

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

In the Consolidated Matters of:

STUDENT,

Petitioner,

v.

LANCASTER ELEMENTARY SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006100037

LANCASTER ELEMENTARY SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007030809

DECISION

Administrative Law Judge (ALJ), Stella L. Owens-Murrell, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on May 9-11, and May 14, 2007, and June 25-26, 2007, in Lancaster, California.

Lancaster Elementary School District (District) was represented by Stacy L. Inman, Esq. of School's Legal Service. Janis Rivera, Director of Student Services was also present throughout the entire hearing.

Student was represented by Christian M. Knox, Esq. of the Law Office of F. Richard Ruderman. Student's mother (Mother) was present throughout the hearing.

On September 29, 2006, Student filed a request for due process hearing, which is identified as OAH Case No. N2006100037.

On March 26, 2007, District filed a request for due process hearing, which is identified as OAH Case No. N2007030809, and requested consolidation of the cases. An order was issued on March 29, 2007, granting the consolidation. The order provided that the timelines in OAH Case No. N2007030809 would control the consolidated matters.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of hearing, the record remained open for the parties to file their closing briefs on or before July 10, 2007. On July 6, 2007, District filed a motion requesting a ten day extension of the briefing deadline because District's Counsel was temporarily disabled. On July 6, 2007, the ALJ granted the motion, in part, over Student's objection, and extended the briefing deadline to July 17, 2007. The parties timely filed their closing briefs. The record closed and the matter was submitted on July 17, 2007.

ISSUES¹

1. Did District fail to appropriately assess Student in the 2004-2005 school year in all areas of suspected disability?
2. Was District's eligibility determination in the 2004-2005 school year, appropriate?
3. Did District fail to appropriately assess Student in the 2005-2006 school year in all areas of suspected disability?
4. Was District's eligibility determination in the 2005-2006 school year, appropriate?
5. Did District fail to appropriately assess Student in the 2006-2007 school year in all areas of suspected disability?
6. Was District's eligibility determination in the 2006-2007 school year, appropriate?
7. Are District's Assessment(s) dated February 15, 21, and 28, 2007, and March 5, 2007, appropriate?
8. Did the District deny Student a FAPE for the 2004-2005 school year, including the extended school year (ESY) by: failing to provide him with an appropriate educational placement; failing to provide him with services including occupational therapy, social skills training, mental health counseling; failing to

¹ The issues in the due process complaint have been restated and in some cases, combined, for purposes of organizing this decision.

provide him with supports to meet his educational needs; failing to develop an appropriate transition plan to transition him out of special education services?

9. Did the District deny Student a FAPE for the 2005-2006 school year, by failing to find him eligible for special education services, under the additional categories of emotional disturbance or specific learning disability; failing to provide him with appropriate placement and services including occupational therapy, social skills training, and modified work?

10. Did the District deny Student a FAPE for the 2006-2007 school year by failing to provide him with appropriate placement; and failing to provide him with appropriate services?

CONTENTIONS OF THE PARTIES

These consolidated matters arise out of District's determination to exit Student from special education. Student contends that District failed to appropriately assess him in all areas of suspected disability in the 2004-2005 school year to and including the 2006-2007 school year. Student contends further that he remains eligible for special education programs and services, as a child with emotional disturbance, a specific learning disability, and as a child with "autistic-like behaviors," based upon independent clinical evaluations and independent educational evaluations conducted by qualified individuals. Student also contends District denied him a FAPE in the same period by failing to provide appropriate placement and services. Student asserts that he requires placement in a SDC and not a general education classroom setting, based upon his unique needs, and that District failed to implement needed supports and services offered in both his 2005 and 2006 IEPs.

Student seeks the following remedies for the 2004-2005 school year to and including the 2005-2006 school year: compensatory education; and funding for an Independent Educational Evaluation (IEE). Student also seeks the following remedies for the 2006-2007 school year: placement in an Special Day Class with a highly qualified teacher and appropriate mainstreaming opportunities in a classroom of eight to ten, children with provision of instruction to develop his math skills, spelling and phonics skills, and social interaction skills; modified work, including acceptance of a lesser number or shortened class assignments; implementation of occupational therapy (OT) services based upon the recommendations from a private Occupational Therapist's evaluation; and reimbursement for costs associated with the IEE² by Paula Solomon, Ph.D., dated April 16, 2007.

² While the federal Individuals with Disabilities in Education Act (IDEA) refer to such testing as "evaluations," California uses the term "assessments." The acronym "IEE" is used to describe independent educational testing under either rubric.

District contends that the multidisciplinary assessments dated February 15, 21, and 28, 2007, and March 5, 2007, are appropriate and meet all necessary legal and educational requirements under the IDEA and California Education Code. Therefore, District contends Student is not entitled to an IEE at public expense. District further contends that it properly relied upon the assessments to make a determination that Student was not eligible for special education services.

FACTUAL FINDINGS

Jurisdiction

1. Student was born on November 18, 1995.³ He is 11 years and 3 months old, and he resides with his adoptive parents in the District. Student is currently in a fifth grade general education class and in his last year of attendance at Jack Northrop Elementary School (Jack Northrop), his school of residence.⁴

Background

2. Student was referred to the District's Early Childhood Education Program for an initial IEP on September 3, 1998, at the preschool level. District assessed Student, and the assessments showed that Student had significant delays in all developmental areas. The assessments estimated Student's cognitive skills to be within the mildly delayed range, and showed that communication and self-help skill development were his most significant areas of need. District determined Student was eligible for special education under the category of speech and language impaired (SLI), with an articulation disorder.

3. District held an initial IEP on September 29, 1998. The IEP noted that "Student's needs require small group intervention with same-aged peers within a preschool setting." District offered Student placement in a SDC at Lincoln Preschool for ten hours per week, ESY, transportation, and speech and language therapy (LAS) services for 60-90 minutes per week. The IEP indicated that Student continued to be eligible for special education services and placement in a SDC. He was referred to Desert View Elementary School (Desert View) on September 26, 2000, where he attended a Kindergarten SDC. In August 2001, Student was transferred to Jack Northrop where he attended a combined kindergarten and first grade SDC.

³ A birth date of "January 1, 1995," was originally given to the District in error. Therefore, the scores and overall functioning levels in Student's earlier assessments were inaccurate as they were compared to students ten months older than Student. District was informed of the error on September 26, 2000, corrected Student's records and evaluated Student accordingly. Student does not contend the assessments from 2004 -2005 school year to the 2006-2007 are inappropriate based on error in Student's birth date.

⁴ At all relevant times Jack Northrop was on a "Modified Traditional" school year schedule. The school year began in August and ended in June.

4. Student was a client of the North Los Angeles County Regional Center (NLACRC) where he received services. Student continued as a client of the NLACRC and was evaluated by the regional center in October 1998. A NLACRC psychological evaluation indicated Student had global developmental delays in the mildly retarded range. He was diagnosed with mild mental retardation. Student was later diagnosed by NLACRC with sensory integration disorder, expressive language disorder, and attention deficit hyperactivity disorder (ADHD.) Student was prescribed medication for the ADHD.⁵

5. District conducted a triennial assessment in August and September 2001. Student was assessed primarily in the areas of pre academic/academic achievement (Woodcock-Johnson III) and speech and language. The September 27, 2001 Multi-Disciplinary Assessment Report, signed by Angela Mercer, a District school psychologist, indicated that Student's adaptive functioning was delayed with weaknesses in the areas of communication and daily living skills. Student had strengths in the areas of socialization and motor skills. In the preacademic/academic domain, the assessment results indicated Student's oral language skills, reading comprehension, and level of academic knowledge were average, his academic skills and ability to apply those skills were within the low average range. Student was also in the low average range in basic reading skills and written language and low range in math reasoning. The report found that due to deficits primarily in the areas of expressive language, Student remained eligible for special education services as a child with a speech and language impairment. The report recommended continued placement in a SDC and participation in a LAS specialist program.

6. Student transferred from Jack Northrop to El Dorado School where he remained in a SDC receiving speech and language services. On August 14, 2003, Student was transferred back to Jack Northrop. He remained at Jack Northrop until July 2004, when he was transferred to Lincoln Elementary in a fourth grade SDC. Student was transferred back to Jack Northrop, while still in the fourth grade. District determined, in the 2004-2005 school year, that Student was no longer eligible for special education services. Student was exited from special education in the fifth grade, and was placed in a general education program.

The 2004-2005 School Year

Appropriateness of the July and August 2004 Multi-Disciplinary Assessments

7. Student contends that District's Multi-Disciplinary Assessment of July 13, 2004, July 21, 2004, July 24, 2004, and August 4, 2004, was not appropriate because the psychoeducational assessment did not adequately assess whether Student had a processing disorder, and the speech and language assessment did not assess Student in the area of

⁵ The NLACRC determined in August 2006 Student to still be eligible for regional center services based on their diagnosis of ADHD. The NLACRC operates under the California Department of Developmental Services and provides medical and clinical support services to its clients deemed eligible for services under state law. NLACRC does not make determinations of eligibility for special education services, which is governed by the Individuals with Disabilities Education Act (IDEA).

expressive language. Specifically, Student contends District failed to assess him for eligibility under the disability category of Specific Learning Disability (SLD). Student also contends that District failed to assess him in other suspected areas of disability including occupational therapy,⁶ social and emotional development, adaptive skills, and social skills.⁷

8. District contends that it appropriately assessed Student in all areas of suspected disability and the assessments were appropriate. District conducted a triennial multi-disciplinary assessment of Student on July 13, 2004, July 21, 2004, July 24, 2004, and August 4, 2004. The academic achievement assessment was completed on July 13, 2004, and a speech and language assessment on August 4, 2004. At the time of the assessments Student was attending Lincoln Elementary SDC.

9. The purpose of the assessments was to assist the IEP team in determining Student's continued eligibility for special education. The assessment tested auditory perception, sensory-motor integration, attention, and perceptual development. The District also evaluated Student to determine whether Student had qualifying disabilities under the categories of Other Health Impaired (OHI) specifically for ADHD, Mental Retardation (MR), and SLD.

10. An appropriate reassessment of a special education student requires a school district to follow numerous and specific testing regulations. Testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be administered in the student's native language. The tests and assessment materials must be validated for the specific purpose for which they are used and must be administered by trained personnel in conformance with the instructions provided by the producers of the test and materials. Assessments must also include testing which is tailored to assess specific areas of educational need. Failure to properly assess a student can constitute a procedural violation of FAPE.

11. A district is required to assess a child in all areas related to a suspected disability, and a district is required to reassess a child before exiting that child from special education. Failure to properly assess student can constitute a procedural violation of FAPE.

12. Rosemary Terrazas-Napoleon (Napoleon), a Psychologist Intern for District conducted the psychoeducational assessment.⁸ The academic achievement tests were

⁶ Occupational Therapy is not a disability category. Rather, it is a related service designed to address unique needs of a student who has been determined to be eligible for special education services under one of the enumerated disability categories under title 5 of the California Code of Regulations part 3030, et seq.

⁷ These are not areas of disability but components of disability categories under title 5 California Code of Regulations, part 3030, et seq., including speech and language impairment (SLI), specific learning disability (SLD), other health impaired (OHI/ADHD), mental retardation (MR), and emotional disturbance (ED).

⁸ Ms. Terrazas-Napoleon had a Bachelor of Arts Degree in Childhood Development, a master's degree in School Psychology, and a Pupil Personnel Credential. In 2004 she had a preliminary intern credential, she was in

administered by Ms. Tracy Robertson, Student's fourth grade teacher⁹. The speech and language assessment was administered by Colleen Francis, Speech Pathologist¹⁰. The assessment team also included Student's mother, speech and language teacher, special education teacher and a regular education teacher. The assessment instruments included behavioral observations by Student's fourth grade teacher, parent interview, the Cognitive Assessment System (CAS), The Test of Visual Perceptual Skills Revised (TVPSR), the Test of Auditory Perceptual Skills (TAPS), the Visual Motor Integration Test (VMI), Woodcock-Johnson Test of Achievement III (WJ-III), the Goldman Fristoe Test of Articulation-2 (GFTA-2), Voiceless and Voiced /th/ Probes, and the Adaptive Behavior Scales. These assessment instruments were used for the purpose of determining Student's developmental levels, and his pre-academic, social/emotional, sensory-motor, language, self-help, and cognitive skills.

Psychoeducational Assessment

13. The psychoeducational assessment results showed Student was above average in ability, and above average in auditory and visual processing. Student appeared to be socially and emotionally age appropriate, but Student had difficulty with his self-care needs. Student also fell within the average range in expressive and receptive language.¹¹ The results of the WJ-III indicated that, when compared to others at his grade level, Student academically fell within the low range. He was low average in basic reading skills, reading comprehension, and written language. He had difficulty in the area of spelling. Student's performance was average in math calculation skills, and math reasoning (Broad Math). Overall, the assessment results indicated Student functioned in the average range in all areas. According to the assessment report, "there did not appear to be a discrepancy in any area," and his academic assessment results were consistent with the overall psychological results.

Speech and Language Assessment

14. Colleen Francis, Student's speech pathologist, testified she administered the GFTA-2, the Voiceless and Voiced /th/ Probes, observed Student, and interviewed his parents. Student also passed a hearing and vision screening. Ms. Francis found Student had improved in his articulation skills over his last evaluation in 2001. She testified that, among other areas, Student was assessed in expressive language with no evidence of a severe deficit

graduate college and did her internship at District. She had one year of field work and one year of internship in school psychology, and had prior experience doing assessments at Los Angeles Regional Center. She had conducted more than 30 assessments.

⁹ Ms. Robertson was employed by District and had ten years experience as an SDC teacher at Lincoln Elementary.

¹⁰ Ms. Francis was a District Speech and Language Pathologist who provided LAS services to Student and had previously assessed Student for speech and language in a September, 2001 multidisciplinary assessment.

¹¹ Expressive language is the ability to express ideas. Receptive language understands words and word retrieval.

and no evidence of a speech and language impairment. Pursuant to Factual Finding 10 and 11, the speech and language assessment met all legal requirements and District met its obligation to assess areas of suspected disability. The District's speech and language assessment was appropriate.

Other Areas of Suspected Disability

ADHD

15. Although Student contends District failed to assess in all areas of suspected disability, as discussed in Factual Finding 9, District assessed for eligibility under the categories of OHI/ADHD, SLD, and MR. With respect to ADHD, Student referred to the behavioral observations section of the August 2004, Multi-Disciplinary Assessment Report, which indicated Student frequently, required one-to-one attention, his actions were impulsive, and that he had difficulty completing and or starting assignments. Student suggested that this behavior was an indication of ADHD. Student's assertion regarding the psychoeducational assessment lacks merit. Ms. Napoleon testified that she administered the CAS to Student. Student scored 100 on the Planning subtest and 112 on the Attention subtest. She stated that a child with ADHD would typically not have the ability to attend, figure or problem solve. Student scored in the high average range and his full scale score on the CAS was 112. There was no basis for District to suspect ADHD at the time of the assessment, and the assessment results appropriately ruled out ADHD.

SLD

16. Student's assertion that District failed to assess for specific learning disability is not supported by the evidence

17. Student claims that District failed to test his auditory processing skills. Student also argues that the scores on the TAPS showed significant deficits in forward number memory and interpretation of directions, which should have prompted further evaluation of a processing disorder. Ms. Napoleon testified that Student scored 88 in the auditory portion on the TAPS. Student's score fell within the low average range but was not significant because it was in the reasonable range of Student's ability. Ms. Napoleon further testified that the subtests could not be viewed in isolation. Student received a standard score of 103 in the average range on the memory portion of the TAPS, which tended to show Student did not have a deficit in this area. The test results support a finding that District appropriately assessed Student in the area of auditory processing skills and determined overall that Student fell within a normal range, and thus did not have an auditory processing disorder.

18. Ms. Napoleon testified that although Student's test scores in some areas showed a weakness, for example, Student scored 75 in spelling; she looked at Student's score in written expression to determine whether Student had a SLD. Student scored 104 placing him in the average range. As discussed in Factual Finding 13, the psychoeducational

assessment results showed Student was above average in ability, and above average in auditory and visual processing.

MR

19. District also assessed Student for MR. Ms. Napoleon testified District considered the NLACRC report and diagnosis of MR. District looked at adaptive scales and cognitive ability using the CAS. Student's overall adaptive scale score was 80 or low average. Student's full scale score on the CAS was 112. Ms. Napoleon properly concluded, based upon the overall assessment results, that Student did not meet the criteria for MR.

20. The evidence supports a finding that each of the tests was used to assess specific areas of educational need. The tests and assessment materials were administered by trained personnel in conformance with the test instructions and were validated for the specific purpose for which they were used. District appropriately assessed Student in all suspected areas of disability, and the District's multi-disciplinary assessment was appropriate.

District's Eligibility Determination for the 2004-2005 School Year

The August 13, 2004 and March 8, 2005 IEPs

21. 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 and "who, by reason thereof, needs special education and related services."

22. The August 13, 2004 Multi-Disciplinary Assessment Report indicated that Student did not have a speech and language impairment, or any other qualifying disability. The assessment report recommended that the IEP team consider Student's participation in a "small group learning environment, such as the Resource Specialist Program or a 'Special Class,' as the least restrictive, most appropriate educational alternative, based upon assessment findings and State of California Education Code guidelines." The report also recommended that the IEP team consider continuing Student in a speech and language program and gradually transition him to a full-time general education curriculum to exit Student from special education. Generally, the IEP team agreed that Student should remain in the SDC and begin mainstreaming into a general education math class and increase his transition over the next year. The assessment report included the following final recommendations: (1) modify Student's general education work and gradually increase assignments; (2) to provide a peer tutor in the general education setting to allow Student time to assimilate to the new environment; and (3) to provide Student a consistent routine to improve his self-care needs.

23. District convened an IEP team meeting on August 13, 2004. The IEP team reviewed the August 13, 2004 multidisciplinary assessment report. Based upon the assessment report the IEP team determined Student was no longer eligible for special education services. The IEP indicated that Student was able to begin mainstreaming into general education in the current school year, with modified work, and Student would first be transitioned into general education math. The IEP offered Student placement in a SDC for 72 percent of the day, and Speech and Language services as a “transition model.” This meant Student would transition from an SDC to general education gradually until he was completely mainstreamed in a general education classroom. Mother consented to the offer of placement and services.

Student’s Exit from Special Education

24. As part of a reevaluation of a student, when exiting a student from special education, the IEP team and other qualified professionals, must review existing data on the child, including evaluations and information provided by the parents of the child. The IEP team must also consider current classroom based, local or State assessments, and classroom-based observations; and observations by teachers and related services providers. On the basis of that review, and input from the child’s parents, the IEP team must identify whether the child is a child with a disability, and the educational needs of the child, or in case of a reevaluation, whether the child continues to have such a disability and such educational needs.

25. District convened a second IEP team meeting on March 8, 2005, to exit Student from special education and to complete Student’s transition to a general education curriculum. The IEP team discussed Student’s academic performance in general education, reviewed his grades, considered his below grade level work and concluded that Student did not qualify for special education services. The IEP team concluded Student had successfully completed the transition program offered in the August 13, 2004 IEP, and that placement in the general education class was appropriate. The IEP offer included speech and language services “consultation-transition”¹² and dismissed Student from the SDC and special education effective immediately. Student’s transition from the SDC setting to a general education classroom was completed by the third trimester, in March 2005.

26. The evidence supports a finding that District properly determined Student was no longer eligible for special education services and appropriately exited Student from special education.

¹² Student did not receive DIS speech and language. Instead, the speech and language pathologist met with Student’s teacher to review Student’s work and address any concerns.

The 2005-2006 School Year

Appropriateness of the December 15, 2005 Multi-Disciplinary Assessment

27. Student contends that assessments performed by District in December 2005 were not adequately performed and District failed to assess in all areas of suspected disability.

28. Pursuant to Factual Finding 10 District must adhere to numerous and specific regulations to conduct an appropriate assessment of a special education student.

29. Student was placed in a fifth grade general education class at Jack Northrop. Student's teacher was Ms. Tamara Woods. Ms. Woods had been teaching for 20 years; 14 years as a fifth grade teacher at Jack Northrop. Ms. Woods testified that Student attended her class for the entire 2005-2006 school year. Ms. Woods observed that Student was a nice respectful boy, but that he had difficulty with several subjects, among them was math and writing. He performed two grade levels below the fifth grade level.

30. A student study team meeting was held on October 28, 2005. The meeting was held to discuss Mother's concerns for Student's lack of progress in general education and difficulties Student was having with his work. The team was comprised of Student's mother, Ms. Woods, Angela Mercer, District school psychologist, Jack Northrop's principal, Claire Winstone, therapist from California Children's Bureau, and other District employees. The team discussed Student's possible sensory integration deficits and expressive language delays. The team agreed on a modification plan to address these areas of concern and generated a Student Study Team Report. The report noted that Ms. Woods had moved Student's desk closer to the front of the room but that Student was easily distracted. Student's work had been modified but his grades remained low. Mother reported that Student was spending more than two hours a night on homework. The report further noted that Student was not retaining what he had learned even with special modifications and learning aides at home. Visual aides appeared to help Student especially in math, and Ms. Woods and mother agreed he had difficulty remembering his multiplication facts. The team agreed to work with Ms. Woods on further modifications of Student's work. The team also agreed to reassess Student for special education services.

31. Ms. Woods further modified Student's work by using a math calculator, and shortening his spelling words from 20 to 10. According to Ms. Woods, Student did not improve in math and writing, even with the additional modifications. Ms. Woods also observed that Student did not demonstrate age appropriate language, had difficulty defining simple words, problems recalling words to convey ideas, had difficulty maintaining attention in class, had difficulty making friends, and did not converse informally with his peers.

32. In response to Mother's request, District conducted a multidisciplinary assessment in November and December 2005. The evaluation consisted of a

psychoeducational assessment and a speech and language assessment. Angela Mercer,¹³ school psychologist, conducted the psychoeducational assessment. The WJ- III was administered by Ms. Brandy Hourigan, Resource Specialist Teacher, on December 5, 2005. The test was later reviewed by Ms. Cynthia Estevez.¹⁴ The speech and language assessment was administered by Michelle Lopez, District's speech and language pathologist.¹⁵ The assessment team also included Student's mother, and his general education teacher. The assessment instruments included behavioral observations, Weschler Intelligence Scales for Children – Fourth Edition (WISC-IV), Developmental Test of Visual Motor Integration (DTVMI), TAPS, WJ-III, Student Interview, Conner's Parent Rating Scale – Revised: Long Version (CPRS-R:L), the Conners Teacher Rating Scale – Revised: Long Version (CTRS-R:L), the Comprehensive Assessment of Spoken Language (CASL), and the Goldman Fristoe Test of Articulation, Second Edition (GFTA-2).¹⁶ Each of the tests was used to assess specific areas of educational need. All of the tests were standardized tests well known and widely used to evaluate students.

33. The assessment results found Student's intellectual range of functioning to be average; there was no severe discrepancy between student's intellectual ability and his academic achievement; and he was normal in the area of visual, auditory, sensory-motor processing and memory. The report did note Student displayed a significant degree of inattention at home and school, and hyperactivity at home. In the academic/pre-academic domain, Student's strengths were found to be in math calculation, reading comprehension, written expression. His weakness was reported in basic reading skills. Student's expressive and receptive language development was low average. In the area of social-emotional adjustment, the report noted Student displayed a significant amount of anxiety and shyness and social problems at school and home. He had difficulty making friends and had poor social skills. The report also noted that Student was receiving counseling services through the California Children's Bureau by Claire Winstone.

¹³ Ms. Mercer was employed six years with the District. She holds a bachelor's degree in Psychology and a master's degree in Psychology.

¹⁴ Ms. Estevez was employed as a resource specialist program teacher (RSP), at Jack Northrop. At the time of the assessment she taught the Explorer's Club class. The class was offered to pupils who needed help in specific subjects and the class was used for observation and further assessment of pupils in need of remedial assistance. Ms. Estevez did not administer the WJ-III but reviewed Ms. Hourigan's test scores. Ms. Hourigan was no longer employed by District at the time of test review.

¹⁵ Ms. Lopez was a licensed speech pathologist since July 1999, and was a member of ASHA, American Speech and Hearing Association.

¹⁶ The CASL is designed to measure receptive and expressive language skills in the following areas: antonyms, syntax construction, paragraph comprehension, non literal language, and pragmatic judgment. The GFTA-2 was designed to measure sounds in words and sentences.

WJ-III Academic/Pre Academic Assessment

34. Cynthia Estevez testified that at the time of this assessment she was newly employed by the District. She had administered approximately 60 WJ-III tests in the past year. She reviewed Ms. Hourigan's scoring of the WJ-III for accuracy and believed the scores were accurate. She reported the results at the December 15, 2005 IEP team meeting convened to review the assessment results. Ms. Estevez testified that she was not able to define the term "basal" but she was familiar with the term "ceiling."¹⁷ Ms. Estevez admitted that on reviewing the Letter-Word Identification Test, administered by Ms. Hourigan that Ms. Hourigan gave Student credit for a response after Student's responses met ceiling and therefore, scored the test incorrectly. A similar error occurred in the scoring of the Calculation subtest Ms. Estevez testified that another subtest she reviewed, the Reading Fluency Test, had a time limit of three minutes. The test required either the use of a stop watch or noting the start and end time of the test in the boxes provided on the test form. Neither was done in the test. Ms. Estevez had not administered the test and could not give the start and end time of the test. The same held true for the Math fluency and Writing fluency subtests, which were timed tests. Ms. Estevez stated that the effect of not keeping time on a timed subtest might result in the pupil scoring higher than normal. Ms. Estevez also admitted there were scoring errors on the Writing Samples subtest, and based upon her review of the test protocols Student should not have achieved a grade equivalent of 8.3. Ms. Estevez testified that she was aware Student had severe deficits in spelling but could not explain why the Spelling subtest was not administered. She testified further that she did not consider the importance of the Spelling subtest because she was new and this was her first WJ-III test for District, and the first IEP she participated in since her employment with District. Ms. Estevez was aware Ms. Hourigan did not administer the Spelling, Story Recall, and Understanding Directions subtests. Ms. Estevez believed, however, that the test protocols did not make administration of all subtests, such as the Story Recall subtest, mandatory. District did not produce Brandy Hourigan to testify to her administration of the assessment. There is no credible evidence that the subtests and assessment materials were administered by trained personnel in conformance with the test instructions. At the time of the assessment, Ms. Estevez lacked the experience and qualifications necessary to review the WJ-III and evaluate its accuracy. The test results were unreliable because the WJ-III was flawed.

Speech and Language Assessment

35. Student's speech and language assessment also evidenced a series of errors in its administration. Michelle Lopez testified that she conducted the assessment on November

¹⁷ The WJ-III test protocols, general administration and scoring procedures, states that many of the tests require the examiner to establish a basal and a ceiling. The purpose of the basal and ceiling requirements is to limit the number of items administered but still be able to estimate, with high probability, the score that would have been obtained if all items were administered. The criterion varies based upon the particular test to be administered. For example in the Letter-Word Identification subtest, the basal criterion is met when the test subject responds correctly to the first six test items. Ceiling criterion is met when the test subject responds incorrectly to six consecutive test items. The test subject does not receive credit for subsequent correct responses.

16, 2005. She testified that Student had articulation deficits and had difficulty pronouncing the “th” sounds. Ms. Lopez assessed Student in expressive language and articulation by using the CASL, a conversational speech sample, and the GFTA-2. The CASL protocol used assessed pupils age seven to 21 years old. It assessed oral, expressive and receptive language skills, and consisted of 15 different subtests. There were numerous blank pages of subtests because Ms. Lopez elected to administer only five. She testified that the five subtests were the core tests, which represent the other 15 subtests.¹⁸ Student received a standard score of 90 on the five subtests. Ms. Lopez testified that if Student had scored 80 she would have administered the remaining subtests to investigate other possible speech or learning disabilities. Ms. Lopez admitted that she had incorrectly scored the Paragraph Comprehension subtest on the CASL and made two scoring errors on the Pragmatic Judgments subtest. One of the scoring errors resulted in Student not reaching ceiling criterion which would have resulted in a lower score. Finally, the CASL included a page entitled “Examiner’s Observations” (behavioral and language), which was not filled in. Ms. Lopez also testified that she did not complete this page and the only observation was during the administration of the test. Ms. Lopez had not reviewed the information request form completed by Ms. Woods which described Student’s difficulties in communication, articulation and language. Ms. Lopez testified that she relied on the observations she conducted, record review, and followed testing protocol. She also testified that the standard scores were normed, and despite the minor testing errors, the scores were accurate. Ms. Lopez’s testimony was not persuasive.

36. Paula Solomon, Ph.D. testified as Student’s expert witness. She is a licensed clinical psychologist, certified in neuropsychology, taught classes in assessments, and has been a private practitioner for the past 12 years.¹⁹ Dr. Solomon testified credibly that she reviewed the multi-disciplinary assessment and found errors in administration of both the WJ-III and the speech and language assessments. Dr. Solomon testified that the scoring errors in the WJ-III were problematic. Dr. Solomon testified that the errors in the Reading Vocabulary subtest invalidated the test because basal criterion had not been established on Part C of the test. Dr. Solomon testified the District should have administered the Spelling subtest because Student had severe delays in spelling. Dr. Solomon also stated that District should have followed up and done further investigation of Student’s low score in the area of word discrimination on the TAPS. She testified that the Story Recall and Understanding Directions tests should have been administered because of Student’s low scores in Working Memory on the WISC IV, and further investigation should have been done into Student’s auditory memory. Dr. Solomon credibly testified that the WJ-III and the speech and

¹⁸ According to the WISC-IV Scoring and Administration Manual, although the WISC-IV consists of 15 subtests, at least 10 core subtests are typically administered to derive the composite scores. Clinicians may choose to use additional supplemental subtests for practical or clinical reasons. This suggests that more than five core subtests should have been administered in this case.

¹⁹ Dr. Solomon has a B.A. degree in Psychology from Temple University, an M.A., and Ph.D. in Clinical Psychology from Pacific Graduate School of Psychology, Dr. Solomon also has a Certificate in Neuropsychological Assessment from the University of California at Berkeley. She has more than 12 years experience in the field of psychology, including the conduct of comprehensive psychological assessments of children with emotional disturbance, attention deficit disorders, learning disabilities, and pervasive developmental disorders.

language assessments were materially flawed and thus unreliable. Accordingly it is found that these assessments were not appropriately conducted by District's assessment team.

District's Failure to Assess in All areas of Suspected Disability

37. Student further contends District failed to assess in all areas of suspected disability. Specifically, Student alleges that District failed to conduct an assessment to determine whether Student had an ED or SLD.

Emotional Disturbance

38. The multidisciplinary assessment report was prepared and signed by Angela Mercer. The report summary concluded that Student was not eligible for special education services under the category of speech and language impairment. The report indicated further that if his academic difficulties persisted, Student may be reassessed in the future for consideration of eligibility for special education services, including under the category of emotional disturbance.

39. As discussed in Factual Findings 29-31, the December 15, 2005 multidisciplinary assessment report, the report and observations of Student's 5th grade teacher Ms. Woods, the observations of Ms. Estevez, and Mother's testimony reveal Student had an inability to learn, which could not be explained by intellectual, sensory or other health factors, and his grades continued to decline. He was unable to build or maintain satisfactory interpersonal relationships with peers, he often had inappropriate feelings under normal circumstances, and he exhibited a tendency to develop fears and anxiety associated with personal or school problems. In the social-emotional and development domain the assessment reported Student displayed:

a significant degree of anxiety and shyness and social problems at school and home. His feelings are easily hurt, is timid, and easily frightened. He evaluates himself negatively in comparison to others. He has difficulty making friends and occasionally has poor social skills....He experiences a high level of anxiety. The subject of his worry include what others think of him, the possibility of other kids being mean to him and what will happen when he grows up.

40. The testimony of Claire Winstone, mental health therapist, from the Children's Bureau also supports these observations. Student was receiving mental health counseling services through the Bureau and had been diagnosed with an impulse control disorder.

41. Mother testified about Student's social skills deficits. Mother stated Student had difficulty relating to other children and making friends. Lamont Nixon, Student's NLACRC caseworker, testified Student's Individual Program Plan (IPP) had social goals of making friends, improving personal hygiene, and self-help skills. Student's fourth grade SDC teacher, Tracey Robertson, testified Student's "social pragmatics were very low."

42. As discussed in Factual Finding 45, District recognized the possibility Student might suffer from emotional disturbance and noted this in its assessment summary. District failed to assess Student for ED. District had reason to suspect Student had a qualifying disability in the form of ED; District should have conducted an assessment to determine Student's eligibility under the category of ED.

Specific Learning Disability

43. As discussed in Factual Findings 15 to and including 18, District evaluated Student for SLD in the 2004-2005 school year and appropriately ruled out SLD. However, as discussed in Factual Findings 29 to and including 31, and Factual Finding 39, District should have reassessed Student to determine if he had a SLD.

44. As discussed in Factual Finding 34 to and including 36, District's December 2005 multi-disciplinary assessment was not appropriate. Portions of the WJ-III and speech and language assessment were not properly administered, and District failed to assess in all areas of suspected disability.

District's Eligibility Determination in the 2005-2006 School Year

45. The multidisciplinary assessment report was prepared and signed by Angela Mercer on December 15, 2005. Angela Mercer testified at hearing that the eligibility determination was based largely upon the academic achievement test results. The report summary ruled out any sensory integration problems and expressive language delays, and further concluded that Student was not eligible for special education services. The report indicated further that if his academic difficulties persisted, Student may be reassessed in the future for consideration of eligibility for special education services, including under the category of emotional disturbance. The report recommended Student attend Explorer's Club for assistance with his academic work.

The December 15, 2005 IEP

46. District convened an IEP team meeting on December 15, 2005, to discuss the Multi-Disciplinary Assessment Report of the same date. Student's mother attended on his behalf. The District team included Tamara Woods, Angela Mercer, and Ms. Estevez. Claire Winstone, Mental Health Therapist, attended on behalf of the Children's Bureau. The IEP team reviewed the assessment results and again concluded that Student was not eligible for special education services. The IEP team discussed further modifications to Student's general education curriculum. Mother raised a concern that Student was doing "super modified work." The IEP team recommended Student be placed 49 percent of the day in a resource class (RSP), but that Student not actually be placed on the resource teacher's class roll. Mother consented to the IEP.

47. As discussed in Factual Finding 44, District's assessment was inappropriate therefore, District could not properly rely on it to make any eligibility determination, and no determination could be made specifically with regard to Student's eligibility under ED or SLD because of District's failure to conduct appropriate assessments. Based upon the evidence District's eligibility determination was inappropriate.

The 2006-2007 School Year

48. Student continued to attend Ms. Woods's fifth grade general education class for the balance of the 2005-2006 school year. Student also attended Ms. Estevez's RSP class or Explorer's Club where he was to receive assistance in math and writing one hour per day. Ms. Woods testified that Student was a conscientious person in that he made an effort in class, but that even with the modifications in the general education class and the additional help provided in the RSP/Explorer's Club, Student made insufficient progress and continued to struggle in his academic subjects, in particular math and writing. Ms. Woods also testified that she administered the California Standardized Test (STAR) to Student in the 2005-2006 school year, and Student scored below basic in language arts and far below basic in mathematics. Student's grade report supported the widely held belief that he was not progressing. For the entire school year since his exit from special education, Student was doing modified work two grade levels below his actual fifth grade level in reading, spelling and mathematics. Student also performed one grade level below his actual grade in written language. Student received failing grades in reading, spelling, and math at the beginning of the school year and failed math and writing at the end of the school year.

49. Student was retained in the fifth grade for the 2006-2007 school year. Student's mother and District believed Student had not made sufficient progress academically to advance to middle school, and it would be appropriate for him to repeat the fifth grade. Student was placed in the fifth grade class of Mr. John Gibba. Student also continued placement in RSP/Explorer's Club class for 49 percent of the school day.

50. In September 2006 Student's mother provided District with the report of Donald Gallo, Ph.D., which noted Student demonstrated significant signs of Autism.

Autism Assessments

51. Student contends that District's Autism assessments for the 2006-2007 school year were inappropriate and that District failed to assess Student in all areas of suspected disability. District seeks a determination that the assessments were appropriate.

Report of Donald Gallo, Ph.D.

52. On September 8 and 18, 2006, Student was evaluated by Donald Gallo, Ph.D., with the Kaiser Permanente Department of Behavioral Sciences. The evaluation was requested by Student's pediatrician to obtain a better understanding of Student's current level of functioning and for clarification of Student's diagnosis. Dr. Gallo administered the WISC

IV. Student's full scale IQ score was 104, placing him in the average range of intellectual functioning. Student's scores on the Verbal Comprehension subtests ranged from low to average. The Perceptual Reasoning subtests were within average to high average range, denoting good ability in the areas of visual organization, discrimination, visual motor coordination and attention to detail. Student performed well on both the Working Memory and Processing Speed Scales. He showed an average ability in the areas of attention, short-term auditory memory, information processing, visual motor ability, cognitive flexibility and perceptual discrimination. Dr. Gallo concluded Student had no cognitive deficits, which could account for Student's academic performance problems; but concluded further that Student showed significant signs of Autism. Dr. Gallo testified that he diagnosed Student with Autism Spectrum Disorder. His diagnosis was based upon the Diagnostic Statistical Manual, Fourth Edition, (DSM IV-TR 299.00). He recommended a treatment plan and Student's placement in an autistic classroom in a regular education school or non-public school specializing in treatment of autistic children. Dr. Gallo testified that he did not use other testing tools or observation in Student's school setting, but relied solely on Student's history to form his opinion. He admitted he was not a school psychologist; he rendered only a clinical diagnosis and did not consider the diagnostic criteria for "autistic-like behaviors" under the California Code of Regulations or the California Education Code. Dr. Gallo's testimony was unpersuasive on the issue of whether Student qualified as a child with "autistic-like behaviors."

The March 7, 2007 Multi-Disciplinary Assessment Report

53. Parents requested the evaluation based upon Dr. Gallo's diagnosis. District conducted assessments on January 26 and 31, 2007, February 6-7, 9, 15, 21, and 28, 2007, and March 2 and 5, 2007. District agreed to reassess Student to determine eligibility for special education services under the category of "autistic-like behaviors."

54. The assessment team members included Student's parents, Benay Loftus, M.A., and Theresa Ede-Levine, M.S., school psychologists²⁰, Diane Sasaki, special education teacher, John Gibba, general education teacher, Renee Bieling, APE teacher, Nancy Collins, assistive technology specialist, Lauri Carpenter, R.N., Nurse, and Liezel O'Brien, M.S., CCC, SLP, speech and language pathologist.

55. District's assessment tools included the WISC IV and the Developmental Test of Visual Motor Integration (DTVMI) both administered by Angela Mercer on December 15,

²⁰ Ms. Loftus, District's autism expert, has a B.A. in Psychology and an M.A. in Psychology with an emphasis in school psychology. She worked as school psychologist in the preschool to sixth grade for District for more than 10 years. She was credentialed and trained in the administration of applied behavioral analysis (ABA), discreet trial training, PECS, TEACCH, Behavior Intervention, and other methodologies to teach autistic students. Ms. Ede Levine has a B.A. and M.S. in Psychology, and has been employed by District as a Supervising School Psychologist from 1998 to the present. Both had conducted numerous assessments

2005; Test of Auditory Perceptual Skills –Revised (TAPS-3); The Childhood Autism Rating Scale - Parent and Teacher (CARS); The WJ-III administered by Diane Sasaki; Autism Diagnostic Observation Schedule (ADOS), administered by Benay Loftus; Goldman Fristoe 2 Test of Articulation (GFTA-2), administered by Liezel O’Brien; Behavior Assessment System for Children – Parent Rating Scale and Self-Report (BASC); BASC – Teacher Rating Scale (Child), and the Vineland Adaptive Behavior Scales, Teacher Rating Form (Vineland), administered by John Gibba; and the Kinetic Family Drawing and House Tree Person Drawing. District also considered Dr. Gallo’s September 2006 report. Both an OT assessment and Assistive Technology assessment were also conducted. Student does not dispute the appropriateness of these two assessments.

56. On March 7, 2007, District published the test results in its Multi-Disciplinary Assessment Report; the assessments were reviewed and approved by Ms. Loftus and Ms. Levine. Based upon a review of records, Student’s overall intellectual ability fell within the average range. Student demonstrated adequate auditory, visual, attention, sensory-motor, and memory processing skills. Student demonstrated the necessary speech, language and communication skills to learn the curriculum and participate in school. Student did not demonstrate a speech and language impairment. The report concluded that based upon the current assessment results, parent/teacher rating scales, and observations, Student did not meet eligibility criteria for special education services under the category of “Autistic-Like Behaviors.” Student’s mother disagreed with District’s assessment and sought her own independent assessment.

57. Student asserts that the ADOS and the WJ-III were not appropriately administered. Specifically, Student argues that Benay Loftus was not adequately trained or experienced to administer the ADOS. The evidence does not support this assertion. Ms. Loftus holds a master’s degree in School Psychology, A Master of Arts Degree in Educational Leadership, and bachelor’s degree in Psychology. She served as school psychologist for District from 1992 to 2002, and has experience in the evaluating and assessing students for Autism. Ms. Loftus testified and described the methodology used to administer the ADOS to Student. She explained the uses for ADOS.²¹ Ms. Loftus testified that she was trained on the administration of ADOS through the District and she had administered the ADOS to other children. She admitted that she had not purchased the manufacturer’s test manual but she followed the manual when administering the test. She did not believe it was mandatory to purchase the manufacturer’s manual or video. She believed the ADOS was appropriately administered and achieved the correct result, and the results were jointly reviewed and approved by Ms. Ede Levine, supervising school psychologist. Ms. Loftus was adequately trained and knowledgeable in the subject matter tested, administered the test in accordance with the manufacturer’s manual, and was qualified to administer the ADOS. Student failed to present any credible evidence that Ms. Loftus was

²¹ ADOS is a standardized assessment of communication, social interaction, and play or imaginative use of materials for individuals who are suspected of having an autism spectrum disorder.

not qualified to administer any portion of the multi-disciplinary assessment. The ADOS was appropriately administered.

58. Concerning the administration of the WJ-III. Student identified several defects in the administration of the test. Student asserts that not all important subtests were administered, the test was not scored correctly, and test results were based, in part, upon unreliable data. The test was administered and scored by Diane Sasaki. Student received an average standard score of 90-110. He received a 96 in Writing Fluency, 118 in Writing Sample, 77 in Spelling, and 90 in Spelling Sounds. Student received an average standard score of 90-100 in reading. Ms. Sasaki testified that she administered well over 100 WJ-III tests in her career. She tested Student by reviewing writing samples, provided from Student's teacher, John Gibba, and conducted observation, and reviewed a battery of prior assessments, including the WJ-III administered in 2005. Ms. Sasaki testified that she opted not to give Student the Story Recall subtest because there was no deficit in that area. She also gave the core subtests, as had been done in the 2005 WJ-III. Ms. Sasaki testified that she did not need to give all the subtests and selected those that were representative of the subtests that were not administered. Ms. Sasaki admitted that she made errors in scoring that resulted in Student getting higher scores than warranted in some areas. For example, Student received a score of 21 on the Math Calculation subtest when it should have been a 20. On the Math Fluency subtest, a timed test, Ms. Sasaki did not note the time Student accomplished the test answers.²² Ms. Sasaki testified she timed Student at two minutes. Other scoring errors in the Math subtests resulted in the reduction of Student's compuscore from grade 5.7 to the 4th grade level. Ms. Sasaki also admitted to having assisted Student in answering some of the questions on the Arithmetic/Algebra Competency test. Ms. Sasaki believed that she did not violate the test protocols because the tests were administered to determine placement. Ms. Sasaki also testified that she reviewed the tests administered by Mr. Gibba, but did not rely on them in scoring. Her testimony in this regard was not credible. In addition to the numerous errors in test administration, Ms. Sasaki's admission that she assisted Student in his answers during the test and miscalculated Student's math compuscore raises concerns and suspicions about the accuracy and the validity of the test results.

59. The administration of the BASC and the Vineland Teacher Rating Scales²³ by John Gibba is equally troubling. Mr. Gibba's scoring of Student's class work in the areas of spelling, and writing was replete with errors. He assigned higher scores to Student on work and writing samples that contained obvious errors. This work was taken into account in Mr. Gibba's completion of the BASC and Vineland. Mr. Gibba testified that Student performed

²² According to the test protocols time entry was required in order to achieve a precise score. The protocols allowed a maximum of three minutes.

²³ The Vineland Teacher Rating Form requires a student's teacher to evaluate a student's behavior in communication, daily living skills, and socialization. The Vineland Teacher Rating Form Manual indicates the respondent must be a teacher who is very familiar with the student being evaluated, and should have frequent contact daily for a specified period of time.

well in his class. However, Mr. Gibba testified that Student attended Explorer's Club a substantial part of the school day, for more than four hours a day. Mr. Gibba also testified that he did not know what level of work Student performed in Explorer's Club. The school day was approximately six to six and one-half hours. Student apparently spent little time in Mr. Gibba's class. Though Student spent little time in his class room, Mr. Gibba testified that Student did "very well" in his class. The evidence established that Mr. Gibba believed that Student did not belong in special education and that Student's parents were "scamming" the District by their insistence that Student be placed in a special education class. Mr. Gibba's evaluation of Student indicated some bias against Student being assigned to Explorer's Club. Mr. Gibba's testimony concerning Student's behavior directly contradicted the testimony of Tamara Woods, Student's prior fifth grade teacher, who reported Student was not doing well in class, struggled with his academic work, and did not interact with other students. Mr. Gibba's testimony was not credible. Mr. Gibba's testimony also tended to show he was inaccurate in reporting Student's classroom performance, which raised concerns about the accuracy and validity of his ratings and his observations of Student in the assessment.

60. When administering standardized tests in order to use the scores derived from the test it must be administered in compliance with standardized procedures and test instructions. A departure from the standardized procedure may result in an invalid test score, which then cannot be properly compared to other, standardized scores.²⁴ Based upon the evidence, it is found that the numerous errors, the appearance of bias on the part of Student's general education teacher, Mr. Gibba, and the deviation from the test instructions invalidated the overall assessment results. District's assessment and finding that Student did not qualify for special education as a child with "Autistic-Like Behaviors" is based upon flawed and invalid test data and is not persuasive.

Report of Paula Solomon, Ph.D.

61. On April 16, 2007, Student's parents obtained an independent educational evaluation from Dr. Solomon. Dr. Solomon's credentials included teaching assessments at the university level; she had extensive expertise in assessing children with developmental disorders. Dr. Solomon was qualified to evaluate Student. Dr. Solomon testified that she obtained background information from Mother by telephone. She visited Student's school where she was permitted approximately one and one-half hour of on-campus observation. She was not able to initially identify Student and twenty minutes of that time was spent with Angela Mercer searching the school grounds at recess looking for Student. Dr. Solomon

²⁴ The General Administration and Scoring Procedures manual for the WJ-III provides: "the goal of standardized testing is to see how well a person can respond when given instructions identical to those presented to individuals in the norming sample." The manual further instructs the examiner to pay particular attention to the information on the introductory pages of each test and the specific instructions on the test pages. The examiner is instructed to follow instructions precisely. The manual recognizes that there may be instances where the test subject may need accommodations; however, even where accommodations are required the manual cautions the examiner that "standard administration and scoring procedures should be carefully followed."

could not conduct her evaluation on school grounds and conducted the tests and a brief interview at a local McDonalds. Dr. Solomon reviewed District's assessments and the Multi-Disciplinary Assessment Report. She testified that she did not administer test instruments such as the WISC IV or the WJ-III because they had been recently administered for the second time in two years, and there was a concern about "practice effect." Dr. Solomon administered a limited battery of tests consisting of the Stroop Color Word Test, the Delis Kaplan Executive Functioning System (DKEFS), the Achenbach Youth Self Report Test, the Kovac's Children's Depression Inventory, and the Revised Children's Manifest Anxiety Scale, and conducted a limited neuropsychological evaluation of Student. The evaluation was conducted under less than ideal testing conditions. Of the test instruments she used, Dr. Solomon concluded that Student's appearance and behavior were consistent with a "high functioning child with Autism." Dr. Solomon further concluded that Student's needs would best be met in a special education program in an SDC with appropriate supports and services. Dr. Solomon also recommended further neuropsychological testing of Student. Dr. Solomon billed \$2, 812.50 for the evaluation. Dr. Solomon's test procedures, the conditions under which the tests were administered, and the test results were inadequate. Moreover, Dr. Solomon's evaluation was inconclusive as the report suggested that a complete neuropsychological evaluation should be done. Dr. Solomon's evaluation was not appropriate.

62. Based on the evidence, Student failed to prove eligibility for special education services under the category of "Autistic-Like Behaviors."

63. Based upon the evidence, District failed to prove that its multi-disciplinary assessment ruling out eligibility under the category of "Autistic-Like Behaviors," met all legal requirements, and was appropriate. The evidence supports a finding the Student must be appropriately reassessed to determine eligibility for special education under the category of "Autistic-Like Behaviors."

Reimbursement

64. Parents and guardians have the right to obtain an independent assessment of their child. However, in order to do so at public expense, a parent or guardian must disagree with an assessment obtained by the school district, and must request that the school district pay for an independent educational assessment. Once they have made the request, the district must either agree to fund the independent assessment or initiate a due process hearing to show that its assessment is appropriate.

65. Based upon Factual Findings 61 to and including 62, the evidence establishes that Dr. Solomon's evaluation was not appropriate. Student is, therefore, not entitled to reimbursement.

District's Eligibility Determination

The March 8, 2007 and April 24, 2007 IEP

66. District held an IEP team meeting to discuss the assessment results. The IEP team reviewed the assessments and the District team members agreed Student was not eligible for special education services under the category of "Autistic-Like Behaviors." The team also reviewed the results of the occupational therapy assessment. The occupational therapist informed the team that Student fell within the average range of gross motor development. The occupational therapist recommended limited consultation services to address any additional sensory integration concerns expressed by Mother. IEP team agreed to offer Student OT services outside of the IEP because Student was not eligible for special education services. District's eligibility determination was inappropriate because it was based on invalid and flawed assessments, and failed to assess in all areas of suspected disability.

Denial of FAPE in the 2004-2005 to the 2006-2007 School Years

2004-2005 school year

67. As discussed in Factual Finding 23 to and including 26, during the 2004-2005 school year, District appropriately determined Student was no longer eligible for special education services after the August 13, 2004, IEP. The IEP offer provided SDC placement with a gradual transition to full time general education class room. Student was not entitled to placement in an SDC and special education services and therefore was not entitled to a FAPE.

68. Student contends District did not offer Student a FAPE in the 2004-2005 and 2005-2006 school years by failing to provide a specific transition plan to exit Student out of special education and by failing to provide appropriate placement and services to Student.

69. District appropriately determined Student was not eligible for special education services in the 2004-2005 school year. As of that date Student was not entitled to special education placement and services. As to Student's claim that District failed to provide Student a transition plan. Student presented no evidence that he was entitled to a transition plan. Student was entitled to be properly exited from special education. As discussed in Findings of Fact 24 to and including 25, District met all of the legal requirements to exit Student from special education.

2005-2006 and 2006-2007 school year

70. As discussed in Factual Finding 45, 63, and 66, District failed to assess in all areas of suspected disability. Failure to conduct appropriate assessments violated Student's procedural right to a FAPE. However, because further assessments must be done to determine Student's eligibility for special education services, there is no evidence upon

which to base findings regarding Student's claim of eligibility to special education and entitlement to FAPE.

Compensatory Education

71. Student contends he is entitled to compensatory education because of District's denial of a FAPE.

72. A school district may be ordered to provide compensatory education to a pupil who has been denied a FAPE. Compensatory education is an equitable remedy that courts may employ to craft appropriate relief for an aggrieved party. Compensatory education may be granted for denial of appropriate special education services to help overcome lost educational opportunity.

73. Compensatory education cannot be awarded because it has not been determined that District substantively denied Student a FAPE.

LEGAL CONCLUSIONS

Applicable Law

1. The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, whether it is the disabled child or the school district. District has the burden of proving the appropriateness of the multi-disciplinary assessments conducted in 2007, raised in issue seven. Student has the burden of proof on all remaining issues. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 126 S.Ct. 528, 163 L.Ed.2d 387.)

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a) (1) (A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards and that conform to the student's IEP. (20 U.S.C. § 1401(9)(A)-(D); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA- Procedural and Substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [Rowley].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique

needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* at pp. 206-207.)

4. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*Rowley, supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. Sch. Dist. Of Greenville County* (4th Cir. 2002) 303 F.3 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F. 3d 877, 892.)

5. Under the IDEA a district must, in an initial evaluation, determine whether the child evaluated is a child with a disability. (20 U.S.C. § 1414(a)(1)(C)(i)(I).) In California, a district assessing a student for eligibility for special education must use tests and other tools tailored to assessing "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code, § 56320, subds. (c) & (f).) Statutory examples of such related areas of educational need include areas such as vision, hearing, motor abilities, academic performance, and social and emotional status. (*Ibid.*) Federal law also requires that the child be "assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).) Like the California statute, the federal statute does not require a medical diagnosis. Instead, it requires assessment in all areas of educational need related to the suspected disability. (34 C.F.R. § 300.532(g); see, *J.K. v. Fayette County Bd. of Educ.* (E.D.Ky., Jan. 30, 2006, Civ. A. No. 04-158) 2006 U.S. Dist. LEXIS 3538, pp. 12-13.)

6. Assessments shall be conducted by persons knowledgeable of the suspected disability. (Ed. Code, § 56320, subd. (g).) Psychological assessments shall be conducted by a credentialed school psychologist who is trained and prepared to assess (Ed. Code, § 56324, subd. (a).) Testing and assessment materials must be administered by trained personnel in conformance with test instructions; and must be validated for the specific purpose for which they are used. (Ed. Code, § 56320, subds. (a) & (b).) Assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (Ed. Code, § 56320, subd. (c).) No single procedure shall be used as the sole criterion for determining an appropriate educational program for a child. (Ed. Code, § 56320, subd. (e).) Assessment materials must be selected and administered so as not to be discriminatory on a racial or cultural basis; must be provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to provide or administer; and must be used for purposes for which the assessments or measures are valid and reliable. (20 U.S.C. § 1414(b)(2) & (3).)

7. Parents and guardians have the right to obtain an independent assessment of their child. However, in order to do so at public expense, a parent or guardian must disagree with an assessment obtained by the school district, and must request that the school district pay for an independent educational assessment. Once they have made the request, the

district must either agree to fund the independent assessment or initiate a due process hearing to show that its assessment is appropriate. If at hearing the final decision is that the district's assessment is appropriate, the parent still may obtain an independent assessment, but not at public expense. (Ed. Code, § 56329, subd. (c).)

8. A district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320.) A district is also required to reassess a child before exiting that child from special education (unless the child has graduated with a high school diploma or is past the maximum age for special education). (Ed. Code, § 56381, subds. (h) & (i).)

9. As part of a reevaluation of a student, the IEP team and other qualified professionals, shall review existing data on the child, including evaluations and information provided by the parents of the child; current classroom based, local or State assessments, and classroom-based observations; and observations by teachers and related services providers; and on the basis of that review, and input from the child's parents, identify whether the child is a child with a disability, and the educational needs of the child, or in case of a reevaluation, whether the child continues to have such a disability and such educational needs. (20 U.S.C. §1414(c)(1)(A)-(B)(i)-(iv).)

10. 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 and "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, subds. (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).)

11. California law permits two methods for determining a specific learning disability: 1) the severe discrepancy method; and 2) the "response to intervention" (RTI) method. (Ed. Code, § 56337.) The severe discrepancy method is described in California Code of Regulations, title 5, part 3030, subdivision (j). Under that provision, a child has a specific learning disability if the child has a disorder in one or more basic processes (such as auditory or visual processing) and "has a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in section 56337, subdivision (a) of the Education Code."

12. 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).) If standardized tests do not reveal a severe discrepancy the IEP team may find that a severe discrepancy does exist, provided that the team documents in a written report that a 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 b 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)(C)(1)-(6).) An IEP team may determine that a child has an specific learning disability if the “child does not achieve adequately for the child’s age or to meet state-approved grade-level standards” in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics. (34 C.F.R. § 300.309(a) (1).)

13. Specific learning disability does not include “learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (34 C.F.R. § 300.8(c) (10) (ii); Ed. Code, § 56337, subd. (a).)

14. 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 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, subd. (i)(1-5).)

15. California Code of Regulations , title 5, part 3030, subdivision (g) (1)-(7) establishes the assessment criteria to be used in evaluating eligibility for special education services based upon the disability of autistic-like behaviors. Under this section a pupil must exhibit any combination of the following of autistic-like behaviors, including but not limited to: (1) inability to use oral language for appropriate communication; (2) history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) obsession to maintain sameness; (4) extreme preoccupation with objects or inappropriate use of objects or both; (5) extreme

resistance to controls; (6) display of peculiar motoric mannerisms and motility patterns; and (7) self-stimulating, ritualistic behavior. (Cal. Code. Regs., tit. 5, § 3030, subd. (G).)

16. California, Code of Regulations, title 5, part 3030, subdivision (h) establishes assessment criteria to be used in evaluating eligibility for special education services based upon the disability of mental retardation. A student is eligible as a mentally retarded student if the student has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil's educational performance. (Cal. Code. Regs., § 3030, subd. (h).)

Determination of Issues

Based on the factual findings and applicable law, it is determined as follows:

Issue 1: District appropriately assessed Student in the 2004-2005 school year in all areas of suspected disability.

17. Based upon Factual Findings 7 through 20, and Legal Conclusions 1, 5-6, and 8, District appropriately assessed Student in the 2004-2005 school year.

Issue 2: District's eligibility determination in the 2004-2005 school year, was appropriate

18. Based upon Factual Findings 21 through 26 and Legal Conclusions 8 through 10, District's eligibility determination was appropriate.

Issue 3: District failed to appropriately assess Student in the 2005-2006 school year in all areas of suspected disability.

19. Based upon Factual Findings 32 through 44, and Legal Conclusions 6, and 8-9, District failed to appropriately assess Student in all areas of suspected disability.

Issue 4: District's eligibility determination in the 2005-2006 school year, was not appropriate.

20. Based upon Factual Findings 46-47, and Legal Conclusions 8-10, District's eligibility determination was based upon flawed assessments and was not appropriate.

Issue 5: District failed to appropriately assess Student in the 2006-2007 school year in all areas of suspected disability.

21. Based upon Factual Findings 53 to and including 60, and 63, and Legal Conclusions 6 and 8-9, District did not appropriately assess Student, and failed to assess areas of suspected disability of ED and SLD. District must conduct appropriate assessments to determine eligibility under the categories of ED and SLD

Issue 6: District's eligibility determination in the 2006-2007 school year, was not appropriate.

22. Based upon Factual Findings 53 to and including 60, and 63, and Legal Conclusions 6 and 8-9, District's eligibility determination was inappropriate because it was based upon flawed and inappropriate assessment data. Further assessments are necessary to determine whether Student remains eligible for special education services.

Issue 7: District's Assessment(s) dated February 15, 21, and 28, 2007, and March 5, 2007, was not appropriate.

23. Based upon Factual Findings 53 to and including 60, and 63, and Legal Conclusions 6-7, District's failed to show that the multi-disciplinary assessments conducted to determine whether Student was a child with "Autistic-Like Behaviors," complied with the legal requirements and was appropriate. District must conduct appropriate assessments to reassess Student under category of "Autistic-Like Behaviors." In addition, the independent evaluation of Paula Solomon, Ph.D., was inappropriate and did not establish Student was disabled as a child with "Autistic-Like Behaviors." Based upon Factual Finding 62, and the Legal Conclusions stated above in this determination, Student is not entitled to reimbursement for the evaluation.

Issue 8: District did not deny Student a FAPE for the 2004-2005 school year, including the extended school year (ESY) by: Failing to provide him with an appropriate educational placement; Failing to provide him with services including occupational therapy, social skills training, mental health counseling; Failing to provide him with supports to meet his educational needs; Failing to develop an appropriate transition plan to transition him out of special education services.

24. Based upon Factual Findings 7 through 20, and Legal Conclusions Conclusions 1, 5-6, and 8, Student did not meet his burden. The evidence shows that District's assessment was appropriate in the 2004-2005 school year. District appropriately determined Student was not eligible for special education services. District did not deny Student a FAPE. District also properly exited Student from special education.

Issue 9: District did not deny Student a FAPE for the 2005-2006 school year by: Failing to find him eligible for special education services, under the additional categories of emotional disturbance or specific learning disability; Failing

to provide him with appropriate placement and services including occupational therapy, Social skills training, modified work.

25. Based upon Factual Findings 32 through 44, and Legal Conclusions 6, and 8-9, District did not assess Student for ED or SLD. Failure to appropriately assess is a procedural violation. However, until Student is assessed there is insufficient evidence to determine whether Student was eligible for special education placement and services.

Issue 10: District did not deny Student a FAPE for the 2006-2007 school yea, by: Failing to provide him with appropriate placement; and Failing to provide him with appropriate services.

26. Based upon Factual Findings 53 to and including 60, and 63, and Legal Conclusions 6 and 8-9, District did not appropriately assess Student for Autism. Failure to appropriately assess is a procedural violation. However, until Student is assessed there is insufficient evidence to determine whether Student was eligible for special education placement and services.

ORDER

1. District is ordered to develop an assessment plan and appropriately assess Student to determine whether Student is eligible for special education under the disability category of Emotional Disturbance.

2. District is ordered to develop an assessment plan and appropriately assess Student to determine whether Student is eligible for special education under the disability category of Specific Learning Disability.

3. District is ordered to develop an assessment plan and appropriately assess Student to determine whether Student is eligible for special education under the disability category of “Autistic-Like Behaviors.”

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. Pursuant to this mandate, it is determined that the Student prevailed on issues 3 to and including 7, and District prevailed on issues 1, 2, and 8 to and including 10.

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: August 24, 2007

A handwritten signature in black ink, appearing to read 'Stella L. Owens-Murrell', is written over a horizontal line. The signature is fluid and cursive.

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