

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

In the Matter of:

VICTOR ELEMENTARY SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2008020162

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Victorville, California, on March 17 and 18, 2008.

Cynthia D. Vargas, Attorney at Law, represented the Victor Elementary School District (District). Student's Mother represented Student.

Present throughout the hearing for the District were Ruth S. Aldrich, Program Manager, Desert/Mountain Special Education Local Plan Area, John L. Levell, Complaint Officer for the District, and Lori Clark, District school principal.

On February 5, 2008, the District filed its request for a due process hearing. On February 26, 2008, OAH granted a request to continue the hearing. At the close of the hearing, the parties requested time for written argument and to submit examples of Student's classwork. The parties filed their closing briefs and examples of Student's classwork¹ on March 28, 2008, and the matter was submitted that day.

¹ The District's documents are marked as Exhibit D-14, and Student's as Exhibit S-8. At the request of the ALJ, the District also submitted a copy of the parties' January 8, 2008 Settlement Agreement (Agreement), which was marked as Exhibit D-15.

ISSUES

1. Did the District's January 16, 2008 speech and language assessment appropriately assess Student, and comply with the legal requirements?
2. Did the District's January 11, 2008 multidisciplinary assessment appropriately assess Student in all areas of suspected disability, and comply with the legal requirements?
3. Does Student qualify for special education and related services, or may the District exit Student from special education services without Parent's consent?

REQUESTED REMEDIES

The District seeks an order that it appropriately assessed Student, and that Mother is not entitled to independent educational evaluations (IEE). Also, the District seeks an order that Student no longer qualifies for special education services.

CONTENTIONS OF THE PARTIES

The District conducted a multidisciplinary and speech and language assessment in January 2008 as part of Student's triennial assessment. The District contends that it appropriately assessed Student in all areas of suspected disability, which were speech and language, autistic-like behaviors and specific learning disability (SLD). The District asserts that its assessors properly conducted Student's assessments in a manner that complied with federal and state law; therefore, the District should not be required to fund Mother's requests for IEEs. Additionally, the District asserts that Student does not qualify for special education services, and Student's excessive absences are the cause of any educational problems.

Student contends that she continues to qualify for special education services in the category of speech or language disorder, and that she should also qualify for special education services in the category of autistic-like behaviors or SLD. Student also asserts that the District did not properly conduct its assessments. Student contends that the District violated the parties' Agreement by not having a speech and language assessor who had not worked with Student conduct the assessment. Additionally, Student argues that she is not performing adequately in her regular education classes due to her learning disability. Because the District did not properly assess Student, she asserts that the District should provide IEEs at District expense.

FACTUAL FINDINGS

Background

1. Student is ten years old, attends fourth grade in a District elementary school, and presently resides with her Mother within the geographical boundaries of the District. Student presently qualifies for special education services in the category of speech or language disorder.

2. Los Angeles Unified School District (LAUSD) initially qualified Student for special education services in preschool as a child with a speech or language disorder. Student then moved into the Ontario-Montclair Unified School District (OMUSD), where she continued to receive special education services due to her speech or language disorder. Student moved into the District during the 2004-2005 School Year (SY), and received special education services due to her speech or language disorder based on her articulation disorder. Student has attended regular education classes while within the District. For the past two years, the District has provided Student with speech and language services in a small group setting, twice a week, for thirty minutes a session.

District's Triennial Assessments of Student

3. A district must reassess a child before exiting that child from special education. In conducting such a reassessment, a district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability. To determine whether a child continues to have a disability, the Individualized Education Program (IEP) team and other qualified professionals must review existing assessment data on the child, including assessments and information provided by the parents, current classroom-based assessments and observations, and teacher and related service provider observations. A parent has the right to obtain an IEE if the parent disagrees with a district's assessment. When a parent makes a request for an IEE, a district must either fund the IEE at public expense or file for a due process hearing to show that its assessments were appropriate.

4. An agreement to settle a legal dispute is a contract and its enforceability is governed by the principles of contract law. Where the language of a contract is clear and not absurd, it will be followed. The parties entered into an Agreement on January 8, 2008, to resolve a complaint Mother filed with the California Department of Education regarding the timeliness of Student's triennial assessment. Pursuant to the Agreement, the District agreed to conduct a speech and language and multidisciplinary assessments. The Agreement stated that the District would assess Student using assessors who had not worked with Student previously.

Speech and Language Assessment

Appropriateness of Speech and Language Assessment

5. Cathryn Sloan conducted the District's speech and language assessment on January 16, 2008. Ms. Sloan is a speech and language pathologist employed by the District since 1992. Ms. Sloan has provided Student with speech and language services since 2005, has previously assessed Student, and is her case carrier. In the Agreement, the District agreed that it would assess Student by using a speech and language pathologist who had not worked with Student in the past. However, Mother later waived this requirement. After signing the Agreement, Mother waived the provision requiring an outside assessor when the District offered an assessor who had not worked with Student in the past. Mother waived the Agreement provision because she wanted Ms. Sloan to conduct the assessment. Therefore, Mother waived her right to have an assessor who had not worked with Student previously.²

6. Ms. Sloan was qualified to conduct the speech and language assessment. She has a Bachelor of Science in Education and Communication Disorders and a Master of Arts in Communication Disorders. Ms. Sloan possesses a California credential to provide speech and language services, and a certificate of clinical competency from the American Speech-Language Hearing Association. Ms. Sloan has worked with over 200 pupils with learning disabilities, and approximately 25 pupils with autism.

7. Ms. Sloan attended Student's initial IEP meeting with the District in September 2004, and the annual IEP meeting on February 11, 2005. The District maintained Student's eligibility for special education services under the criteria of speech or language disorder due to Student's articulation deficits. The only goal for Student on the February 11, 2005 IEP was to improve her ability to produce sounds involving the letters "s" and "z." This continued to be Student's only IEP goal for SY 2006-2007 and SY 2007-2008.

8. Ms. Sloan administered the Goldman-Fristoe Test of Articulation (GFTA), which is designed to measure a person's production of sounds in words and sentences. Ms. Sloan has administered the GFTA over 500 times. Ms. Sloan appropriately administered the GFTA and for the purposes for which it is designed. Student still had a slight frontal lisp due to her tongue placement when producing sounds involving "s," "z," "sh" and "ch." However, Student's speech was intelligible and the tongue placement did not distort Student's sound production. Finally on the GFTA, Student's expressive and receptive language skills were age appropriate.

9. Additionally, Ms. Sloan observed that Student's speech mechanism structure and its functioning were within normal limits. Student's spontaneous speech was perfectly

² Student contended that the District did not comply with the assessment plan as Ms. Sloan promised Mother that she could observe the assessment. However, Ms. Sloan attempted to reach Mother, who did not respond to her telephone calls and messages to arrange a time for Mother to observe the assessment.

intelligible during Ms. Sloan's assessment. Student's articulation and her ability to appropriately produce sounds involving the letters "s" and "z" had improved with Ms. Sloan's assistance in the speech and language sessions as Student had met her IEP goals. Additionally, Student's voice pitch, loudness, quality, prosody, and her fluency skills were appropriate for her age.

10. Student asserted that due to her autism, she had problems with her expressive, receptive and pragmatic language skills. Based on Mother's concerns, Ms. Sloan assessed Student's expressive, receptive and pragmatic language skills, even though Student did not exhibit deficits in these areas based on her prior experience with Student.

11. Ms. Sloan administered the Test of Language Development: Intermediate, Third Edition (TOLD-III) to measure Student's expressive, receptive and pragmatic language skills. Ms. Sloan has administered the TOLD-III, Intermediate, over 100 times. She properly administered the TOLD-III to Student, and for the purposes for which the test is designed. Student's scores on all the TOLD-III subtests were at or above average for Student's age.

12. Ms. Sloan assessed Student in all areas of suspected speech and language disability, and appropriately administered the test instruments. Ms. Sloan used multiple test tools and did not rely on a single test to make her findings. Ms. Sloan administered the tests in English and the tests were validated for the specific purpose for which they were used and selected as most appropriate given Student's racial, cultural, and individual needs. The tests were administered and utilized in the areas they were intended to measure. The tests were not racially biased and are normed on a diverse population. Therefore, the evidence established that Ms. Sloan properly assessed Student.

Speech or Language Disorder Eligibility

13. As discussed in Legal Conclusions 8 and 9, a child qualifies for special education and related services under the eligibility category of "language or speech disorder" if his or her language abilities are not commensurate with her chronological age, or if a discrepancy exists between the child's ability and language performance.

14. Student did not meet eligibility requirements for qualifying in the category of speech or language disorder. Student's scores on the GAFTA and the TOLD-III were not 1.5 standard deviations below the mean or below the 7th percentile with Student's scores in the average to above average range for her chronological age. Additionally, Student's speech and language skills were commensurate with her developmental level, which was at the fourth grade level, as determined by the multidisciplinary assessment discussed below.

15. Regarding Student's articulation, Ms. Sloan appropriately concluded after conducting her assessment that Student did not qualify for special education services. Based on the GAFTA results and Ms. Sloan's observations during therapy sessions, Student's articulation deficit did not significantly impair her ability to communicate with others.

Additionally, Student had met her articulation IEP goal. Finally, Student's teacher, Ms. Sibling testified that Student did not have difficulty communicating with her or Student's classmates. Therefore, the evidence established that Student did not have an articulation disorder that qualified her for special education services.

16. Regarding Student's expressive, receptive and pragmatic language, Student did not have significant deficits that qualified her for special education services based on the tests Ms. Sloan administered and her observations. Ms. Sloan did not observe Student displaying problems with her expressive, receptive or pragmatic language during her therapy sessions. Additionally, Student was able to communicate adequately with the other pupils in the speech and language sessions and did not display problems with expressive, receptive and pragmatic language. Student's third and fourth grade teachers, Robert Thweatt and Brenda Sibling, have not observed Student having problems communicating with them or her peers, or understanding classroom instructions. Additionally, Student did not have problems in communicating with her teachers or understanding classroom instruction. Student could appropriately communicate with her classmates and carry normal conversations. During the assessment, Student displayed excellent pragmatic language skills as she stayed on topic, gave age appropriate answers and maintained excellent eye contact. Therefore, the evidence established that Student did not have any expressive, receptive or pragmatic language deficits that qualified her for special education services as her skills were age appropriate.

17. Based on Ms. Sloan's assessment, her observations and the observations of Student's teachers, Student's articulation, expressive, receptive and pragmatic language skills were all age appropriate and commensurate with her developmental level. Therefore, the evidence established that Student did not have a speech or language disorder that qualified her for special education services.

Appropriateness of Multidisciplinary Assessment

18. The District complied with the Agreement by using assessors for the multidisciplinary assessment who never work with Student previously. Lorene J. Lucas and Anita Reinebach conducted the District's multidisciplinary assessment, and neither had worked with Student before their January 2008 assessment. Ms. Lucas is a licensed school psychologist, with over 30 years' experience as a school psychologist. She has a masters' degree in counseling psychology and is credentialed in California as a school psychologist. Ms. Lucas has conducted hundreds of psychoeducational assessments. She has worked with children with autistic-like behaviors and learning disabilities, and has assessed these children.

19. Ms. Lucas spoke to Mother when she developed the assessment plan, and reviewed Student's educational records to determine Student's areas of suspected disability. Mother informed Ms. Lucas about Student's prior diagnoses of autism. Mother also informed Ms. Lucas about her concern that Student had a learning disability based on Student's difficulties in class and with her homework, especially math. Based on information provided by Mother and Student's educational records, Ms. Lucas administered

the Kaufman Brief Intelligence Test, Second Edition (KBIT-2), Test of Nonverbal Intelligence, Third Edition (TONI-3) and Wide Range Achievement Test, Third Edition (WRAT-3) to measure Student's cognitive abilities, and the Learning Efficiency Test, Second Edition (LET-II) to measure her visual and auditory processing skills. Ms. Lucas administered the Childhood Autism Rating Scales (CARS), Berry-Buktenica Test of Visual Motor Integration (VMI), Myklebust Personal/Social Rating Scale (Myklebust), and Walker Problem Behavior Identification Checklist (Walker) to examine Student for indications of autistic-like behaviors and to evaluate her social and emotional functioning. Ms. Lucas appropriately selected these test instruments to examine Student's areas of suspected disability related to autistic-like behaviors and SLD. As part of the assessment, Ms. Lucas spoke with Ms. Sibling, but did not observe Student in class.

20. Ms. Lucas has extensive experience administering all of these test instruments, and properly administered them during her assessment. When Ms. Lucas administered the tests, she followed the testing protocols and therefore believed that Student's test scores properly measured his current levels of functioning. The tests were administered in English and were validated for the specific purposes for which they were used and selected as most appropriate given Student's racial, cultural, and individual needs.

21. Student asserted that Ms. Lucas did not consider historical information that she had autism. LAUSD conducted a psychoeducational assessment in 2003 and the District conducted one in 2005. Neither assessment found Student eligible for special education services in the category of autistic-like behaviors. In support of Student's claim, Mother relies on private assessments from 2002, which Ms. Lucas had not seen, that stated Student met the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) criteria for autism. Additionally, the District's February 11, 2005 IEP stated that Student had a history of high functioning autism.

22. While Ms. Lucas did not review these prior private assessments, Ms. Lucas knew from Mother, and other information in Student's file, about the prior concerns about Student being autistic. Ms. Lucas assessed Student for autistic-like behaviors as an area of suspected disability. Additionally, even if Ms. Lucas reviewed the 2002 private assessments as part of the multidisciplinary assessment, they were of limited value, since they were six years old, and are not representative of Student's present functioning. Finally, the private assessments did not examine whether Student required special education services due to autistic-like behaviors; they only examined whether she met the medical definition of autism.

23. Ms. Lucas administered the CARS, which is an observational rating instrument for children suspected of having an autism spectrum disorder. The instrument contains 15 items that are rated and scored by observation. Ms. Lucas has administered the CARS numerous times, and properly administered it during her assessment. A score of 30 and above is indicative that the child is autistic. Ms. Sibling and Mother completed the CARS questionnaire.

24. Ms. Sibling's CARS rating scale for Student was 16, non-autistic, while Mother's rating scale was 33, mild-to-moderate autistic range. Ms. Lucas correctly determined that Ms. Sibling's rating scale was an accurate reflection of Student based on her observation of Student, information provided by Ms. Sibling and Mother, and Student's school history. Additionally, Ms. Lucas's determination that Student did not have autistic-like behaviors was consistent with the findings in the prior two psychoeducational assessments. Ms. Sibling's score more accurately reflected Student because Mother testified that Student exhibited autistic-like behaviors, which were not observed by others at school nor by Ms. Lucas and Ms. Reinebach who had never worked with Student previously.

25. Ms. Lucas administered the VMI to assess Student's sensory motor skills, which involve the integration of a person's visual and motor skills. Ms. Lucas has administered the VMI numerous times, and properly administered it during her assessment. The VMI identifies possible hand-eye and motor coordination deficits, which are common for children with autism. A VMI standard score of 100 is the median, and Student scored 97, which placed her in the average range.

26. Because children with autism often display social/emotional functioning deficits, Ms. Lucas assessed Student in this area and administered the Myklebust and Walker. Both the Myklebust and Walker use a rating scale based on responses to posed questions, which Ms. Sibling and Mother answered. Ms. Lucas has administered both test numerous times, and properly administered these tests during her assessment. On the Myklebust, Ms. Sibling rated Student average or above average regarding her cooperation, attention, organization, ability to handle new situations, social acceptance, responsibility, completion of assignments and tactfulness. On the Walker, Ms. Sibling did not observe that Student had problems with acting out, distractibility or peer relations. She did observe mild problems with withdrawal and immaturity.

27. On the other hand, Mother noted on both the Myklebust and Walker that Student had significant social/emotional problems. However, Mother underestimated Student's abilities and overestimated Student's difficulties during her testimony. Mother testified that Student did not have friends, but told Ms. Lucas that Student had friends at church. Ms. Sibling credibly testified that Student had friends at school based on her observations of Student. Ms. Sibling and Mr. Thweatt did not note Student having any behavior problems during their classes, nor did Ms. Sloan during her speech and language sessions. Therefore, the evidence does not establish that Student had social/emotional deficits.

28. Regarding whether Student qualified for special education in the category of SLD, Ms. Lucas administered the TONI and KBIT-2 to measure Student's intellectual functioning. Ms. Lucas has administered both test numerous times, and properly administered these tests during her assessment. Student's cognitive functioning was average to above average in all academic areas, including reading, writing and math, and in both Student's verbal and non-verbal performance. Regarding any processing deficits, Ms. Lucas administered the LET-II. Ms. Lucas has administered the LET-II numerous times, and

properly administered it during her assessment. Student possessed average to high average visual processing, and average auditory processing, on the LET-II, which established that Student did not have a processing disorder.

29. Ms. Reinebach is special education teacher with District. Ms. Reinebach has worked with the District for eight years, and before that with the Barstow Unified School District for six years as a special education teacher. Ms. Reinebach has a masters' degree in reading difficulties, a Bachelor of Arts in Elementary Education, and a special education, mild to moderate, teaching credential. Ms. Reinebach has worked with over 300 special education pupils, including pupils with autistic-like behaviors and learning disabilities.

30. Ms. Reinebach administered the Woodcock Johnson Tests of Achievement, Third Edition (WJTA-III) to measure Student's academic skills in written language and expression, reading, and math, and her ability to apply these skills. Ms. Reinebach has administered the WJTA-III over 300 times, and properly administered the WJTA-III to Student. Student's score on all subtests were in the average range³ for her age and grade in school. Student did not display any indication during Ms. Reinebach's administration of the WJTA-III that she may have a learning disability. Student did not struggle in answering the questions, did not reverse letters or numbers in her answers, transitioned well between subtests and maintained good focus. Ms. Reinebach administered the WJTA-III in English and it was validated for the specific purposes for which it was used. Ms. Reinebach properly administered the WJTA-III to Student, and it was an appropriate test to use to determine Student's academic abilities.

31. Ms. Lucas properly assessed Student to determine whether she qualified for special education under the criteria of autistic-like behaviors. She appropriately administered the test instruments. Ms. Lucas used multiple test tools and did not rely on a single test to make her findings. Ms. Lucas administered the tests in English and the tests were validated for the specific purpose for which they were used and selected as most appropriate given Student's racial, cultural, and individual needs. The tests were administered and utilized in the areas they were intended to measure. The tests were not racially biased and normed on a diverse population.

32. Ms. Lucas and Ms. Reinebach properly assessed Student to determine whether she qualified for special education in the category of SLD, and appropriately administered the test instruments. The District's assessors used multiple test tools and did not rely on a single test to make their findings. Ms. Lucas and Ms. Reinebach administered the tests in English and the tests were validated for the specific purpose for which they were used and selected as most appropriate given Student's racial, cultural, and individual needs. The tests were administered and utilized in the areas they were intended to measure. The tests were not racially biased and normed on a diverse population.

³ Student obtained standard scores between 98 and 119 on the subtests, with a standard score of 100 being the median for all pupils.

Autistic-like Behaviors Eligibility

33. As discussed in Legal Conclusions 16 and 18, federal law defines “autism” as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child’s educational performance. As discussed in Legal Conclusion 17, in order to qualify for special education services as a student with autistic-like behaviors, the student must exhibit a combination of the following behaviors, including but not limited to: (1) An inability to use oral language for appropriate communication; (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) An obsession to maintain sameness; (4) Extreme preoccupation with objects or inappropriate use of objects or both; (4) Extreme resistance to controls; (6) Displays peculiar motoric mannerisms and motility patterns; and (7) Self-stimulating, ritualistic behavior. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

34. Student did not display autistic-like behaviors during the Multidisciplinary Assessment. Additionally, Student did not display autistic-like behaviors at school. Student could appropriately communicate using oral language, based on Ms. Sloan’s assessment and Ms. Sloan’s, Ms. Sibling’s and Ms. Lucas’ observations. Student neither exhibited extreme withdrawal, nor related to others inappropriately based on Ms. Sloan’s and Ms. Sibling’s observations, and the Walker and Myklebust scores. Student was friendly and cooperative with Ms. Lucas and Ms. Reinebach, whom Student first met the day of their assessments, and did not shy away from them.

35. Student did not display in either her classroom with Ms. Sibling or Mr. Tweatt, or during any of the assessments or speech and language sessions, an obsession to maintain sameness or an extreme preoccupation with, or inappropriate use of, objects. During class and the assessments, Student did not exhibit a resistance to control; Student was cooperative with her teachers and assessors.

36. Regarding Student’s motor skills, she did not display motoric mannerisms and motility patterns during the assessment, her speech and language sessions or during class. Student did not demonstrate any sensory motor skills deficits based on her obtaining a score in the average range on the VMI. A review of Student’s classwork submitted by the parties showed that Student had good penmanship, which indicates good fine motor skills. Based on Ms. Lucas’ and Ms. Siblings’ observations, Student’s gross motor skills were age appropriate regarding her ability to jump, run, hop, and maintain erect posture while standing, and her general coordination. Finally, Student did not demonstrate self-stimulating or ritualistic behaviors based on Ms. Sloan’s and Ms. Sibling’s observations and information from CARS.

37. Finally, as discussed in Factual Findings 43 through 46 below, Student made adequate educational progress in her general education class without special education and related services. Student only received speech and language services for her articulation disorder, and no other special education services for academics or any deficit related to autistic-like behaviors. The District did provide Student with some modifications in her

classroom by having her sit in the front of the classroom. Therefore, even if Student met the DSM-IV medical definition of autism, she has demonstrated that she can succeed in her general education classroom with simple modifications to her general education instruction.

38. Student did not meet any of the criteria for autistic-like behaviors based on Ms. Lucas' assessment and observations, and the observations of Student's teachers and speech and language therapist. Therefore, the evidence established that Ms. Lucas properly assessed Student and that Student did not qualify for special education in the category of autistic-like behaviors.

39. Ms. Lucas and Ms. Reinebach properly assessed Student to determine whether she qualified for special education in the category of SLD, and appropriately administered the test instruments. The District's assessors used multiple test tools and did not rely on a single test to make their findings. Ms. Lucas and Ms. Reinebach administered the tests in English and the tests were validated for the specific purpose for which they were used and selected as most appropriate given Student's racial, cultural, and individual needs. The tests were administered and utilized in the areas they were intended to measure. The tests were not racially biased and normed on a diverse population.

Specific Learning Disorder Eligibility

40. Student contends that she is eligible for special education in the category of specific learning disability (SLD). There are two factors to consider in determining whether a child has a SLD under the severe discrepancy method: 1) Does a severe discrepancy exist between the child's intellectual functioning (or cognitive ability) and her academic achievement? and 2) Does a child have a disorder in one of the basic psychological processes such as attention? If the answer to both questions is "yes," the child is considered to have a SLD. A determination must then be made regarding whether the pupil's unique needs can be addressed in general education. If not, the pupil is eligible for special education services.

41. Student asserts that she is not adequately progressing academically, especially in the area of math, and should continue to receive special education services due to her learning disabilities. The District contends that Student made adequate educational progress, and that her excessive absences were the source of any academic difficulties. Additionally, the District argued that Student did not have a disorder in one of the basic psychological processes.

42. Student does not have a discrepancy between her intellectual functioning and her academic achievement. Student's intellectual functioning is in the average to above average range and her academic achievement is in the average range based on Student's TONI, KBIT-2 scores and WJTA-III. Ms. Lucas' and Ms. Reinebach's findings regarding Student's intellectual functioning and academic achievement are supported by Student's performance in Ms. Sibling's and Mr. Thweatt's classroom and standardized testing.

43. Student received average to above average grades in third grade in all academic subjects. Mr. Thweatt testified credibly that Student met grade level standards in reading fluency, reading comprehension, written expression and mathematics based on his observations and Student's work in his class. Additionally, on California's Standardized Testing and Reporting Program (STAR) test in the spring of 2007, Student obtained a score of 381 on the English-language arts section, which is in the proficient range, and a score of 436 on the mathematics section, which is in the advanced range.

44. In fourth grade, Student continued to make adequate progress despite the fact that she was absent 33 days out of 105 days of instruction from September 6, 2007, through February 28, 2008. For the first report card period, September 6 through November 16, 2007, Student missed 13 days of class out of 50 instructional days. Student's absences were caused primarily by Mother withholding Student from school due to a dispute with the District regarding Student's brother's special education services that led Mother to keep her brother from school.

45. In reading during the first fourth grade reporting period, Student was at the proficient level. Student worked consistently in the 80 percent range on the objectives taught. In writing, Student was approaching proficiency, with her work in the 70 percent range on the objectives taught. Student had trouble with math. She was approaching proficiency in number sense, which involves working with whole numbers and number concepts, and below grade level, in the 60 percent range, on algebraic functions and mathematic problem solving.

46. Student's classwork shows her performing at the proficient level in language arts, and that her math skills were slightly below average. Ms. Sibling credibly explained that Student's academic difficulties during fourth grade, especially in math, were caused by her missing nearly one-third of her classes, since Student missed learning foundational skills that she needed to perform higher level tasks. Therefore, Ms. Sibling provided Student with additional individual or small group instruction when Student attended class to catch her up with her classmates. Student was able to learn the missed skills with the additional instruction. Student's problems in math are not the result of any learning disability, as the evidence establishes that she could adequately learn math concepts that she missed due to her absences. Because of this, Student would be at least at the proficient level without her excessive absences.

47. Student did not exhibit any visual or auditory processing deficits on the LET-II. She possessed above average visual processing skills and average auditory processing abilities for her age. Ms. Sibling and Mr. Thweatt both testified that Student did not display any auditory or visual processing deficits in class since Student understood classroom instruction that they gave verbally and visually.

48. At the IEP meeting, Mother disagreed with the District's IEP team members' determination that Student did not have a learning disability and was at or above grade level in academic ability and progress. Mother believed, without any support, that the District's

IEP team members, especially Student's teachers, were not being truthful. However, Student's classwork corroborates Ms. Sibling's testimony regarding Student's academic abilities in fourth grade. Student's STAR results corroborate Ms. Thweatt's testimony that Student met third grade academic standards.

49. Student's academic and intellectual skills were all age appropriate based on the District's assessment, the assessors' observations, the observations of Student's teachers and Student's test scores. Therefore, the evidence establishes that the District properly assessed Student and that Student did not qualify for special education in the category of SLD.

CONCLUSIONS OF LAW

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 537], the party who filed the request for due process has the burden of persuasion at the due process hearing. The District filed for this due process hearing and bears the burden of persuasion by the preponderance of the evidence.

*Requirements of an Evaluation or Assessment*⁴

2. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) The school district shall not use any single measure or assessment as the sole criterion for determining whether a child is eligible for special education services or the appropriate educational program. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) The assessment must use technically-sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).) Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and

⁴ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

3. Before a child may be found ineligible for special education, the local educational agency must assess the child in all suspected areas of disability. The IEP team or other qualified professionals must review existing data regarding the child and determine, with input from the parents, what additional data are needed to determine questions regarding whether a child is a child with a disability, the present levels of academic performance and developmental needs of the child, whether the child needs or continues to need special education and related services, or whether modifications to the IEP are required to enable the child to meet annual goals. (20 U.S.C. §§ 1414(c)(1)(A) & (B); Ed. Code, § 56381, subds. (b) & (c).) Parental consent must be obtained for any reevaluation. (20 U.S.C. §§ 1414(c)(3); Ed. Code, § 56381, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, § 56381, subd. (h).)

4. Upon completion of the assessment, the determination of whether the child is a child with a disability must be made by a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) A local education agency may request a due process hearing when there is a disagreement about a proposal to change the special education eligibility of a child. (See Ed. Code, § 56501, subds. (a)(1) & (a)(2).)

5. "Special education" is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401(a)(29); Cal. Code Regs., tit. 5, § 3001, subd. (ac).) "Related services" (referred to as designated instruction and services or DIS in California) are defined as transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (z).) A child is not considered a "child with a disability" for purposes of the (Individuals with Disabilities Education Improvement Act if it is determined that the child only needs a "related service" and not special education. (34 C.F.R. § 300.8(a)(2)(i).) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school

district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*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.)

6. *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, 1110, demonstrates that a child may have a qualifying disability, yet not be found eligible for special education, because the student's needs can be met with modification of the general education classroom. In *Hood*, the due process hearing officer and the reviewing court looked to the child's above-average success in the classroom, as shown by the child's grades, and the testimony of teachers as evidence that the child's needs could be met in a general education classroom without specialized education and related services. (*Ibid.*)

Assessment in Compliance with the Parties' Agreement

7. The enforceability of settlement agreements is based on familiar and well-established principles of contract law. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727, 733; see also *Jeff D. v. Andrus* (9th Cir. 1990) 899 F.2d 753, 759.) If a written agreement is not equivocal or ambiguous, "the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do." (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134; see also 1 Witkin, Summary of Cal. Law, Contracts, § 89 [Ordinarily, one who accepts or signs an instrument, which on its fact is a contract, is deemed to assent to all its terms']; cf. *Skrbina v. Fleming Co., Inc.* (1996) 45 Cal.App.4th 1353, 1368 [releases must be "clear, explicit and comprehensible in each of their essential details"].) By entering into a settlement agreement, each party agrees to "extinguish those legal rights it sought to enforce through litigation in exchange for rights secured by the contract." (*Village of Kaktovik v. Watt* (D.C.Cir. 1982) 689 F.2d 222, 230.) Where the language of a contract is clear and not absurd, it will be followed. (Civ. Code, § 1638; see, *Apra v. Aureguy* (1961) 55 Cal.2d 827, 830.)

Speech and Language Assessment

8. A child who demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance that cannot be corrected without special education services has a language or speech disorder that is eligible for special education services. (Ed. Code, § 56333.) The difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that the difficulty results from any of the following disorders: (1) articulation disorders, such that the child's production of speech significantly interferes with communication and attracts adverse attention; (2) abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; (3) fluency difficulties which results in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (4) inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the child's language performance

level is found to be significantly below the language performance level of his or her peers; and (5) hearing loss which results in a language or speech disorder and significantly affects educational performance. (*Ibid.*) Similarly, under federal law, a speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(11).)

9. A child who has a language or speech disorder meeting one or more of the following criteria is eligible for special education services: (1) Articulation Disorder; (2) Abnormal Voice; (3) Fluency Disorders; (4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria: (a) The child scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or (b) The child scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in (a) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

10. Pursuant to Factual Finding 5, the District complied with the parties' Agreement in assessing Student. The District offered to use a speech and language assessor who had not previously worked with Student. However, Mother wanted Ms. Sloan to conduct Student's speech and language assessment, even though Ms. Sloan had previously provided services to Student. Therefore, Mother voluntarily waived the provision of the Agreement that the District must use an assessor who had not previously worked with Student.

11. Pursuant to Factual Findings 6 through 12, the District's speech and language assessment complied with legal requirements and appropriately assessed Student in all areas of suspected disability. Ms. Sloan was qualified to conduct the assessment and administer the test instruments. Student no longer had an articulation disorder that qualified her for speech and language services because her speech production was intelligible and not significantly impaired. Additionally, Student did not have any expressive, receptive or pragmatic language deficits as her abilities were age appropriate. Student could effectively communicate with her peers and teachers. Therefore, the District properly assessed Student.

Student's Speech or Language Disorder Eligibility

12. Pursuant to Factual Findings 14 through 17, Student's articulation and expressive, receptive or pragmatic language abilities were age appropriate based on the District's assessments and observations of Ms. Sloan and Student's teachers. Therefore, Student did not qualify for special education services in the category of speech or language disorder.

Appropriateness of Multidisciplinary Assessment

13. Pursuant to Factual Finding 18, the District complied with the Agreement regarding the multidisciplinary assessment because Ms. Lucas and Ms. Reinebach did not previously work with or assess Student.

14. Pursuant to Factual Finding 18, Ms. Lucas was qualified to assess Student to determine whether she qualified for special education services under the criteria of autistic-like behaviors and to administer the test instruments used in the assessment. Pursuant to Factual Findings 19 and 20 and 23 through 27, Ms. Lucas properly assessed Student and administered the test instruments. Pursuant to Factual Findings 21, 22, 24, 26, 27 and 31, Ms. Lucas considered all relevant information in her assessment from Mother, Ms. Sibling and Student's educational record. The fact that Ms. Lucas did not have Student's 2002 private assessments is of little consequence, because these assessments were of little value due to their age. Therefore, Ms. Lucas properly assessed Student for autistic-like behaviors.

15. Pursuant to Factual Findings 18 and 29, Ms. Lucas and Ms. Reinebach were qualified to assess Student regarding any possible learning disabilities based on their experience, training and education. Pursuant to Factual Findings 28, 30 and 32, they used proper test instruments to measure Student's intellectual functioning and academic performance, and considered information presented by Mother concerning Student's academic problems, especially with math. Therefore, Ms. Lucas and Ms. Reinebach properly assessed Student for SLD.

Autistic-like Behaviors Eligibility

16. A student is eligible for special education if he or she is a "child with a disability" such as autism or autistic-like behaviors, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1) and (c)(1); Ed. Code, § 56026, subds. (a) & (b); Cal. Code Regs., tit. 5, § 3030, subd. (g).)

17. Pursuant to California Code of Regulations, title 5, section 3030, subdivision (g), a student meets the eligibility criteria for "autistic-like behaviors" if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.

(7) Self-stimulating, ritualistic behavior.

If a pupil exhibits any combination of these behaviors and the autistic disorder is adversely affecting his educational performance to the extent that special education is required, the pupil meets the eligibility criteria for autism. (20 U.S.C. § 1402; 34 C.F.R. § 300.8; Cal. Code Regs., tit. 5 § 3030, subd. (g).)

18. Similarly, federal regulations define autism as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” (34 C.F.R. § 300.8(c)(1)(i).)

19. Pursuant to Factual Findings 34 through 39, Student did not qualify for special education services as she did not exhibit autistic-like behaviors either during the assessment, or at school, based on the observations of Student’s teachers and Ms. Sloan. Therefore, Student did not qualify for special education services in the category of autistic-like behaviors.

Specific Learning Disability Eligibility

20. A child with a specific learning disability, who requires special education services as a result, is eligible for special education services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a); Ed. Code, § 56026.) A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1402(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) A specific learning disability includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1402(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).) A specific learning disability does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural or economic disadvantage. (20 U.S.C. § 1402(30)(C); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).)

21. Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) Intellectual ability, for the purpose of calculating a severe discrepancy, includes both acquired learning and learning potential, and shall be determined by a systematic assessment of intellectual functioning. (*Id.*, subd. (j)(2).) The level of achievement, for the purpose of calculating a severe discrepancy, includes the student’s level of competence in materials and subject matter explicitly taught in school, and shall be measured by standardized achievement tests. (*Id.*, subd. (j)(3).)

22. A school district shall determine that a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.309(a); Ed. Code, § 56337, subs. (b) & (c).)

23. The severe discrepancy method requires that a student have a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); 34 C.F.R. § 300.309(a)(1)(ii); 71 Fed.Reg. 46651 (Aug. 14, 2006); 34 C.F.R. § 300.309(a)(2)(ii) [authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Ed. Code, § 56337, subd. (b); Cal. Code Regs., tit. 5, § 3030(j).) The severe discrepancy between achievement and intellectual ability shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030(j)(5).)

24. If standardized tests are valid for the student, a severe discrepancy is demonstrated as follows. The achievement and ability test scores are converted into common standard scores with a mean of 100 and a standard deviation of 15. The difference between these two common standard scores is compared to the standard criterion, which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A difference between the achievement and ability common standard scores which equals or exceeds this standard criterion, adjusted by one standard error of measurement, not to exceed four common standard score points, may indicate a severe discrepancy. The discrepancy must be corroborated by other assessment data, which may include other tests, scales, observations, and work samples. (Cal. Code Regs., tit. 5, § 3030(j)(4)(A).)

25. The decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel, which takes into account all relevant material which is available on the student. No single score or product of scores, test or procedure shall be used as the sole criterion for the decision of the IEP team as to the student's eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).)

26. Pursuant to Factual Findings 41 through 49, Student's assessment, classroom performance and test results established that her intellectual function is average to slightly above average, and her academic achievement was commensurate with her intellectual functioning. Student did not have any discrepancy between her intellectual functioning and ability on standardized tests administered by Ms. Lucas. Additionally, Student did not have any processing disorders. Therefore, the District properly assessed Student and determined that she did not qualify for special education services under the criteria of SLD.

Exiting Student from Special Education Services

27. Pursuant to Legal Conclusion 12, the District appropriately determined that Student should be exited from special education as she no longer qualified for services pursuant to a speech or language disorder. Pursuant to Legal Conclusions 19 and 26, the District appropriately determined that Student did not qualify for special education services in the category of autistic-like behaviors or SLD. Additionally, the District complied with the procedural requirements to exit Student from special services. Therefore, Student does not qualify for special education services and may be exited from special education services.

ORDER

1. The District's assessments were appropriate, and Student is not entitled to an IEE at public expense.
2. Student is no longer eligible for special education.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), this decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case may appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: April 15, 2008



PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings