, which put her in the 54th percentile of her same-age peers, and her writing samples produced a standard score of 90, which put her in the 51st percentile. Ms. Raymer testified that Student had some difficulties in writing in SY 2012-2013, but that information was not before either of the District's IEP teams when they met and does not by itself amount to a showing of eligibility in the SLI category and does not bear on the time period addressed here.

81. Student's standardized test scores are somewhat lower in writing exercises than in other subjects. Student characterizes this as "a weakness" in writing and argues that this weakness means she has a processing deficit. No professional supported that view at hearing. Eligibility in the SLD category requires more than a showing of weakness; it requires the existence of a severe discrepancy between ability and achievement as defined by law and regulation. Student does not argue in her closing brief that such a severe discrepancy exists, and the evidence did not reveal such a discrepancy. In addition, there was no evidence that Student's relative weakness in writing has had any impact on her performance in school.

82. Student did not discharge her burden of proving that she had any severe discrepancy between ability and achievement during the time addressed here, or that any such discrepancy adversely affected her education. She therefore did not establish eligibility in the category of SLD.

Other Health Impaired

83. Eligibility in the OHI category requires proof of the existence of three things: (1) that the student has limited strength, vitality or alertness, (2) that is caused by chronic or acute health problems and (3) that adversely affects her educational performance. Student did not prove she meets any of these requirements.

84. Ms. Graveline reported that the reliability of her 2010 S/L assessment was lessened by Student's fatigue, and Ms. Gutierrez noted that during her 2010 assessment Student sometimes lacked focus and attention. But there was no evidence that Student suffered limited strength, vitality, or alertness at school. Dr. Yarbrough testified that some of her behavior in preschool may have been caused by an energy level higher than normal. Megan Cameron, a resource specialist at Stanbridge, reported she was an "active participant in class . . ." Neither of Student's Stanbridge teachers nor any of the District witnesses who observed her at Stanbridge mentioned such a deficit, and her excellent academic and social performance there make the existence of such a deficit highly unlikely.

85. There was no evidence that Student has or had chronic or acute health problems. As shown above, Dr. Klaiman's diagnosis of anxiety disorder is unpersuasive, and Student's speech impairment is relatively mild and is not a health problem. Neither possible diagnosis was connected by any evidence to limited strength, vitality or alertness.

86. Finally, there was no evidence that any such health problem had any effect on Student's performance in school. Student was therefore unable to establish eligibility in the category of OHI.

87. For the reasons above, Student did not discharge her burden of proving that, during the school years at issue, she was eligible for special education and related services in the categories of ED, SLI, SLD, or OHI.

The Need for Special Education

88. Federal and state law provide that special education is only for those who need it. Federal law defines a child with a disability as someone who, by reason of impairment, needs special education and related services. California law requires special education for individuals with exceptional needs, who are defined in part as individuals whose impairment requires instruction, services, or both, which cannot be provided with modification of the regular school program. Special education is defined as specially designed instruction for pupils whose educational needs cannot be met with modification of the regular instruction program. California law further requires that a pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.

89. At its IEP team meetings for Student in fall 2010 and fall 2011, the District concluded that Student's deficits could be adequately addressed in the general education setting of its schools. The notes of the 2010 meeting show that the team discussed the possibility that Student, if placed in a general education kindergarten class, might be eligible for a "504 plan."¹⁶ The notes suggest that such a plan could employ the same

¹⁶ A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations

accommodations and modifications developed and implemented at Stanbridge, and add: “Flexible testing in setting and time, preferential seating during classroom instruction, and offering [Student] frequent breaks would all be areas for a 504 team to consider if a plan is developed.” Similar suggestions were made in fall 2011. Parents were not interested in pursuing those possibilities.

90. Dr. Yarbrough is aware of the support available to Student in the District’s general education classes because his duties include program development and expansion of full inclusion support services for students with disabilities in the District’s kindergarten through eighth grade classrooms, and training of staff in positive behavior support and intervention strategies. He testified persuasively that the District’s kindergarten teachers are very skilled at supporting a wide range of needs that children display on arrival. This is true in part because many children with special needs, including those who will later receive special education and services, have not yet been identified and assessed and so routinely appear in general education kindergarten classrooms. The teachers are thus skilled and experienced in handling social, emotional and behavioral difficulties.

91. Dr. Yarbrough established that the problem of eloping can be successfully addressed in general education in the District’s kindergarten and first grade classes. The District could adopt a prevention plan using any of a variety of interventions for a student with or without an IEP. District staff are trained in Pro-ACT; a program that teaches prevention and intervention techniques for dealing with behavioral crises in school, residential and psychiatric settings. Eloping is one of the behavioral problems addressed by Pro-ACT, which teaches physical intervention techniques if necessary to the situation. Both general and special education teachers in the District receive Pro-ACT training.

92. Ms. Gutierrez testified that she did not agree with Dr. Klaiman’s anxiety diagnosis, but even if she did, all the needs identified in Dr. Klaiman’s report could be met in general education in the District. In her 2010 S/L assessment Ms. Canoy made five recommendations to Parents of methods to help Student with articulation. Four of them (playing games, using flash cards, and the like) could be implemented by any parent. The fifth involves standing in front of a mirror and employing proper movement of the mouth and tongue to produce particular sounds. Ms. Canoy testified that Parents would require initial training by an S/L therapist to learn how to do that, and Student argues this is proof that she needs an IEP. However, Ms. Canoy testified that such training from an S/L therapist is available in general education in the District. Ms. Canoy gives that kind of consultation for general education students pursuant to a Student Study Team plan or a 504 plan. She established that all of the interventions Student might need for her articulation delay are available in general education in the District.

93. In her 2010 OT assessment Ms. Sein identified ways to address Student’s relatively low performance in motor coordination, and suggested that the IEP team discuss a

to children who have physical or mental impairments that substantially limit a major life activity such as learning.

sensory diet and strategies to help Student with self-regulation and her attention span in class. In her 2011 assessment Ms. Sein also recommended the use of three tools for improving Student's writing: the "pencil grip," a slant board, and a 3-lined composition book. She established that all of these tools are used in general education classrooms in the District and that an OT is assigned to every school and is available for consultation with a general education teacher to provide any sensory support Student might need.

94. The only professional who testified that Student needs special education was Ms. Parnello, who made that judgment based only on her experience as a general education inclusion teacher for three years in Arizona. She opined that Student "fit the profile" of a special education student in Arizona because she needed additional intervention in the classroom and more support than the average student.

95. However, when asked whether she would have expected Student to have an IEP if she had been in her Arizona classroom, Ms. Parnello responded that she would have expected Student to have been "part of the intervention process to determine if she needed an IEP." She testified further that before Student would have been admitted to special education in Arizona, she would have been given an intervention plan in general education, and only if that failed would she have been eligible for special education.

96. More importantly, there was no evidence that the same kinds of interventions for mildly disabled students were available in general education kindergarten and first grade in Arizona as are available in the District. Ms. Parnello admitted she had never visited a District classroom and knew nothing about its general education capabilities. Ms. Raymer, Ms. Parnello's colleague at Stanbridge, testified that in her opinion Student's difficulties could be adequately addressed in public school general education, though her knowledge of the District's general education resources was no better than Ms. Parnello's.

97. Student presented no evidence about the capabilities of the District to address her mild deficits in general education classrooms. No witness for Student claimed any knowledge about the District's resources or practices in general education. The consistent and credible testimony of Dr. Yarbrough, Ms. Gutierrez, Ms. Canoy and Ms. Sein that the District could adequately address Student's deficits in general education kindergarten and first grade was therefore essentially un-refuted.

98. For the reasons above, even if Student had proved eligibility in one or more of the categories discussed above, the evidence showed that her needs could adequately have been met in general education and that she could obtain educational benefit there. Student therefore would not have required special education and related services had she been enrolled in District schools.

99. Because of the conclusions reached here, there is no need to address the parties' disputes concerning the appropriateness of Stanbridge as a private placement, the amount of tuition Parents paid Stanbridge, or whether Parents acted reasonably in the timing

of her enrollment there, in the timing of the notice of unilateral enrollment they later gave the District, or in their incomplete cooperation in District assessments.

LEGAL CONCLUSIONS

Burden of Proof

1. Because Student filed the request for due process hearing, she had the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

Eligibility for Special Education and Related Services

2. An ALJ has authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487,492-493.) If a district has failed to identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Dept. of Educ. v. Cari Rae S.*(D. Hawaii 2001) 158 F.Supp.2d 1190, 1196.)

3. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).) State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose "impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) Special education is defined as "specially designed instruction ... to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program . . ." (Ed. Code, § 56031.) Accordingly, "[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized." (Ed. Code, § 56303; see also *Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1107-1108 [*Hood*][decided under former Ed. Code, § 56337].) A disabled student whose needs can adequately be met by a 504 plan does not require special education. (*Id.* at pp. 1108-1109.)

4. In deciding whether a student needs special education, the courts apply the *Rowley* standard and consider whether the pupil can receive some educational benefit from the general education classroom. (*Hood, supra*, 486 F.3d at pp. 1106-1107.)

Emotional Disturbance

5. A child's impairment constitutes a serious emotional disturbance when she exhibits one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affect educational performance:

- (a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations;
- (d) A general pervasive mood of unhappiness or depression; or
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (i).)

6. The law does not define or specify the "long period of time" required for ED eligibility. An advice letter from the United States Department of Education states that a generally acceptable definition of "a long period of time" is a range of time from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. (*Letter to Anonymous* (OSEP 1989) 213 IDELR 247.)

7. The Department of Education has also advised that "[r]unning away from a stressful situation, whether at home or at school, is not characteristic of the type of behavior this definition [of ED] contemplates." (*Letter to Anonymous, supra.*)

Issue No. 1.A.: Did the District deny Student a FAPE from June 7, 2010, to June 7, 2012 by failing to identify her as eligible for special education and related services in the category of ED?

8. Based on Factual Findings 1-48 and 88-99, and Legal Conclusions 1-7, Student did not prove that she exhibited inappropriate types of behavior or feelings under normal circumstances in several situations, or even that her behaviors in preschool were abnormal. Father's testimony was sufficient to establish that Student has displayed inappropriate behavior at home for an extended period of time, but that is the only setting in which such behaviors were proved to exist to any serious degree. Her behaviors did not rise to that level at school, and according to Mother was "fine" in public places such as banks and stores. Student also did not discharge her burden of proving that her allegedly inappropriate behaviors existed over a long period of time or to a marked degree. Instead, her allegedly inappropriate behaviors appeared to have been concentrated in the Preschool. Nor did

Student prove that any emotional difficulties she had could not be adequately addressed in general education classrooms.

Speech and Language Impairment

9. A student is eligible for special education and related services if she demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects her educational performance and cannot be corrected without special education. (Ed. Code, § 56333.) The criteria are:

- (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.

(Ed Code, § 56333.) Determination of the existence of a language disorder under subdivision (d) of the statute is governed by regulation:

(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.

(Cal.Code Regs., tit. 5, § 3030, subd. (c).)

Issue No. 1.B.: Did the District deny Student a FAPE from June 7, 2010, to June 7, 2012 by failing to identify her as eligible for special education and related services in the category of SLI?

10. Based on Factual Findings 1-6, 49-69, and 88-99, and Legal Conclusions 1-4 and 9, Student has a mild articulation disorder which has improved over time. Student benefited from S/L therapy at Stanbridge, but she did not prove that S/L therapy was necessary to access her curriculum or allow her to benefit from her education. The S/L evaluations by Ms. Canoy and Ms. Blois were more reliable than that of Ms. Graveline, and correctly concluded that Student's articulation delay did not rise to the level of a qualifying impairment. That delay did not interfere with Student's educational performance and could be adequately addressed in the District's general education kindergarten and first grade classes.

Specific Learning Disability

11. A student is eligible for special education and related services if she has a specific learning disability (SLD) as defined by statute and regulation. An SLD is 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 the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).)

12. By regulation a student has an SLD as defined above when she 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." (Cal.Code Regs., tit. 5, § 3030, subd. (j).)¹⁷ In determining the existence of an SLD:

¹⁷ The other way to demonstrate an SLD, which involves a student's response to scientific, research-based intervention during the assessment process, is not involved in this matter. (See Ed. Code, § 56337, subs. (b), (c).)

- (a) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression;
- (b) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning;
- (c) 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;
- (d) The decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel in accordance with Education Code Section 56341(d), which takes into account all relevant material that is available on the pupil; and
- (e) The discrepancy shall not be primarily the result of limited school experience or poor school attendance.

(Cal. Code Regs., tit. 5, § 3030, subd. (j).) Thus the law avoids total reliance on a single mathematical calculation to determine a severe discrepancy by requiring corroboration of that calculation by other assessment data, which may include other tests, scales, instruments, observations, and work samples, as appropriate. (*Hood, supra*, 486 F.3d at pp. 1105-1106.)

13. In determining the existence of a severe discrepancy, “[n]o 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.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).) Instead, the IEP 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 pupils 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 IEP 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.

(Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

Issue No. 1.C.: Did the District deny Student a FAPE from June 7, 2010, to June 7, 2012 by failing to identify her as eligible for special education and related services in the category of SLD?

14. Based on Factual Findings 1-6, 70-82, and 88-99, and Legal Conclusions 1-4 and 11-13, Student's low scores on two memory subtests of the WRAML-2 did not by themselves establish a severe discrepancy within the meaning of law and regulation, and were understatement of her abilities. There was no evidence of a memory weakness in her educational performance. Nor did her writing establish the existence of an SLD. Ms. Parnello graded Student's writing as "Excellent" in her first year at Stanbridge and "Satisfactory" in her second. Ms. Sein's two OT assessments did not reveal significant writing difficulties, and nothing was before the two IEP teams that suggested that she had such difficulties in kindergarten or first grade. Student's weakness in writing on standardized tests was only relative to her better performance on other measures, and did not rise to the level of a severe discrepancy between ability and achievement. There was no evidence that her relative weakness in writing interfered with her academic performance, and the evidence showed that special education was not needed to address it.

Other Health Impaired

15. A student is eligible for special education and related services in the category of OHI if she meets the following criteria:

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 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. In accordance with Section 56026(e) of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001(v).

(Cal.Code Regs., tit. 5, section 3030, subd. (f).)

Issue No. 1.D: Did the District deny Student a FAPE from June 7, 2010, to June 7, 2012 by failing to identify her as eligible for special education and related services in the category of OHI?

16. Based on Factual Findings 1-6 and 83-99, and Legal Conclusions 1-4 and 15, Student did not prove that she had limited strength, vitality or alertness in school. Nor did Student prove that she had any chronic or acute health problem; as the testimony of District witnesses established, Dr. Klaiman's diagnosis of Anxiety Disorder NOS was unreliable and unpersuasive. Student also did not prove that any such problem caused limited strength, vitality or alertness, or that any deficiencies she might have in that area either interfered with her education or required special education to address.

Relief from IDEA Violations

17. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may be entitled to the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c) (2006); *School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 369-371 [105 S. Ct. 1996].) Parents need not enroll a child in the public schools before making a unilateral placement and seeking reimbursement. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 241-245 [129 S.Ct. 2484].)

18. Reimbursement for a private placement may be reduced or denied if parents do not notify the District 10 days in advance of the unilateral placement of their intent to make the placement, or if their conduct with respect to the placement has been otherwise unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)(2006).)

Issue No. 2: Should any award of reimbursement to Parents for educational expenses incurred as the result of the District's alleged denial of FAPE be reduced or denied because Parents behaved unreasonably in giving notice of the private placement and in other ways concerning it?

19. Because of the disposition of Issue No. 1, there is no need to decide Issue No. 2.

ORDER

Student's requests for relief are 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, the District prevailed on all issues.

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: May 6, 2013

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