

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

In the Matter of:

STUDENT,

Petitioner,

vs.

COVINA-VALLEY UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2005060599

**DECISION**

The hearing in the above-captioned matter was held on September 13 through 16, 2005, at Covina, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), presided. Student appeared through her mother (Mother), and counsel, Cindy A. Brining, Law Offices of Carol Graham. Respondent Covina-Valley Unified School District (District) appeared through G. Robert Roice, G.R. Roice & Associates, Educational Consultants.

Evidence was received, and the record held open so that the parties could submit written closing arguments. Student's Closing Argument is identified for the record as Exhibit OO. Respondent's Closing Argument is identified as Exhibit 47. The matter was submitted for decision on September 30, 2005.

The Administrative Law Judge hereby makes his findings of fact, legal conclusions, and orders, as follows.

**INTRODUCTION AND STATEMENT OF CASE**

Student, who is now in the sixth grade, has received special education services from the Respondent school district since she was a preschooler. She suffers from a learning disability in the areas of reading and written language, because she has significant deficits in auditory processing, visual sequential memory, and an attention disorder.

Student is currently enrolled in a non-public school because her mother did not believe that Respondent could adequately meet her child's educational needs when the child

entered middle school in the fall of 2005. Student asserts that the services offered by her IEP team for her sixth grade program were not adequate to meet her needs for that coming school year, and that the District should therefore pay for her non-public school. Further, Student contends that the services provided in the past five years have not provided a free and adequate public education. She seeks compensatory services as a result.

In its defense, the District asserts that Student has made progress on a year- to-year basis, and especially during the past two years. It points to the continued provision of special educational services as having fostered progress, and argues that the services that Student needs in the future can be provided at one its own middle schools, and need not be provided at the private school.

## FACTUAL FINDINGS

### *The Parties and Jurisdiction:*

1. Student is a girl of eleven years who attended school in the District from 1998 until approximately June 2005, or from preschool through the fifth grade. It is undisputed that Student suffers from learning and language disorders, and that she is therefore in need of and entitled to special education services.

2. During the period relevant to this case, Student attended Cypress Elementary School (Cypress), one of the District's school sites. She was slated to begin sixth grade at Las Palmas Middle School (Las Palmas) in September 2005. However, she enrolled at Prentice School, a private school that serves students who suffer from learning disabilities.

3. This proceeding was instituted in October 2003 by Student's mother. (See Ex. FF.) She asserted that the District was not then providing a free and appropriate public education (FAPE). By the time of the hearing in this matter, the issues had expanded, and were stated as follows:

(A) Did Respondent fail to offer and provide Student with a free appropriate public education (FAPE) from October 31, 2000 through the end of the 2000-2001 school year, by not providing the child with the appropriate placement and support services;

(B) Did Respondent fail to offer and provide Student with a FAPE for the 2001-2002 school year, by not providing her with the appropriate placement and support services, and goals and objectives;

(C) Did Respondent fail to offer and provide Student a FAPE for the 2002-2003 school year, by not providing her with the appropriate placement and support services, and goals and objectives;

(D) Did Respondent fail to offer and provide Student a FAPE for the 2003-2004 school year, by not providing her with the appropriate placement and support services, and goals and objectives;

(E) Did Respondent fail to offer and provide Student with a FAPE for the 2004-2005 school year, by not providing her with the appropriate placement and support services, and goals and objectives;

(F) Did Respondent fail to offer a FAPE to Student for the 2005-2006 school year, by not providing her with the appropriate placement and support services, and goals and objectives;

(G) Must Respondent reimburse Student's mother for expenses related to privately placing Student in a non-public school for the 2005-2006 school year?

(H) Must Respondent provide Student with compensatory education for the alleged failure to provide FAPE during one or all of the school years from 2000-2001 through 2005-2006?

4. The District responded, denying that it had failed to meet its obligations to provide a FAPE. It was undisputed that jurisdiction had been established to proceed in this matter.

*Student's Educational Background:*

5. Student has had difficulties in the classroom from an early age. Although she is a girl of average intelligence, her academic performance has tended to be significantly below average in key subject areas for most of her academic life. Ultimately, the District attributed this disparity between her IQ and her academic performance to a learning disorder, but that did not happen until Student reached the first grade. Prior to that time she was assessed as requiring speech and language assistance.

6. Student demonstrated academic difficulties in kindergarten and even pre-school. Teachers from those two classes had expressed concerns to Mother during that period. On December 16, 1998, while in pre-school, Student was determined to have a significant speech/language disorder which adversely affected her performance. Three hours of speech and language services were provided each week in response to that finding. (Ex. N.) She continued to receive those services through kindergarten. (Ex. L; Ex. M; see also, Ex. 20, p. 1, at Educational History.) The speech and language problems were described in her November 1999 Individualized Education Program (IEP) as semantics/syntax-morphology/phonology. (Ex. L, p. 2.) Student was advanced to the first grade, and in early November of that year her teacher notified Mother that she was referring the child for an evaluation and assessment for special education services. (Ex. CC, third page.) It is noteworthy that the referral refers, in four places, to problems Student was having with her

attention and focus. For example, it is stated that she “has not been able to pay attention long enough to develop her writing skills.” (*Id.*, first page.)

7. The IEP team met on November 9, 2000, before completion of the assessment described hereafter. At that time Mother was concerned that her daughter’s language delay would affect classroom progress. The amount of speech and language services was then at 40 minutes per week (2 sessions, 20 minutes per session), as opposed to the two 1.5 hour sessions authorized when she was in kindergarten. (See Ex. K, p. 6 of 10.) No additional special education services were offered at that time, except that the speech and language services previously provided were continued.

8. The District conducted a “psycho-educational study” in December 2000. That assessment process resulted in a nine-page report prepared by Ellen Mahler, a school psychologist employed by the District. (Ex. 20.) Ms. Mahler utilized various testing instruments as part of the assessment process. For example, an IQ test was administered, showing a full-scale IQ of 98, an average score<sup>1</sup>. (*Id.*, p. 2.) The results of the Woodcock-Johnson achievement test showed standard scores between 93 and 100, in the average range. However, the Test of Auditory Perceptual Skills (TAPS) did not show average scores; three of seven subtests showed Student at or below the seventh percentile, and three other scores were in the low average range. (*Id.*, p. 3.) The Test of Visual Perceptual Skills (TVPS) showed even lower scores: on three subtests Student was found in the first percentile; on two more she was in the third percentile, and another at the eighth percentile. During testing she was observed to avoid tasks and to not attend to them. Her auditory and visual processing issues were described as “demonstrate[ing] some weakness,” but it was concluded that such problems were not interfering with her overall achievement, in light of her average IQ and her performance on the standardized academic achievement tests. Ms. Mahler recommended that Student remain in a general education class and that speech and language services continue. (*Id.*, pp. 6-8.)

9. When the IEP team convened in December 2000, it reviewed Ms. Mahler’s psycho-educational study and considered the need for an RSP (resource specialist) placement. (Ex. J., p. 1 of 2.)<sup>2</sup> Student was described within the IEP document as a “disorganized, impulsive student with few internal controls.” (*Id.*) It was stated that her attention in class impacted her performance significantly, and her parents were encouraged to discuss the child’s attention problems with their doctor. Student’s placement was a general education class, without RSP support, but with continued speech and language services; eligibility continued to be based on a language/speech disorder. (See Ex. K, p. 2 & Ex. J, p.1.)

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<sup>1</sup> Scores of 90 to 110 are deemed in the average range.

<sup>2</sup> This is the designation written on the second page of the exhibit, the first being a pre-printed addendum form.

10. In November 2001, when Student was in the second grade, she was deemed qualified for RSP services in connection with reading and written language. The IEP team for the first time found that she qualified for special education services based on specific learning disabilities, in addition to the language and speech disorder previously found.<sup>3</sup> (Ex. I, p. 2; compare with Ex. K, p. 2.) Speech and language services were continued, but the Student was now “pulled out” of class for RSP services. The IEP team also agreed she would receive elementary remedial classes during the extended school year. New goals for speech and language were discussed and agreed upon and other accommodations were made. (Ex. I, p. 11 of 12.) The document also reveals that the child’s need for glasses was discussed, along with her potential need for medication to manage her attention problems. Mother was informed of the teacher’s observations that her daughter’s attention tended to deteriorate in the afternoon and Mother represented she would discuss the matter with Student’s doctor. (*Id.*, p. 12 of 12.)

11. (A) When Student entered the third grade, another IEP meeting was held, on November 1, 2002. (See Ex. H.) By that time, the Student was receiving medication for her attention problems. The teaching staff observed that the medication was helping her in class, but its positive effects tended to wear off in the afternoon, a matter which Mother was to take up with Student’s physician. The child remained eligible for special education due to both a language and speech disorder, and a specific learning disorder. (*Id.*, p. 2 of 15.) Certain accommodations and modifications were agreed upon, such as allowing her to take open-book exams on school-based exams. (See pp. 11 through 13, Ex. H.)

(B) An occupational therapy (OT) assessment was performed during the latter part of the third grade to address Student’s handwriting problems, self-organization deficiencies, and self-regulation problems. (Ex. G, p. 5 of 5.) During a subsequent IEP meeting held to review and evaluate that OT assessment (May 13, 2003) it was noted that Student was having trouble with attention on Mondays and Tuesdays because her parents were not giving the child her attention disorder medication on the weekends. (*Id.*) The IEP plan was modified to provide one fifty-minute OT session per week through December 2003.

12. (A) In the fall of 2003, when Student was in the fourth grade, Ms. Mahler performed a second “psycho-educational study,” as part of the triennial re-evaluation. (See Ex. T.) Standard testing instruments were again used to assess Student’s abilities and performance.

(B) Once again her IQ was found to be in the average range, as she received a full-scale score of 107. On the other hand, Student’s achievement scores tended to fall in the less-than-average range. The school psychologist again administered the Woodcock-Johnson III achievement test, and Student’s reading scores were generally the weakest that resulted. For example, the standard score for “broad reading” was 59. Her broad written language

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<sup>3</sup> A disorder in attention, visual processing, and auditory processing was documented, leading to a severe discrepancy between intellectual ability and achievement in basic reading skills, reading comprehension, and written expression. (Ex. I, p. 2 of 12.)

score was a 74, with spelling at 70. As 100 equates with average in the Woodcock-Johnson III, the test results show that this fourth grader's performance, in some areas, was 30 or more points below average. To be sure, Student's math scores were stronger, with a broad math score of 89 (Ex. T, p. 3), but the difference between her average cognitive ability and her sub-average achievement scores continued to justify the finding that she suffers from a learning disability, and that she was therefore entitled to special education services to address that learning disability.

(C) Tests of Student's perceptual skills revealed weaknesses, just as had been revealed in the prior assessment, though some improvement was shown. During this fourth-grade assessment, Student's "auditory quotient" on the TAPS was 80, and several of the subtests scores were substantially below average, including auditory number memory (sixth percentile), auditory word memory (fifth percentile), and auditory word discrimination (tenth percentile). (*Id.*) Overall performance on the test of her visual processing abilities (TVPS) was at the 53rd percentile, or in the average range. This represented a significant improvement over the prior TVPS scores. (See Factual Finding 7.)

13. The assessment report describes Student as a pleasant and talkative child during the testing process, one making a concerted effort to perform the tasks involved. She still exhibited impulsiveness and disorganization, but some improvement was noted in that area. (Ex. T, p. 5.) Her teacher reported that she often disrupted class, and needed to inhibit her responses, and disorganization on the Student's part was reported. The Burks Behavior Rating Scale, as rated by the teacher showed "very significant" behaviors in poor coordination, poor academics, poor attention, and poor impulse control. Significantly poor behaviors included (but were not limited to) excessive anxiety, excessive withdrawal, poor ego strength, poor anger control, and excessive sense of persecution. (*Id.*) Ms. Mahler concluded that Student remained qualified for special education, and that she should have a small structured setting as her placement.

14. (A) A triennial IEP meeting followed the second psycho-educational study, that meeting occurring on October 29, 2003. At that time Mother expressed her concerns about her daughter's reading, and her concerns that the child was not accepted socially. (Ex. F., p. 1.) The team agreed to add RSP math calculation to Student's program. (*Id.*, p. 2.) The summary of the meeting (pp. 18 through 21) shows that the teachers stressed that Student needed to bring her glasses to school and needed to continue with the medication for attention deficit problems. For example, the teacher noted Student's handwriting improved when she was taking her medication regularly. Mother referred to the problems Student was demonstrating with getting homework finished, and the team provided strategies to combat those problems.

(B) The IEP team took other steps to assist Student. The occupational therapist made efforts to help Student organize her school work, and also provided a "fidget toy," something the child could keep in her hand which might alter her habits of picking at her hair or ear when performing a task. It was determined that the OT sessions would also focus on a program called "How's Your Engine Running?" That program is designed to help

students to manage their own energy levels. Because the teacher had noticed some clumsiness on Student's part, the team also requested an APE (assistive physical education) evaluation. Books on Tape were authorized to assist with her reading development. (P.13 of 23.) The team also recommended that the Student participate in after-school activities where she had some strengths, such as art or music, and she was encouraged to attend school in the summer.

15. (A) When the IEP team next met, on May 14, 2004, it found that Student's handwriting was improved. The IEP team agreed Student would continue to receive after-school assistance, and summer school was offered to her. The plan addendum reports Mother's opinion that her child had done well, and that she would like to continue one-to-one assistance during the summer and the following school year. (*Id.*)

(B) The District offered a summer program that would have 12 children per class, leveled on functional ability, with the teacher working with the students individually or in small groups. Staff also suggested that one-on-one work could be performed by the summer school teacher, and the District offered to make workbooks available to the child during the summer so she could maintain her skills with the help of appropriate family members. Ultimately, it was decided Student would receive individual instruction during summer school, and compensatory OT services as well. The staff also discussed matching an appropriate fifth grade teacher to the student for the next school year, and they recommended an intensive remedial reading program. (Ex. E., pp. 2-4.)

16. The May 2004 IEP document establishes that maintaining student's medication continued to be problematic. The school staff believed that the medication significantly affected Student's attention-deficit disorder in a positive way; thus a lack of medication or its effects wearing off mid-day had been noticed. Mother and the school nurse discussed the problem, and according to the May IEP, Mother reported that the family situation had interfered with her ability to obtain the medication on a steady basis. She expected that situation to improve by the end of that month, so that the student's attention problems could be improved. (Ex. E, p. 3.)

17. The IEP team met on September 20, 2004, at the beginning of Student's fifth-grade year. (Ex. 30.) Apparently Mother could not attend, but she had given permission to proceed without her. (An annual meeting was, in any event, scheduled for the next month.) During that meeting the child's classroom teacher reported that Student had trouble staying on task, and the math teacher noted she had trouble returning her homework. (*Id.*, p. 2.) The District offered to provide two hours of RSP support per day; an aide to assist student in the general education classroom; an hour of after-school intervention, four days per week to support language arts; a vision evaluation to see if there were any educational needs; and, the District agreed to review assessment data from the RSP teacher. It was proposed that Mother would ensure attendance, on time, for 95 percent of the school days; ensure that her daughter would complete 90 percent of her homework; and she would ensure that Student would take her medication as prescribed, with the understanding that the school could administer the drugs once an authorization form was completed. Mother was also to execute an

authorization that would facilitate school-doctor communication. (*Id.*, pp. 2-3.) According to the annual IEP document from the next month, the family's representative agreed to these proposals in writing. (See Ex. C, p. 17.)

18. (A) One month later, the IEP team met for the annual review of the IEP. The plan documents Mother's summary of the Student's strengths, and the parent's concerns for the student. Among her worries was a concern that Student read at an appropriate level, that she continue to enjoy reading, and that her math calculation would continue to improve. Mother also stated, as one of Student's strengths, that "she very much enjoys coming to school everyday & (sic) she's doing well socially." (Ex. C, p. 1.)

(B) The IEP documents the strategies discussed at the September meeting, such as the agreement to authorize the school to communicate directly with the Student's doctor. (Ex. C., p. 18.) Reports about Student showed progress in areas such as OT, reading, and math, with goals reported as met and new goals set. (*Id.*, p. 17.) New goals were set for academic areas such as reading, and a new OT schedule was set as well. The parties discussed using the Student's participation in the band as a motivator for better work, because she enjoyed the band. The school recommended a vision evaluation, and Mother agreed to sign an authorization for such. (P. 18.)

19. The IEP team met in April 2005, at Mother's request, to discuss a private assessment of Student that Mother had obtained. (Ex. B, p.1.) Mother then requested a non-public school (NPS) placement for her daughter, who was to start junior high school in the fall of 2005. Mother expressed concern about the child's academic progress and about social and emotional issues. The independent assessment was described in the IEP as showing progress by Student in math, but not so much for reading. Mother stated that her daughter was reporting incidents of teasing from other students, and that other students did not want to be with her. School staff reported that they had not seen any pattern of social problems, or lack of self-confidence on Student's part. Although Mother wanted an NPS placement, she agreed to visit the District's junior high school, Las Palmas, prior to the IEP meeting then scheduled for May 25, 2005. There was discussion of providing an aide for Student, but no decision was made on that point. However, it was agreed that a social-emotional assessment would be conducted.

20. The social-emotional assessment was completed before the next IEP meeting (May 25, 2005), and the IEP team had the opportunity to consider it. The school offered 50 minutes per week of counseling services, which was accepted by the parent. (Ex. A., p. 1.) It appears that Mother did not agree with the results of the assessment; the assessment, based on teacher input and the child's, tended to put Student in an average to borderline status, while Mother rated the child as "significantly high—clinical." (*Id.*, p. 3.) It was noted that Student had been off her medication, which Mother attributed to insurance issues.

21. The District rejected the request for a non-public school placement, in a letter dated June 14, 2005. (See Ex. 28.) Instead, the following placement was offered for the sixth grade:

A general education classroom at Las Palmas Middle School for science, physical education, and literacy development, with a resource specialist classroom for English, social studies, and math;

An intensive literacy development program to provide intervention in the area of language arts;

OT services once per month for 50 minutes, “individual pull out”, with one teacher consult and one parent consult per month;

Group speech and language services once per week, for 30 minutes;

Homework help one hour after school four days per week with credentialed staff, with two hours on minimum school days, every other week;

Counseling services to address social skills, one 50-minute session per week, by a licensed and credentialed school psychologist;

Additional aide support for core subjects.

22. The offer described above was not accepted, and Student enrolled in Prentice school for the sixth grade. That school caters to children with learning disorders. While Prentice is far from Student’s home, she and her family are very happy with the private school, and therefore bear the burden of transporting her to school. At the time of the hearing, Student was receiving a scholarship so that she could attend Prentice. Student enjoys going to school there, and had made a friend in her class. No indicators of her academic performance were available during the hearing.

*Other Assessments and Observations of the Student’s Needs and Performance:*

23. As noted in Factual Finding 19, a private assessment of Student was obtained by her Mother. The assessment was performed in June 2004 by Robert J. Rome, Ph.D., a licensed psychologist. He performed follow-up assessment work in April 2005; the latter assessment was the subject of the April 2005 IEP team meeting.

24. When Dr. Rome performed his psychological evaluation of Student in 2004, he reviewed the District’s prior assessments and other school records, he interviewed Student and Mother, and he made clinical observations. He administered numerous tests, including an IQ test, standard achievement tests, tests of perceptual skills, and other evaluation instruments. (See Ex. P.)

25. (A) During the 2004 assessment, Dr. Rome found that Student had an IQ of 102. This result was obtained through the Wechsler Intelligence Scale for Children, Fourth

Edition (WISC-IV). (Ex. P, pp. 8-9.) Results from the Woodcock-Johnson Achievement Test showed standard scores from as low as 69 for spelling to a high of 92 on the “word attack” subtest. (*Id.*, p. 9.) The total achievement score was a 69, which placed Student’s age score at seven years, seven months, and her standing relative to other students found her in the second percentile. Her grade score was 2.3, indicating overall performance at a second grade level when the Student was near the end of her fourth grade year. Other subtest scores included a standard score of 72 in the broad reading area, 85 for broad math, and 71 for broad written language.

(B) Dr. Rome assessed Student’s academic skills as generally in the mildly deficient range, indicative of learning disabilities in the areas of reading and writing. (*Id.*, p. 10.) He also found auditory perceptual and processing deficits, as well as potential visual perceptual and processing deficits. (Pp. 10-11.) He recommended a vision evaluation by a developmental vision specialist to explore such issues. He found that Student was not showing symptoms of depression, anxiety, excessive anger or disruptive behavior, though she was showing concern regarding her difficulties in school, at a level he deemed inappropriate. Dr. Rome pointed out that Student had shown few signs of attention disorder, but recognized that her medication (then Ritalin) might have been masking the symptoms.

(C) Dr. Rome diagnosed Attention Deficit/Hyperactivity Disorder Combined Type, mainly by history, along with Expressive Language Disorder, Reading Disorder, Disorder of Written Expression, and Math Disorder. (Ex. P, p. 12.)

(D) In his recommendations, Dr. Rome stated his opinion that the differential between Student’s ability and performance, and the breadth of her deficits, indicated the need “for broader and more intensive learning assistance . . . .” (Ex. P., p. 13.) He opined she would have difficulty integrating into a general education class, and that her broad area of need made pull-out assistance difficult, and therefore another approach was necessary. It was his opinion that a special day class was problematic, in that one with high-functioning peers students might not be available. “Consideration of a special non-public school where students with learning disabilities are only accepted if they are at least average in intelligence may be necessary.” (*Id.*) He recommended further assessment by a speech and language specialist, a vision evaluation, speech and language therapy, an assistive technology assessment to respond to her writing skills, and various classroom accommodations.

26. The District funded a vision evaluation, which was performed by W.A. Bescoby, O.D., a Board-Certified optometrist who is a specialist in vision development and therapy. He concluded that Student suffers from dyseidetic dyslexia. (Ex. Y, p. 3.) In his testimony, Dr. Bescoby explained that this is not the type of dyslexia that make a person reverse numbers, but is a neurological condition that forms an impediment to learning. Available therapies are limited, and thus the prognosis for this condition appears poor, but between his report and testimony, Dr. Bescoby was able to recommend some strategies to assist Student.

27. (A) Dr. Rome performed further assessments in April 2005, when Student was a fifth grader. (See Ex. O.) He did not perform another IQ test, as less than one year

had passed since his prior testing and because other records revealed average IQ scores over a period of years. He took note of a parent-teacher conference form generated during October 2004, which indicated that Student was below grade-level standards in math, reading, and science. (Ex. O, p. 2.) He also noted that the RSP specialist had, during March 2005, found the child's spelling at a second-grade level, with reading as "3+". (*Id.*, p. 3.) That teacher had also noted behavioral and academic issues, including unsatisfactory behavior in terms of completing her homework and talking in class. (P. 3.)

(B) Dr. Rome again administered the Woodcock-Johnson Achievement Test (third edition). Overall, Student showed improvements in her achievement. For example, her total achievement standard score was an 80 in 2005, as opposed to a 69 less than one year before. The standard score for broad reading had increased from 72 to 76; broad math had increased from 85 to 99. Broad written language had increased from 71 to 80; basic reading skills had increased from 82 to 84. Math calculation skills had increased from 79 to 98, while written expression had increased from 77 to 91; the standard score for academic skills had increased from 75 to 82. Academic fluency was up from a standard score of 75 to 85, and the Student's score in "academic apps" had increased from 84 to 91. (Ex. O, pp. 9 & 10; compare with Ex. P, p. 9.)<sup>4</sup>

(C) Looking to Student's emotional state, Dr. Rome did not diagnose depression or other psychological or emotional maladies, pointing out that the school has not noted any emotional and behavioral issues of concern. He did report that the child had expressed concerns about her difficulties in school to him. Indeed, she made statements that indicated that she was afraid of doing too well, as it might cause her to lose access to special programming that she understands that she needs. According to Dr. Rome, "she wondered aloud whether she would have had better results in terms of getting special placement and services and help if she had purposefully performed poorly." (Ex. O, p. 12.) Notwithstanding such comments, Dr. Rome concluded that she had done her best in the testing. (*Id.*)

(D) Dr. Rome's diagnostic impressions remained unchanged, with one exception: he no longer found the Student to suffer from Math Disorder. (Compare Ex. O, p. 12 with Ex. P, p. 12.)

28. District staff has routinely made observations of Student's academic performance and class behavior. For example, the teachers prepared, on pre-printed forms, observations of the child when on medication, in November 2004 and January 2005. (See Ex. AA.) Records were made of progress toward annual and short term goals that had been set out in IEP's. (See Ex. 26 and 35.) Written reports of academic achievement were generated by teachers during the second and fifth grade. (See Ex. 18 & 38.) As noted above, various

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<sup>4</sup> The District prepared a chart showing the changes in these scores, and other subtests. (See Ex. 40.) All scores increased, except that for passage comprehension, where the standard scores remained the same.

assessments were performed in connection with DIS services, such as occupational or speech therapy.

29. (A) A number of Student's teachers provided their observations regarding the child, and their opinions about her educational needs, during the course of the hearing. Ms. Beauchemin, the first grade teacher, had been most concerned about Student's attention problems while the child was in her class. This theme was repeated by all the teachers who testified. While Ms. Beauchemin did not perceive Student as the smartest child in her class, she found her to be intelligent and possessed of a good imagination. She acknowledged that the report card for that year showed the child below grade standards. The teacher established that some improvement was observed later in the year.

(B) Ms. Tiaella, Student's second grade teacher, perceived her as a sweet child and described Student as one of her favorite students. She recalled Student's struggles with reading and writing; at the outset of the second grade Student could decode her own writing, but this teacher of some twenty-years experience had difficulty doing so. Ms. Tiaella acknowledged that the child's grades had been poor, especially as toward reading. She also observed that Student's performance varied significantly depending on whether or not she had been using the medication for her attention deficit disorder; the difference being described as "night and day." While the second grade teacher holds the opinion that RSP resources were appropriate, she is clearly of the opinion that a special day class would have been inappropriate. She is also against the concept of placing Student in a class based on a group of children with similar learning disorders.

(C) Ms. Hickle, the Student's third grade instructor, had been very concerned about the child's attention deficits when the child was in her class. She noted that when Student was taking her medication she was organized, less distractible, and needed little help. That was not the case when the child was not using her medication; it was Ms. Hickle's experience that in those circumstances more assistance had to be provided than was necessary when the medications were used. Although Student performed poorly on the STAR test—a standardized achievement test—Ms. Hickle believed the child had more ability. She attributed much of the poor performance to the fact that the Student had to read the test questions; if the questions had been read to Student the teacher would have expected higher scores. The Student did show enthusiasm for science, and responded positively when an OT was brought in to work on handwriting.

(D) Student's fourth-grade teacher, Ms. Harding, noted that math was easier for the child than reading, but Student could not multiply or divide at a simple level, a skill normally mastered during the third grade. Ms. Harding was informed by the RSP teacher that Student demonstrated problems, when reading, with sight words and tracking. The child was not at grade level in the general sense, but was in terms of her goals, except that the child was not meeting her homework goals. Because homework was a significant part of Student's grades, poor homework performance equated to poor grades. This teacher did not receive any complaints from Student about being teased by other students, and did not see such conduct.

(E) Ms. Chyrchel, who also provided fourth-grade instruction, corroborated much of Ms. Harding's testimony. She noted that Student could participate in class, but her homework and other assignments were often not turned in. During this period, Student's grades were placed on a differential basis, and this witness acknowledged that if the standard grading criteria had been used then Student's grades would have been lower. In Ms. Chyrchel's opinion, the OT was a great benefit for Student, especially in boosting Student's organizational skills. She found the child to be "scatterbrained" when not on her medication, and while she did not observe teasing and rude behavior toward Student, she observed that the child did not have a clear friend.

(F) Ms. Kathy Williams taught Student in the fifth grade. This experienced teacher acknowledged that the Student is not at grade level in areas including spelling and reading. In her opinion, the aide who worked with the Student after lunch provided an educational benefit, and that an aide would be beneficial in the future. Ms. Williams did not observe any negative side effects from the prescribed medications. She is also of the opinion that Student needs a remedial sort of class in the future, and that middle-school science will be a struggle for the child. Student occasionally mentioned the problem of other students teasing her to the instructor, but Ms. Williams rated the girl as average in personality and socialization.

(G) Student's one-to-one aides agreed that she is very distractible. In their opinions, the child has been making progress even if her achievements are not to grade level. Both observed that the child's performance suffered if she was not taking her medication; both could discern the lack of medication as her behavior, preparedness, organization, and attention span deteriorated when she was not following her prescription. Although Student told one of the aides, Ms. Vonslowski, that her brother and sister teased her, that aide thought Student appeared excited at the prospect of attending the Las Palmas Middle School with her siblings.

30. In summary, the various individuals who have instructed Student since first grade have all noted the affects of her attention-deficit disorder. Absent medication, Student is disorganized, highly distractible, arriving at school disheveled and unable to locate items in her backpack or desk. While all believe that an aide is beneficial to this Student, the aide's work increases if the mediation is not available. Although there is some indication that the child is sometimes the subject of teasing, there have not been reports that she has been a consistent target. Her school performance and grades have suffered by consistent failure to complete a significant part of her homework, but despite that fact there had been improvements, even if the Student continues to function below grade level in the key areas of reading and math, as well as spelling. The teachers and aides are of the opinion that a general education class with RSP support is the best model for instructing Student, and the consensus is that she should have an aide to assist her, and especially to help keep her on task.

31. Two school psychologists testified in this matter, Ms. Mahler, who prepared the psycho-educational studies referenced in Factual Findings 7 and 12, and Sharon Penzlow. Both have many years of experience as school psychologists. Ms. Mahler believes that Student has multiple problems, especially as to auditory memory and visual processing, and therefore is of the opinion that multiple teaching modalities must be used to educate the child. Both of these witnesses acknowledged that Student continues to display deficits in her basic educational skills; Ms. Penzlow agreed that the inability to multiply and divide at grade level is a serious deficiency. However, both attested that the improvement in, or at least stability of, the standard scores on the achievement testing indicate progress, because the child is either holding her own vis-à-vis peers as the group advances through the school system, or she is actually gaining in her academic achievements. Ms. Mahler and Ms. Penzlow believe that Las Palmas can meet the child's needs, and that an RSP model, with an aide, is the least restrictive and best environment for Student.

32. Three instructors from Las Palmas testified, providing information regarding the capacity of that school to meet Student's special education needs, and describing aspects of the program. They do not believe that having a full-time aide will stigmatize the child, asserting that individual classroom aides are not unusual even if they are not common. The staff has experience in working with children who have the sort of problems that Student does, and the witnesses offered some suggestions as to how they might approach Student's education in the future.

33. The teachers and school psychologists were credible in their testimony. This finding is based on the demeanor of the witnesses, which was straightforward and presented without hint of evasion or prevarication. The witnesses were also credible in light of their experience and training. For example, more than one of the teachers and aides held masters degrees, including Ms. Pressman, who has 30 years experience and a masters in special education. Virtually all of these instructors had more than ten years experience. The two school psychologists had at least 35 years of experience between them; Ms. Mahler had worked for the District for 16 years, and had worked at Frostig School, which serves handicapped children, for another 10 years. Likewise, the speech therapist, Ms. Roberts, had 25 years experience.

34. Dr. Rome also has considerable experience and expertise, and if his explanations were at times convoluted, he appeared credible in his demeanor while testifying. As acknowledged by Ms. Mahler, the psychologists agree on many matters, holding professional differences on others. All of these witnesses appeared to have Student's best interests at heart.

*Findings On Ultimate Issues of Fact:*

35. Student suffers from a learning disorder, and from a speech and language disorder, the former encompassing her attention deficit disorder. She can not access her education unless special education services are provided to assist her. To be sure, there has been no dispute in recent years that she is entitled to special education, the disputes being

how to meet her needs, but her condition should be underscored: based on the entire record, it is clear she will need special education services for some time to come.

36. The District has regularly taken steps to evaluate Student's abilities, deficits, and disabilities. These assessments have been performed by teachers, psychologists, and other professionals, such as occupational therapists, speech therapists, and optometrists. These assessments have been considered during the IEP process.

37. The IEP team has met on a yearly basis, and more often as needed to respond to requests by the Student's parents or teachers, or to consider information and evaluations obtained for the Student. Few services requested by the family have been refused.

38. The Student continues to achieve below grade level in most areas, and especially as to reading, spelling, and math. Notwithstanding this important fact, she has made improvement year-to-year and has obtained academic benefits from her education each year. While a discrepancy continues to exist between her average intelligence and her achievement on standard tests, relative to other students in her grade and in her age group she has moved forward over time, holding her position relative to those students, or improving it. This is reflected in the standard scores from the standard achievement tests, and especially from 2004 to 2005. Indeed, Student's expert witness established significant improvements in academic achievement, as reflected in Exhibit 40.

39. In each academic year that has been made the subject of this proceeding, the District has offered and provided special education services appropriate to Student's needs. For example, in kindergarten, her performance as compared to her achievement had not yet ripened into the sort of discrepancy that would establish a learning disorder. Instead, it was established that speech and language deficits were shown, and the District offered services to address those needs. There was little or no evidence that would support the conclusion that the speech services offered did not meet those needs. As the picture of Student's condition became clearer, the District moved to provide services to address the child's unique needs. The services provided by the District have provided an academic benefit to Student, and that benefit has been more than a de minimus benefit; the school has more than met its obligation to provide a basic floor of opportunity.

40. The offer of placement for Student's sixth grade term met her special education needs for that year. Student did not establish that the Prentice program, or one similar to it, was required to meet her special education needs, notwithstanding Dr. Rome's opinion. Nor was it established that Student's emotional or psychological condition required placement at a non-public school; even Dr. Rome could not make a strong case that her emotional or social needs could not be met in a District placement, especially where the District offered to provide regular counseling.

## LEGAL CONCLUSIONS

### A. Legal Conclusions Common to All Claims:

#### The General Principles of IDEA:

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs ...." (20 U.S.C. § 1400(c).)

2. "Free and appropriate public education" means special education and related services that are provided at public expense, that meet the state educational agency's standards, and conform with the student's individualized education program. (20 U.S.C. § 1401(8)(A)-(D).) "Special education" is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)

3. The educational agency may be required to provide "related services", denominated as "designated instruction and services" (DIS) in California. Such include developmental, corrective, and supportive services that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(22); Ed. Code § 56363.)

4. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities with a "basic floor of opportunity." (458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit. As stated by the Second Circuit Court of Appeals:

Plainly, however, the door of public education must be opened for a disabled child in a "meaningful" way. *Board of Educ. v. Rowley*, 458 U.S. at 192. This is not done if an IEP affords the opportunity for only "trivial advancement." *Mrs. B. v. Milford Bd. of Educ.* 103 F.3d at 1121 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988)). An appropriate public education under IDEA is one that

is "likely to produce progress, not regression." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (3d Cir. 1997) (internal citation omitted), cert. denied, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998).

(*Walczak v. Florida Union Free School Dist.* (2d. Cir. 1998) 142 F.3d 119, 130.)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

5. Procedural errors do not necessarily deprive a student of a FAPE. There must be a substantive harm to the student, such as a loss of an educational opportunity. (See Ed. Code § 56505, subd. (j): [Hearing officer may not base a decision solely on nonsubstantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent's opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. of Trustees* (9th Cir. 1992 ) 960 F2d 1479, 1484; *DiBuo v. Bd. of Educ.* (2002 4th Cir.) 309 F.3d 184.)

6. Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. It contains the following information:

(A) A statement of the child's present levels of academic achievement and functional performance,

(B) A statement of measurable annual goals,

(C) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided,

(D) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,

(E) A statement of the program modifications or supports for school personnel that will be provided for the child,

(F) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class,

(G) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and

(H) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

7. Student bore the burden of proving his claims against the District. (*Schaffer v. Weast* (2005) 126 S. Ct. 528.) While the *Schaffer* decision had not been announced at the time of this proceeding, such a rule should have applied in any event, based on familiar rules of evidence. (See Evid. Code, §§ 500, 664.)

On Credibility Generally:

8. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence”, including a single expert witness. (*Kearl v. Board of Medical Quality Assurance*, *supra*, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. “The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative.” (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) An expert’s credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. “On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written

transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

B. Legal Conclusions Pertaining to Specific Issues In the Case:

9. Jurisdiction to proceed in this matter was established, based on Education Code section 56501, subdivision (a), and Factual Findings 1 through 4.

10. It was not established that the District failed to provide a FAPE to Student in any of the relevant school years between October 2000 through the present date. The record establishes that the District provided a FAPE each year in question, and that Student derived an educational benefit from the programs and services provided. This Conclusion is based upon Factual Findings 5 through 21, 26, 27(B), (C), and (D), 28 through 33, 35 through 40, and Legal Conclusions 1 through 8.

11. It was not established that the District failed to offer a FAPE for the 2005-2006 school year, based on Factual Findings 5 through 21, 26, 27(B), (C), and (D), 28 through 33, 35 through 40, and Legal Conclusions 1 through 8.

12. Based on the foregoing, it was not established that Respondent must reimburse Student and her family for expenses incurred in placing Student in a non-public school in the 2005-2006 school year.

13. It was not established that Respondent must provide compensatory education to Student, based on the foregoing, and on the lack of evidence as to what compensatory education would be required if Student had prevailed on the claim for compensatory education.

14. In this matter the District has prevailed on all issues. (See Ed. Code, § 56507, subd. (d).)

*Discussion and Rationale:*<sup>5</sup>

The Factual Findings and Legal Conclusions set forth above do not establish that the District did the utmost for the Student, as it is clear that the educational program provided has been at times imperfect. However, the record does establish that the District more than fulfilled its obligation to provide an educational benefit that exceeds the de minimus

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<sup>5</sup> The section that follows is meant to provide a discussion of legal issues raised as well as key evidence, and a rationale for the findings, conclusions, and order. So far as stated, it is intended to augment credibility findings. However, the evidence and authorities referenced are not necessarily the only ones relied on in reaching the decision.

standard. Here the District investigated the source of Student's educational difficulties after its teachers referred her for evaluation. Two thorough psycho-educational assessments were performed, which led to the provision of substantial educational services, and other specialized assessments have been performed, such as the vision assessment. The Student's needs have been addressed, year in and year out, by caring professionals who have considerable experience; many of the District's employees have a generation, or more, of educational service behind them. While fault might be found with some aspects of the program, it could not be determined that the District had failed to perform its obligation to provide a free and appropriate public education to this child.

If Student has continued to achieve below grade level, such may not be the fault of the District, and does not necessarily establish that the District has failed to provide a FAPE. (Cf. *Sherman v. Mamaroneck Union Free Sch. Dist.* (2d Cir. 2003) 340 F.3d 87, 93 [failing grades do not necessarily establish failure to provide FAPE, the entire record must be examined to make the determination].) It may be that her learning disabilities can not be completely overcome, or it may be the case that some lack of effort on her part is hindering better achievement. As discussed below, achievement below grade level might in part, be a function of uneven medical management of Student's attention deficits. Furthermore, despite her considerable problems, Student's progress on standard achievement tests, as measured by Dr. Rome, indicates achievement and shows that the District provided an educational benefit.

One of Student's main disabilities is her attention deficit disorder. When medically managed it has not been quite the roadblock to academic success as it might be. However, it has not been consistently managed, and that has been outside of the District's control. While the undersigned does not intend to criticize the choices Student's parents have made regarding medication for that condition, the teachers and aides made it clear that Student's inability to concentrate on a consistent basis has been a genuine impediment to her academic progress, and that matter has not been within the District's control.<sup>6</sup> It was not demonstrated that the District is obligated to provide consistent medication to the child, during the school days and otherwise, and to the extent that attention deficits have held her back, such can not be blamed on the District.<sup>7</sup>

Much of Student's case for the placement at Prentice School was based on a claim that she was unhappy in the public school, that she was the target of teasing and the victim of social isolation. The evidence in support of this claim was weak. For example, as late as the beginning of the fifth grade Student's mother reported to the IEP team that the child liked to go to school, and one of Student's aides attested the child was looking forward to attending

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<sup>6</sup> And, the undersigned is quite cognizant of the fact that circumstances beyond the family's control, such as insurance problems, may have contributed to the situation.

<sup>7</sup> Likewise, the inability of Student to complete her homework, has impeded her progress as well. The District has attempted to address that problem, one within the purview of the family of most students.

Las Palmas with her siblings. Other evidence indicated an anxiety about teasing more than actual problems.

No school, public or private, can guarantee social success or emotional happiness for a student, even one who is rightly described by her teachers as “delightful.” Despite that reality, the District offered regular counseling in order to assist Student’s social development. While the undersigned is not so naïve as to believe that Student’s path will be an easy one—middle school can be difficult for an adolescent of above-average capabilities—Student has not been able to sustain a claim that her emotional or social circumstances require the placement at Prentice, nor has she sustained a claim that she has been denied a FAPE in this regard.

The program at Prentice was held out by Student as the best for her. However, that could not be substantiated from this record, where the evidence regarding that program was supplied by Student, her mother, and Dr. Rome’s description of what he observed there. Further, and of the most relevance, is the fact that the law does not require the District to provide the *best* possible or a *perfect* program; it need only provide a basic floor of opportunity. Here the entire record established that the District offered substantially more than the basic floor of opportunity. It has offered a very good program, one that offered a substantial body of instructional and DIS services designed to address the Student’s specific needs. It can not legally be required to abandon a program that provides FAPE in favor of an NPS program that is arguably of better quality.

#### ORDER

The foregoing action is dismissed, and the District declared the prevailing party on all claims.

March 1, 2006

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Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code § 56505, subd. (k).)