

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

In the Matter of:

COACHELLA VALLEY UNIFIED
SCHOOL DISTRICT,

Petitioner,

v.

PARENT, on behalf of STUDENT,

Respondent.

OAH CASE NO. 2008061071

AMENDED DECISION

Administrative Law Judge Robert D. Iafe, of the Office of Administrative Hearings, Special Education Division (OAH), heard this matter on September 15, 16, 17, 18, 19, 22, and 23, 2008, at 87-225 Church Street, Thermal, California 92274.

Benjamin Nieberg, attorney with Garcia Calderon & Ruiz, LLP, appeared on behalf of Coachella Valley Unified School District (District). Laura Fisher, the Director of Pupil Personnel Services in Special Education for District, was present during the entire hearing except for the last day when she participated via telephone. Carol Unterseher, Coordinator of Special Education for District, was also present during the last day of hearing.

Mother appeared on behalf of Student (Student). Brother was present during the entire hearing. Father, Uncle, and friends of the family were present during part of the first day of the hearing. Student was also present during the entire final day of the hearing.

PROCEDURAL BACKGROUND

On June 26, 2008, District filed the request for mediation and due process hearing in this matter. By order dated June 26, 2008, OAH set the due process hearing to commence on July 21, 2008. On July 16, 2008, District and Mother jointly requested to continue the due process hearing for good cause and OAH issued an order that continued the initial due process hearing date. With the agreement of the parties, OAH then set the due process

hearing to commence on September 15, 2008, with a final written decision due October 10, 2008.

The administrative law judge (ALJ) opened the record on September 15, 2008. The ALJ received sworn testimony and documentary evidence during seven consecutive hearing days through September 23, 2008. At the conclusion of the hearing, the parties requested, and the ALJ ordered, the record to remain open until October 1, 2008, for the filing of written closing arguments. The parties timely filed their closing arguments, and the matter was submitted for decision, on October 1, 2008.

ISSUES

District raised the following issues for decision at the Due Process Hearing:

1. Whether District is justified in requesting a special circumstances instructional assistant (SCIA) assessment of Student in light of: (1) Student's changed circumstances following his March 31, 2008, accident at his elementary school; (2) Student's parent's expressed concerns regarding the role of Student's assigned one-to-one aide; (3) the potential nature and level of individual support services required by Student at the middle school level based on his unique needs and current level of performance?

2. Whether it is appropriate for District to conduct a social-emotional assessment for Student, given his recent alleged significant apprehension and traumatic feelings stemming from attending school, in order to provide appropriate support services to Student to address his unique needs, whether those services be provided in a home instructional setting or at school, as appropriate?

3. Whether District's proposed individualized education program (IEP) dated March 13, 2008, was reasonably calculated to provide Student with a free appropriate public education (FAPE), given his previous progress in the general curriculum?

PARTIES' CONTENTIONS

District contends that its IEP dated March 13, 2008, was reasonably calculated to provide Student with a meaningful educational benefit in the least restrictive environment, thus providing Student with a FAPE for the remaining months of his sixth grade education in elementary school and for his seventh grade education in middle school. District asserts that based on the information available to Student's IEP Team in March 2008, Student's placement in the regular education environment with accommodations and a temporary aide on an as-needed basis would be appropriate to meet his needs. District further contends District should have the opportunity to assess Student's needs to determine whether Student needs a SCIA to obtain educational benefit in District's regular education environment. Finally, District also contends District should have the opportunity to assess Student's social-

emotional needs to determine what, if any, services should be provided to Student in this area of concern.

Student contends the March 13, 2008, IEP was not appropriate because it changed the special circumstances aide support District had been providing for Student without any current assessment of Student's needs. Student also contends that the proposed IEP failed to provide the specific aide support that Student required to access his education in view of his needs for mobility and scribe support. As a result, Student argues District failed to meet its obligation to provide him with a FAPE in its proposed IEP. Student also contends that District should not be allowed to conduct an assessment for a special circumstance instructional aide for Student because District had not properly assessed Student in the past. Student contends that there is not need for District to conduct a social-emotional assessment of Student because District does not have people qualified to do so and Student is being successfully treated outside District.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is an eleven-year-old boy who attended sixth grade at District's Peter Pendleton Elementary School for most of the 2007-2008 school year. He has been eligible for special education and related services under the low incidence disability category of orthopedic impairment as a result of his cerebral palsy (CP). At the time District filed its request for a due process hearing, Student had not attended District's school since April 3, 2008. During the entire time period at issue, Student has resided with his Mother within the geographical boundaries of District.

Background and Student's Unique Needs

The February 13, 2007, OT Report from California Children's Services

2. Susan Siffermann is a physical therapist who has been licensed by the state of California since 1991. She began her career as an acute care inpatient physical therapist at what is now Desert Regional Medical Center and as an outpatient physical therapist at Eisenhower Medical Center. In 1994, she became employed as a staff physical therapist for California Children's Services¹ (CCS) at the Indio Medical Therapy Unit (MTU). She became the supervising physical therapist at the Indio MTU in April 2000. Siffermann noted that the majority of the orthopedically impaired patients she has treated while employed with CCS present with CP. In terms of numbers, she estimates she has treated many hundreds of children with CP.

¹ California Children's Services is a state program for children with certain diseases or health problems. In this program, children up to 21 years old can get the health care and services they need. CCS connects parents with doctors and trained health care people who know how to care for your child with special health care needs.

3. As supervisor, Siffermann primarily helps the staff therapists with evaluations, attending IEPs, and school consults. She described the obligation of CCS to provide medically necessary physical and occupational therapy while school districts provide the educationally necessary therapy. However, she noted there is an overlap in these two areas such that CCS does make recommendations based on mobility issues, or seating, or adaptive modifications that can be made in a classroom, and will meet with a school district's adapted physical education (APE) staff.

4. During her time at CCS, Siffermann has often made recommendations for a one-to-one aide for mobility support for students with CP. The factors to consider in determining whether such a mobility aide is needed include how the child is getting around the classroom and the campus in general and what modifications have already been made. The primary consideration is the safety of the student. In considering safety, however, she noted that a student losing balance and falling is, unfortunately, to be expected. Due to the nature of the neurological disorder of CP, with problems of control and spasticity of the muscles, it is fair to expect a child will fall. CCS attempts to prevent injuries and to provide a safe environment for students.

5. District presented the testimony of Siffermann because she has known Student as a patient at CCS since 1999. She noted Student was qualified to receive services from CCS due to a diagnosis of CP with spastic diplegia. More recently, Student received an additional diagnosis of ataxia. She explained that a diagnosis of spastic diplegia means the primary involvement for Student is spasticity, or an abnormal muscle tone, in the legs. While witnesses without specialized training noted Student walked with an unusual gait that appeared to have him dragging one foot behind the other, Siffermann specifically identified Student as presenting with a trendelenburg type gait pattern. This gait pattern is a result of weakness in the gluteus medius muscles. As Student attempts to take a step, and pick one leg up to clear it through, the weak muscles cause the hip to drop down a little bit and appear to lurch forward because the entire body weight cannot be supported through the step.

6. She also explained that for the additional diagnosis of ataxia, the easiest way to describe that condition is an "incoordination." By way of a simple example, she explained that a person with ataxia would have a difficult time reaching for objects. The person may overshoot or not be able to accurately grab onto an object due to an abnormal response from impulses coming from the brain to the muscles. While the physical manifestations of ataxia are normally seen in the upper extremities, ataxia affects muscles in the entire body. As a result, and separate from his CP, Student's ataxia can cause him to fall to the ground from a standing position without warning and for no apparent reason.

7. "On February 13, 2007, CCS prepared a report concerning Student. The report noted Student did not demonstrate sensory motor deficits but that Student "does demonstrate significant muscle fatigue during repetitive activities, i.e., handwriting and cutting." The report recommended Student be followed on a consult basis at CCS because he did not demonstrate a medical occupational therapy need at the time. The report also recommended "a current school based occupational therapy assessment to determine specific

academic needs/modifications that may benefit [Student].” This report was provided to District and was considered at Student’s IEP meetings in 2007 and 2008.

8. Siffermann noted that among all the evaluations and reports done by CCS for Student, and upon her review of all the information in the CCS file for Student, CCS never made an observation of Student inside the classroom at Peter Pendleton Elementary. Thus, there was no basis for any educational recommendations currently inside the classroom for Student.

9. Siffermann was clear, however, that evaluations by CCS were not directed to the educational needs of Student. She recalled discussions as early as July 2004 concerning Mother’s request for a laptop computer to assist Student. When asked whether she recommended a laptop computer for Student at the time, Siffermann clearly recalled the issue relating to Student’s fatigue and decreased endurance with handwriting. She recalled reminding Mother that the CCS evaluation focused on Student’s activities of daily living and physical abilities, which is in the area of medical needs, but that the school occupational therapist was the appropriate person to evaluate the need for a laptop computer for educational needs. Siffermann affirmed that her area of expertise was for medical needs. She was not qualified to provide any recommendations to address any educational needs of Student.

The 2007 Triennial Review of Student’s Unique Needs

10. As part of Student’s most recent triennial review, which was conducted in March 2007, Alfredo Gutierrez (Gutierrez), school psychologist for District, conducted an assessment of Student. After conducting his assessment, Gutierrez prepared a written Multi-Disciplinary Assessment Report dated March 23, 2007. Gutierrez was qualified to conduct this assessment. He had been a school psychologist for District since 1984. Before becoming a school psychologist, Gutierrez had been a teacher with District beginning in 1977 both in general education and special education.

11. In conducting this assessment, Gutierrez was assisted by Juan Badena (Badena), a resource specialist program (RSP) teacher for District. Gutierrez administered the Woodcock-Johnson III (WJ-III) Tests of Cognitive Abilities and Badena administered the WJ-III Tests of Achievement. Gutierrez had administered the WJ-III tests hundreds of times during his 24 year career. Gutierrez had trained Badena in the administration of the achievement tests and supervised him when he gave the tests to Student. Gutierrez also retested Student on some portions of the achievement tests to get a better understanding of how Student performed.

12. On the Verbal Ability portion of the WJ-III, Gutierrez’ testing revealed Student earned a standard score of 114. This placed him in the high average range compared to other students of his age.

13. However, in the areas of Cognitive Efficiency and Processing Speed, which included timed tests and required Student to visually track and to physically mark answers, Student had difficulty. Student earned a standard score of 79 for Cognitive Efficiency, which is in the low range, and a standard score of 59 for Processing Speed, which is in the very low range. These scores were due in large part to the limitations resulting from Student's CP. Gutierrez noted that the simple physical task of circling an answer was taxing and took a long time which negatively impacted Student's scores. Although Student scored very low in processing, Gutierrez concluded Student had fast processing but was slow at manual tasks.

14. The results of Student's achievement testing were similar. Student's Broad Math standard score was a 106, which falls in the average range but it was composed of tests with great differences in results. For example, Student earned a standard score of 112 for Math Calculation, which is in the above average range. However, on the Math Fluency portion, which is a timed test where Student has to problem solve and write his answers, Student earned a 73, which is below average. In reviewing the difference between these two scores, Gutierrez noted Student performed at almost a seventh grade level on the untimed math calculation test, but his inability to do manual tasks efficiently gave him a score equivalent to a second grade level on the timed math fluency test.

15. Student's results for written language were also similar. Although Student's Broad Written Language standard score was a 94, which falls in the average range, Gutierrez noted the great difference between Student's standard score of 125, on the untimed Writing Samples test, which is in the superior range, and Student's standard score of 74 on the timed Writing Fluency test, which is in the below average range. On the untimed testing, Gutierrez noted that Student wrote very well and wanted to complete everything that he could. It was obvious to Gutierrez that Student had to work very hard to produce his writing and was determined to do his very best. Student even refused an offer of a break during the testing. Gutierrez estimates that the total time Student spent writing was about 40 minutes and that Student was very tired when he completed the testing. Gutierrez did not think that Student could do as much writing as he accomplished. Gutierrez was very impressed with the quality, organization, and development of Student's writing and his vocabulary. Thus, although many of the timed tests placed student in below average range, Gutierrez concluded that Student's Intelligence Quotient (IQ) of 114 was a fair assessment of his cognitive ability.

16. At the hearing, Gutierrez explained that Student's disability gives him deficits in the physical act of writing. He noted Student has the ability to formulate ideas to create an essay, but he needs systems to accomplish the writing and needs additional time. One of the recommendations Gutierrez had made in the past was a voice activated computer program to help Student. However, Gutierrez explained that staff found the program was not easy to use and it was never implemented with Student.

17. Gutierrez remarked several times during his testimony that he was very impressed with Student's determination to complete all required testing. He noted he has assessed many children with CP over the years and usually finds that they tend to give up or rely on others to do things for them. However, this was not the case with Student. Gutierrez

said that Student was determined to see things through, had strong work habits, and had a competitive spirit which he found impressive.

18. Gutierrez presented his Multi-Disciplinary Assessment Report at the IEP team meeting on March 23, 2007 and discussed Student's needs. He was in agreement that Student should participate in District's general education program with RSP support and curriculum modifications. Although District gave Student a laptop computer several months earlier in October of 2006, there was no plan for its use in class or with any voice activated program. Gutierrez recalled that the program was complicated and sophisticated and that District staff needed technical training to really get to know the program. Rather than provide some technology for support, the IEP team agreed to provide a one-to-one special circumstance aide for Student to support him for a full six hours every school day. The IEP identified this instructional assistant would be provided as a "scribe" and for "written language support" and will be providing support throughout the day for Student. In addition, the IEP provided for training to be provided to the aide for strategies to use regarding Student's needs. The aide that District provided to Student was Joe Soria (Soria) who began shortly after the IEP meeting.

Student's Education during the Sixth Grade under the March 23, 2007, IEP

19. The most recent IEP for Student which is not in dispute is the IEP dated March 23, 2007. At that time, Student was 10 years old and attending a regular education sixth grade class with special education support and services. The IEP Team had determined Student was still eligible for special education and related services under the disability category of orthopedic impairment.

20. Laura Chikafsky (Chikafsky) was Student's regular education sixth grade teacher at Pendleton for the 2007-2008 school year. It was the second year Chikafsky taught the sixth grade at Pendleton. She had previously been a teacher in the middle school grades at Palm Springs Unified School District for five years and at Desert Sands Unified School District for 14 months where she taught language arts, social studies, and English language development (ELD). As a regular education teacher she had training in specially designed academic instruction (SDAI) strategies for teaching English language learners. Among the strategies used for English language learners were hands on teaching, use of visual aids, small group instruction, collaborative grouping, teaching in increments and having some students write a three paragraph essay instead of a five paragraph essay.

21. When asked about her experience with special education students, Chikafsky first stated she never had any special education students in her classroom. She later explained that when she taught at Palm Springs she did have some students with auditory processing problems, but a resource aide would come into the classroom and assist those students.

22. At the beginning of the 2007-2008 school year, Chikafsky was Student's core teacher, meaning Student was in her class for two hours in the morning. She also taught him math from the beginning of the year until the end of October when Student transferred to a different math teacher. The math program for the sixth grade was taught in different ability levels and Chikafsky taught the level for students who were far below basic and below basic, the lowest of the three levels. Student's move was to the next higher level described as a basic level class.

23. Chikafsky understood Student had CP which affected his motor functions. When Student was in her class, Chikafsky was given a document called an IEP at a Glance by the RSP teacher Juan Badena (Badena). She recalled that Badena told her Student needed to work on his math and reading comprehension goals. Chikafsky told Badena she had strategies for teaching reading comprehension.

24. At the beginning of the school year, Chikafsky recalled that Badena did not tell her anything specific about what Student's needs were or how to meet Student's needs. She recalled receiving a document called an IEP at a Glance for Student. Although Chikafsky was Student's teacher, she stated at the hearing that she never saw the IEP dated March 23, 2007, until the time of the hearing. Chikafsky did recall, however, that on the day before school started, the principal of the school, Armando Rivera, did tell her that she was going to have a student with special needs in her class and that the set up of the classroom needed to be a certain way. The desks were then placed in a square shape to allow Student to have easier access to the door.

25. Shortly after school started, Mother called for an IEP team meeting in October 2007. Mother's main concerns were whether Student's teachers were being informed of his needs and whether the IEP was being implemented by the teachers. Mother was also concerned that Student was being penalized and receiving a low grade because of errors produced in Soria's writing. The concern was raised when Mother saw a writing assignment on display at a school open house that was started by Student, but was finished by Student's aide Soria, who was acting as Student's scribe. Student received a grade of 1.7 out of a possible 4.0 due to spelling and punctuation errors in the part of the writing produced by Soria. Chikafsky took the position that Student should correct the work of Soria. She preferred that Student produce his own writing but if Soria did the writing, Student should be responsible for correcting Soria's work.

26. The October IEP team meeting resulted in an amendment to the March 23, 2007, IEP that included three handwritten pages of information about Student's needs and specific instructions on how to implement the use of the 1:1 aide and the classroom accommodations and modifications for Student. The aide support was specific that the 1:1 aide would provide assistance with writing assignments and note taking. By way of example, the amendment specifically provided the 1:1 assistant would "take notes simultaneously with Student. Student will take notes until he is able; 1:1 will complete notes for Student."

27. Chikafsky did not believe Soria was qualified to assist Student with his writing. She tried to help Soria out. She saw problems with Soria regarding the content of Student's work. The content problems included making sure that a writing prompt was accurately addressed by Student and that the structure of Student's writing was done properly. Chikafsky also saw grammar and punctuation errors in the writing produced by Soria. She explained that she brought her concerns about the writing ability of Soria to the attention of others at the school but she was told to keep working with Soria and provide him with some skills.

28. As the school year progressed, Chikafsky did notice that Student was frequently complaining of stomach pains usually in the afternoons. She noticed this during the second trimester, when she also recalled Student would be absent, on average, about once a week. After the winter break, the complaints seemed to increase and Student was absent from class more frequently.

29. Walter Cole (Cole) was Student's math teacher after October 2007. He first met Student when he taught a drama program during the summer before sixth grade. He has seen Student fall in class and pick himself back up. Although Student had an aide in his classroom, Cole did not know what Soria was supposed to be doing for Student, but he described what he saw to include making binders for Student, copying notes if Student was absent, moving Student's chair, which had wheels and arm rests, from classroom to classroom. Cole provided accommodations to Student such as giving him extra time to complete assignments, even allowing him to complete work at home. He also reduced the number of math problems that Student had to complete for homework.

30. Math class was conducted for about an hour before lunch and about a half hour after lunch. Cole was aware that Student often became fatigued in class. He was also aware of Student complaining about headaches, stomach aches or tiredness. Student sometimes told Cole directly about his aches but usually told Soria who would then tell Cole. When that happened, Cole would send them to the nurse for evaluation. It appeared to Cole that this happened several times a week with the frequency increasing as time went on.

31. Kyle Endres (Endres) was Student's adapted physical education (APE) instructor, during the 2007-2008 school year. He saw student twice weekly for 30 minute sessions. He could not recall ever seeing Student during recess or lunch periods. He agreed with the health description of Student in the proposed March 2008 IEP which stated that Student "tends to drag his feet at times causing him to lose his balance and occasionally fall over." He was aware that Student's disabling condition hindered his muscle control and movement and that Student would have an awkward gait and could lose his balance. He described Student as very outgoing person who wanted to be involved in everything including sports. He noted that Student would usually try to do things on his own first and would later ask for assistance from Joe Soria, (Soria) his one-to-one aide. He also noted that Soria would sometimes immediately begin to assist Student even before Student asked for help.

32. Soria was Student's 1:1 special circumstances aide in the sixth grade. He had no special education experience before being hired by District to assist Student. His previous work experience included construction and fast food jobs. He did not receive any formal training in working with students with special needs. Most of his information about Student was provided to him by Mother.

33. In describing how he was to help Student, Soria explained his duties to prevent situations where he would fall, to help him with his writing, to keep him on task and up to speed with the other students, and to promote Student's independence. Soria explained that after the winter break, and beginning in about January 2008, Student was complaining of getting more headaches and stomach aches. Soria saw that Student became tired, and complained of headaches and stomach aches when he had to do more writing. Soria also noted that beginning in January 2008, he started staying closer to Student than he did before. He was concerned about him and started seeing Student as a friend rather than a person he went to work with each day. He stayed closer to Student because Soria did not want to see Student fall or hurt himself. And many times after Student fell, Soria would immediately begin to help pick Student back up even before Student made any request for assistance.

34. To help understand Student's needs, District also called independent occupational therapist Beth Aune-Nelson to discuss her assessment of Student conducted on October 7, and November 1, 2004. As expected with children who have low tone and muscle weakness due to CP, she noted that Student has hyper-extensible and unstable joints. She explained that Student's wrist and hand lacks the stability for sustained writing and other manipulative activities. At the time she observed Student in the classroom, she noted he was able to write only about 25% of what other students could write in class. While her descriptions of Student were helpful for an understanding of Student's history, she had not been involved with Student in the classroom for over three years and did not know his current handwriting needs.

The March 13, 2008, IEP Team Meeting and Proposed Program

35. District convened an IEP Team meeting on March 13, 2008, for an annual review of Student's program. Student's current educational needs were discussed. The IEP team also considered two goals in the area of Gross and Fine Motor Development. One goal related to Student being able to catch a tennis ball tossed from 10 feet away. The other goal related to Student being able to jog two and a half laps without stopping. The goals were agreed as appropriate for Student. The problems arose concerning the support Student would receive under the IEP.

36. The program proposed by the March 13, 2008, IEP consisted of the following offer to Student:

- Aids, Services, Program Accommodations/Modifications and/or Supports:
- Additional Time for completing writing assignments.
 - Scribe services for notes as needed.

Preferential seating; seated on perimeter of student desks/rows.
Reduced number of problems in Math (1/3 to 1/2).
Provide charts/graphs on selected teacher activities.
Student tested separately or in small group as needed.
Use highlighter, marker, or manipulative as place holder.
Able to turn in writing assignments double spaced.

Placement:

Regular classroom with RSP Consultation 20 minutes one time a week.
Adaptive PE 2 times a week.

Related Services:

Health & Other Services 436:² Temporary 1:1 assistant to provide assistance for scribes and mobility support as needed. [emphasis added.]

37. District and Mother agreed with most of the accommodations, but Mother wanted the same 1:1 aide support as provided under the previous IEP and wanted further specification of the aide's duties and how the accommodations and modifications were to be implemented. At the time of the IEP team meeting, the printer that District used to print the IEP document was not working and Mother did not receive a copy at the conclusion of the meeting. Two days later, Mother met with Badena and others to receive a printed IEP for her review. She explained that she wanted to read the IEP fully and review it before agreeing to sign anything. Ultimately there was no agreement between Mother and District as to the offer in the written document.

38. The description of the aide support for scribe and mobility support was different in the 2008 offer when compared to the description of the aide support in Student's existing IEP dated March 23, 2007. On the first page of the existing IEP, the services being provided to Student included a 1:1 Special Circumstances Aide to be provided five times per week for six hours each day. Alejandro Gonzalez (Gonzalez), the Elementary Coordinator for District was the person who typed and printed the 2008 written offer to Student. At hearing, when asked why he changed the wording describing the aide, Gonzalez explained that he removed any reference to a Special Circumstances Aide in District's 2008 offer because he became aware of the Special Circumstances Instructional Assistant Observational Report dated March 20, 2007. Gonzalez explained that since he had an assessment from the year before that did not recommend a Special Circumstances Aide, he did not feel it was appropriate to include it on the IEP.

39. The report that Gonzalez considered was a report by one of District's elementary school teachers about some observations that were made of Student to determine whether there was a need for a SCIA at the end of the fifth grade. Although the person who conducted the assessment did not testify at hearing, a two page written report of the evaluation entitled Special Circumstances Instructional Assistant Observational Report

² The "436" reference was an internal code District used for reporting to the state Department of Education.

bearing the date of March 20, 2007, was provided at hearing. According to credible testimony and the report itself, an elementary teacher on special assignment for District conducted the observational evaluation on March 20, 2007. However, other than the statement that the assessor was an elementary teacher on special assignment, there was no evidence presented as to this assessor's knowledge or experience. Moreover, in spite of the fact that the task of physical writing was known to be among Student's needs, there was no observation of Student performing any writing assignment during the evaluation. Rather, the report itself described about two hours of observation including an hour in a language arts class and an hour in a math class.

40. The language arts class observation was a lesson on predictions, vocabulary, and spelling for a new story to be read. First, students were asked to share their predictions about the story and then choral read paragraphs on an overhead projector. Then for the spelling portion, the students would tear out the list of spelling words from their workbooks. The teacher tore Student's list out of his book. Students would then underline the prefix of their work on the board. Finally, the students participated in a spelling bee. While other students walked up to the board to write their spelling words, the teacher accommodated Student's needs by permitting him to spell his word in the teacher's ear. The math lesson involved writing coordinates on a graph and identifying plot points. The teacher provided Student with colored markers to assist with his plotting. Near the end of the lesson, the teacher drew the charts for the several problems that Student could not complete.

41. Based on the accommodations that the teacher provided to Student in these two lessons, the Special Circumstances Instructional Assistant Observational Report concluded that Student did not need a special circumstances assistant during instructional time. The report concluded that accommodations and support from the general education teacher was found to be sufficient for Student.

42. When Gonzalez was asked why he included the word "temporary" to describe the 1:1 assistant in the 2008 offer, he could not explain why. This change in the description of the aide support was an important reason Mother did not sign the March 13, 2008, IEP proposed by District.

43. Another problem with the March 13, 2008, IEP concerned the failure of District to conduct any evaluation of Student's educational needs at Bobby Duke Middle School, which is the school site District proposed for Student for his seventh grade year beginning in September 2008. District took the position that there was sufficient staff around the middle school campus to provide a safe environment for Student. Siffermann stated that it was important that Student should be present for any evaluation of the school site. When CCS conducts an assessment, assessors normally keep a log at their office of any architectural components of the school site that may need accommodations which normally do not change from year to year. However, the Bobby Duke Middle School was recently renovated. To do a true assessment of Student's needs Siffermann would want Student to be observed at the school site. To accurately assess Student, an assessor would need the opportunity to time him as he moved around the campus and walked from classroom to

classroom. It would also be important to time him as he moved around the larger middle school campus.

The March 31, 2008, Classroom Accident and Student's Return to School

44. On March 31, 2008, Student was in the classroom with his aide Soria to complete some work. It was recess time and everyone else had left the classroom. Student fell and opened a wound on the back of his head. Soria telephoned the front office for help. RSP teacher Badena had been on recess break and was called to the classroom. He administered first aid because Student was bleeding from a wound high on the back of his head. Teacher Cole also came into the classroom after Student fell. He saw Student in a prone condition, flat on the floor. He noted Student was very upset and was crying. Student was then transported to the hospital, was treated, and both Mother and Student came back to the school that same day to let the principal and staff know that Student was doing fine.

45. Student stayed home from school for a couple of days and returned to class on April 3, 2008, with Mother. When Student did return to his classroom, he saw the blood stain from his injury was still on the carpet and became upset and depressed during the rest of the day. Student has not returned to school after April 3, 2008. He has reportedly been unable to face school because of his fear of seeing the blood stain on the classroom carpet and his fear of injury in that school setting.

District's Request for Assessment

46. Within a week after the April 3, 2008, return to school, Mother had Student seen by a doctor. Mother then presented District with a document entitled Excuse Slip from pediatrician Maria Remedios R. Gopez, M.D., F.A.A.P. The Excuse Slip was dated April 9, 2008, and was a form document. The portions that were filled in stated:

This patient {Student] was seen and treated on 4/09/08.

Further Treatment:

This person needs follow-up: as needed.

Other Comments:

Advised home school the next couple of months.

47. When District requested additional information for the basis of the home instruction request, Mother presented District with a second Excuse Slip providing some additional information as an addendum to the April 9, 2008, note. The second slip was dated April 28, 2008, signed by Dr. Gopez and noted that Student was seen for follow-up after a fall and that:

Student "presented with psycho-somatic symptoms, likely a post-traumatic stress disorder. Advised to make an appointment with a psychiatrist/psychologist for counseling and in my opinion needs to be home-schooled until he is cleared ok by the mental health professional. He

has an appointment pending at San Diego Children's Hospital. Please call me if you have concerns."

48. Although District made some attempts to telephone Dr. Gopez, no contact was made within a few days. On May 2, 2008, District sent a proposed Assessment Plan to Student through counsel. The assessment was described in counsel's letter as a socio-emotional assessment to not only determine whether home instruction might be appropriate, but to determine whether his IEP team should consider additional supports in his classroom to address any potential issues with his purported anxiety at school. The assessment plan also proposed a special circumstances instructional aide assessment to obtain a clear and comprehensive picture of Student's needs at school with regard to a possible 1:1 aide.

49. At the end of the hearing, Mother advised that she has taken Student out of the District and she stated Student is not going back. District requested guidance on whether the assessments should be conducted until District could confirm that Student was removed from the District.

LEGAL CONCLUSIONS

Burden of Proof

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, the District has the burden of persuasion in this case.

Assessment of Student

2. Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted in all areas of the suspected disability. (20 U.S.C. § 1414(a)(1); Ed. Code, § 56320.) When developing a pupil's IEP, the IEP team must consider the results of this initial assessment, or the most recent assessment, of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56341.1, subd. (a)(3).) Regarding the reassessment of a student with an IEP, Education Code section 56381, subdivision (a)³ provides.

(a)(1) A reassessment of the pupil, based upon procedures specified in Section 56302.1 and in Article 2 (commencing with Section 56320), and in accordance with subsections (a), (b), and (c) of Section 1414 of Title 20 of the United States Code, shall be conducted if the local educational agency determines

³ Under federal law, the circumstances under which a "reevaluation of each child with a disability" must be conducted are the same. *See*, 20 U.S.C. section 1414(a)(2)(A) for the substantive, and 20 U.S.C. section 1414(a)(2)(B) for the "procedural requirements."

that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment.

(2) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary.

If the reassessment so indicates, a new individualized education program shall be developed. (Emphasis added).

3. The reassessment of Student for social-emotional issues and the issue of aide support under the May 2, 2008, Assessment Plan falls squarely within the mandate of Education Code section 56381, subdivision (a). District has met the requirements of this statute.

4. On the social-emotional issues, Student had stopped coming to school one month before the assessment plan was proposed. Since District personnel did not receive the information they believed they needed for the home instruction, even after receiving the two excuse slips from Dr. Gopez, an assessment appeared necessary and this satisfies the requirements of Education Code section 56381, subdivision (a)(1). Moreover, District had not conducted an assessment of Student within one year before the May 2, 2008, assessment plan was created and District's last triennial review was over a year before. This satisfies the requirements of Education Code section 56381, subdivision (a)(2).

5. In addition to the time since Student was last assessed, there was little information available to District concerning Student's social-emotional needs. Mother had provided several documents that demonstrated Student's emotional state had changed dramatically during the last trimester of the 2007-2008 school year. Thus District should have the right to assess Student under these circumstances.

6. On the issue of the provision of an aide to Student, there also had not been an assessment for over a year. There were also new safety and mobility concerns to consider as Student was moving from the confined area of the elementary campus at Pendleton to the more expansive middle school campus at Bobby Duke. Moreover, it was clear that there were never any formal school based assessments of the educational needs of Student, especially relating to writing, as recommended by the CCS annual report from February 2007. In view of this District should have the right to assess Student for a special circumstances aide.

7. However, if a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the reevaluation of the child, the district may not use the consent override procedures available in a due process hearing. (34 C.F.R. § 300.300(d)(4)). Thus, if Mother's statement that she has removed Student from District means she is either home-schooling Student, or has placed Student in a private school, then District does not have the right to assess. If Mother is not home-

schooling Student and has not placed Student in a private school, then the District would not be prevented from obtaining an order for assessment in this case. The evidence provided at the hearing was insufficient to show that Mother was home schooling Student or had placed Student in a private school. As a result, District has the right to assess Student.

Provision of FAPE

8. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(a)(9).)

9. "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(a)(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

10. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

Determination of Issues

11. The dispute in this case revolves around what level of services and supports Student needs in the regular education environment. For the remaining three months of the sixth grade and for most of the seventh grade, District offered a wide variety of accommodations in the March 13, 2008, IEP. In fact, Mother readily agreed that during discussions, District was offering about 90% of what Mother requested for Student. However, Mother requested specificity in describing service and accommodations so that persons implementing the IEP would actually know what to do. The parties were also divided on the provision of an aide for mobility and for instructional assistance. District asserts that Student did not require an aide to obtain educational benefit. Student takes the position that the aide was appropriate for him to obtain educational benefit during the time he was in sixth grade as provided in the last agreed upon IEP; and the aide remains necessary for his education for the remainder of the sixth grade and even more so as he moves to the seventh grade in the middle school.

12. On the issue of specificity of the proposed accommodations, Student argued that the IEP did not appropriately identify how the accommodations would be provided to Student. However, the implementation of the accommodations is not at issue in this case. The March 13, 2008, IEP accurately identified the accommodations and modifications that were available to Student; the skilled implementation of those accommodations and modifications depend on the ability and skill of the teacher. For example, the very first proposed accommodation was “Additional Time for completing writing assignments” and it was available for Student every school day. Whether any particular assignment would be due two days or one week after a certain due date would be dependent upon the particular assignment. It did not need to be specified in the IEP.

13. However, District’s change of the Student’s 1:1 special circumstances aide is a different consideration. No single measure or assessment can be used as the sole criterion for determining an appropriate educational program for a student. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).) When District changed the description of Student’s existing special circumstance aide to a “temporary 1:1 assistant...as needed,” such change was inappropriate. There is no question but that District made the change because its coordinator believed District could not provide the 1:1 aide on the ground District had a single assessment report in its files that did not recommend an aide. Moreover, the assessment report was actually dated before the March 23, 2007, IEP from the previous year. The IEP team in March 2007 had already considered the March 20, 2007, Special Circumstances Instructional Assistant Observational Report and, considering the report and other information, proceeded to agree to provide the aide to Student on a full time basis. In the absence of any additional assessments, it was inappropriate to withdraw the aide support previously provided to Student based on the single, outdated Observational Report. In violation of *Rowley*, District’s failure to provide for a full-time one-to-one aide would not provide the necessary assistance for Student to benefit from his special education program.

