

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009101232

DECISION

Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings, State of California, heard this matter in San Jose, California, on March 1 through 3, 2010.

Jean Murrell Adams, Attorney at Law, represented Student. Student's father (Parent) was present on March 1 and March 3, and Student was present on March 1, 2010.

Rodney L. Levin, Attorney at Law, represented the San Jose Unified School District (District). Kaia Hamilton, District's Special Education Manager, and Lynn Stacey, District's Special Education Director, were present during the hearing on behalf of District.

Student filed his due process request (complaint) on October 19, 2009. Student filed an amended complaint on November 16, 2009. On December 17, 2010, based on an agreement between the parties during mediation, OAH continued the hearing. At the close of the hearing, the matter was continued to March 15, 2010, for the submission of

closing briefs. The parties submitted their closing briefs on March 15, 2010, and the matter was submitted for decision.<sup>1</sup>

## ISSUES

Did District deny Student a free appropriate public education (FAPE) from January 25, 2008, to the present by:<sup>2</sup>

1) Failing to fulfill its child find obligations when it failed to assess Student in all areas related to his suspected disability by failing to perform the following assessments: health and development, social skills, neuro-psychological, pragmatic speech and language, assistive technology, Connors' Rating Scale (or similar rating scale), vocational, and behavioral?<sup>3</sup>

2) Failing to determine that Student was eligible for special education and related services under the category of autistic-like behaviors?

3) Failing to offer an educational program to meet his unique needs that failed to include: placement in an appropriate special education program; interventions to address Student's auditory processing deficits, writing deficits, and social skills deficits; assistive technology; transition services; and counseling?

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<sup>1</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit 67, and District's brief has been marked as Exhibit 68

<sup>2</sup> See Factual Findings regarding District's and Student's settlement agreement on January 24, 2008, where Student waived prior special education claims. Therefore, the time frame for the issues in this case starts on January 25, 2008.

<sup>3</sup> This issue was further clarified for the purpose of this decision.

4) Failing to provide prior written notice regarding District's refusal to timely assess in all areas related to Student's suspected disability, which impeded Parent's opportunity to participate in the decision-making process and resulted in a denial of education benefits to Student?

5) Violating Student's and Parent's procedural rights by failing to provide Parent with a full and complete copy of Student's educational records?

## PROPOSED REMEDIES

Student requests District fund independent assessments; place Student at Lincoln High School; provide Student with continuous counseling; provide 1:1 educational therapy in reading, math, writing, and other areas as necessary; provide compensatory education, including instruction in core academic areas, speech, and transition services; produce all of Student's cumulative school records from kindergarten through 10th grade; provide Student opportunities for self-esteem building, confidence building, peer mentoring, social skills development, counseling, and cooperative learning; pay Student's attorney's fees and costs; and hold an individualized education program (IEP) meeting to determine eligibility.

## CONTENTIONS OF PARTIES

Student contends that from October 19, 2007, to the present, District had sufficient notice of his deficits and unique needs to have assessed him and make him eligible for special education but failed to do so. Student asserts that he was diagnosed in 2007 with Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS), an autism spectrum disorder, and that District failed to assess him in areas related to his suspected disability and failed to determine that he was eligible for special education and related services under the category of autistic-like behaviors. Student claims that District failed to offer an educational program to meet his unique needs. Student asserts

that District failed to provide prior written notice regarding their refusal to assess Student. Student contends District failed to provide copies of his speech and language and nurse's assessments.

District contends that the relevant time period in this case runs from January 24, 2008, not October 19, 2007, because Student and District signed a settlement agreement on January 24, 2008, where Student waived his special education claims to that date and stipulated to a plan under Section 504 of the Rehabilitation Act of 1973 (504 Plan).<sup>4 5</sup> District contends that the 504 Plan addressed Student's needs, and permitted Student to make adequate educational progress. District asserts that it did not fail in its duty to assess Student for special education eligibility since there were no changes that required District to assess him further. District contends that Student has made educational progress and without a duty to assess, there was no failure to find Student eligible for special education services, offer a special education program, or provide prior written notice. District contends it provided Student's educational records.

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<sup>4</sup> A "504 plan" is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; implementing regulations at 34 C.F.R. § 104.1 *et. seq.*) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

<sup>5</sup> Student's 504 Plan was admitted into evidence and both parties referred to this part of the settlement agreement during the hearing, waiving confidentiality.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 16-year-old boy who resides with Parent within the geographical boundaries of District. Student is in the 10th grade for the 2009-2010 school year attending Gunderson High School. Student and Parent have resided within the boundaries of District at all times relevant to this proceeding. Parent is an eighth grade social studies teacher with District. During the course of his 25-year career with District, Parent held positions in special education and school administration and has experience with the special education eligibility process.

### APPLICABLE TIME FRAME AND THE JANUARY 2008 SETTLEMENT AGREEMENT

2. Student and District signed a settlement agreement on January 24, 2008, when Student stipulated to a 504 Plan. District claims that Parent waived all claims prior to January 24, 2008, when he signed the agreement. The release states, "This settlement is a resolution of all special education claims to date and Parties waive any special education claims to date against each other including claims raised in OAH Case #N2007120615...."

3. The enforceability of settlement agreements is based on familiar and well-established principles of contract law. If an agreement is clearly stated, one party is not relieved of its contractual obligation because it intended to be obligated to different terms than those in the agreement.

4. Parent claimed that he did not understand the implications of the release he signed, believing that the waiver applied to District's June 6, 2007, assessment that was in dispute. This seems unlikely given that Parent is well-educated and experienced in the special education field. However, viewing this from the perspective of a worried parent trying to help his child, under those stressful circumstances it is more reasonable.

But, even if true, it is an established principle that if an agreement is clearly stated, one party is not relieved of its contractual obligation because it intended to be obligated to different terms than what was in the agreement. In this case, the waiver provision was clearly worded and duly signed by District and Parent. Therefore, without any other reason to the contrary, the Parent is bound by the terms of the waiver. The relevant period for the complaint runs from January 25, 2008, to the present.

#### CHILD FIND AND DUTY TO ASSESS

5. The term “child find” refers to a school district’s affirmative, ongoing obligation to identify, locate, and assess all children residing within its jurisdiction who are suspected of having disabilities and who may need special education as a result of those disabilities. The relevant inquiry is whether the local educational agency should assess the child, not whether the student will ultimately qualify for services.

6. Student contends that his academic and behavioral problems related to his PDD-NOS put District on sufficient notice that Student might require special education services that gave rise to a duty to assess him within the relevant time period, which begins on January 25, 2008. District asserts that it did not have any reason to assess Student after January 24, 2008, because District had previously assessed him, Student made adequate educational progress with his 504 Plan and regular educational resources, and he exhibited no behavioral issues.

#### 2004 Assessment

7. District’s prior assessments are relevant to evaluate what information about Student’s deficits and unique educational needs District was already aware of by January 25, 2008. In January 2004, during Student’s fourth grade year (2003-2004 school year) at River Glen Elementary School, Parent requested District assess Student citing

concerns over his reading comprehension, self-esteem, ability to listen and follow directions, and behavior.

8. District initiated an assessment, which was conducted in both Spanish and English since Student was in an immersion program and receiving instruction in both languages. The resource specialist completed her report on March 18, 2004, which was then integrated into the school psychologist's Integrated Assessment Report (IAR). The IAR, completed on April 25, 2004, concluded that Student was not eligible for special education services. The assessment found that Student was overall within the high-average range in terms of academic potential and there were no significant delays to interfere with his academic progress. Student's nonverbal reasoning skills; verbal and linguistic skills; visual perception; ability to focus, interpret information, and express results; and reading performance were average to high-average. The assessment also noted that Student was in the low-average range in remembering information, exhibited some attention difficulties with verbal instruction that might interfere with short-term memory, and can be easily distracted. An IEP team met on May 13, 2004, reviewed the IAR and determined that Student was not eligible for special education services. Parent attended and participated in the IEP meeting.

#### March 2007 Independent Educational Evaluation

9. Remaining concerned over Student's academic performance, self-esteem, and behavior, Parent had Student evaluated at Kaiser Hospital's Autism Spectrum Disorders Center in March 2007. Student was 13-years-old and in seventh grade at Castellero Middle School. The participants were Student, Parent, a Kaiser psychiatrist, and a psychological assistant. The evaluation consisted of reviewing Student's records, interviewing Parent, reviewing questionnaires, assessments, and a checklist, and a semi-structured observation. The Kaiser report evaluated Student as meeting the diagnostic

criteria for PDD-NOS and Generalized Anxiety Disorder, medical classifications in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition.<sup>6</sup>

10. The Kaiser report found that Student demonstrated good cognitive abilities with variable adaptive functioning skills. Student demonstrated basic social skills, and had difficulty understanding more subtle social cues and sophisticated social rules. Student struggled with reading. Student responded to questions using appropriate sentences with normal speech, although with little variation or pitch. Student expressed his own thoughts, feelings, and opinions, but with limited gestures and less spontaneity than expected. Student had poor eye contact with few facial expressions. Student adequately responded to social situations, but made minimal overtures on his own. Student showed the ability for spontaneous creative or imaginative play, and had no repetitive or stereotypical behaviors associated with autism.

11. The Kaiser report recommended Parents share the report with District and recommended Student “be assessed for IEP services to address ... social deficits and planning and organization.” The report included a number of educational recommendations, including a behavior management program for the classroom, lunchroom, and playground; social skills training; and individualized speech and language therapy focused on pragmatic skills (the social use of language). The report

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<sup>6</sup> The report described PDD-NOS as a disorder on the autism spectrum characterized by impaired reciprocal social interaction due to impairment in verbal or nonverbal communication skills, or the presence of certain stereotyped behavior, interest, and activities associated with autism. Children diagnosed with PDD-NOS do not meet the criteria for specific Pervasive Developmental Disorders such as Autistic Disorder or Asperger’s Disorder.



included suggestions for behavioral strategies to help Student cope at home, including completing homework assignments. Parent gave the Kaiser report to District staff for consideration at the next IEP team meeting in June 2007.

#### District's 2007 Assessment and June 6, 2007 IEP Team Meeting

12. On March 27, 2007, Parent requested District conduct an assessment. District assessed Student and on June 6, 2007, Student's IEP team found Student was not eligible for special education services.

13. District's 2007 IAR assessed Student's psycho-educational, academic, and speech and language domains. The 2007 IAR noted that there were differences in Parent's perception of Student's functioning and his school providers' perceptions, and concluded that Student was not eligible for special education services. The assessment found that Student was average in academic potential, which included verbal comprehension, reasoning, memory, and processing speed. Student scored in the average range in speech and language, and reading and writing. The assessment noted Student's strength in math, where he scored in the superior range. Student was cooperative during the assessment, responding appropriately to questions, though rarely elaborating. Student thought carefully before answering and was able to convey his thoughts. Student's behavior was appropriate throughout the assessment. His teachers' input showed that Student participated in class, was polite, well-behaved, and well-liked by his classmates.

14. School psychologist, Gordon Giretti, credibly established that District's IEP team members were aware of and considered the Kaiser report. The District's team members also considered District's own testing and multi-disciplinary review of Student's psycho-educational, academic, and speech and language domains to make the final determination that Student did not qualify for special education. Mr. Giretti established that the IEP and IAR did not include a separate speech and language

assessment or nurse's assessment. The speech and language assessment was embedded within the IAR, which was ultimately included in the IEP.

#### December 2007 Independent Educational Evaluation

15. In December 2007, Parent obtained an independent educational assessment of Student through Educational Planning Services. This assessment, conducted by a board-certified educational therapist on December 13, 2007, and January 3, 2008, concluded that Student did not meet the criteria for special education services. Student was described as shy, but cooperative and attentive and able to respond appropriately to questions. Student's eye contact was sporadic until he became comfortable with the therapist. Student's behavior was appropriate throughout the assessment. The assessment found Student had average cognitive abilities and was within the average range on standard academic achievement tests. Student was found to be in the low-average range in a number of categories related to language, including verbal ability and short-term memory. Reading scores were below average. The assessment recommended that Student be considered at-risk due to his PDD-NOS and anxiety disorder, weak language skills, and low grades. The assessment concluded that Student should have a 504 Plan to provide the accommodations that would help him. Parent did not agree with the conclusions of this assessment.

#### January 2008 504 Plan

16. In response to the June 2007 IEP and determination of ineligibility, Parent requested District pay for an Independent Educational Evaluation (IEE). District, believing their June testing was adequate, did not agree to provide an IEE and instead requested a due process hearing in OAH Case No. 2007120615.

17. In connection with the due process action, on January 24, 2008, District and Parent entered into a written settlement agreement for Student to receive a 504

Plan with access to other general education support interventions. The agreement also stipulated that Student's 504 Plan would be reviewed annually at the start of the academic school year.

18. District held the first 504 Plan meeting on January 31, 2008, and then proceeded to hold them annually on November 18, 2008, and November 10, 2009. Parent was present at these meetings and signed each plan indicating his agreement with the findings and accommodations.

19. For the January 31, 2008 plan, the review team determined Student to be disabled under Section 504 based on PDD-NOS and anxiety. The team found that Student needed help with organizational and language skills and anxiety. The team determined that Student needed accommodations and supports, including preferential seating close to the teacher, using binders and folders, allowing Student to clarify directions, extra time to do assignments or quizzes, encouraging participation in class, using sequential steps when given directions or assignments, counseling, Parent access to a website to check progress, and communicating with Parent via email or phone.

20. On November 18, 2008, and January 10, 2009, the review team determined Student had the same disability and needs, and provided the same accommodations and supports. In November 2008, the team added that Student was to attend daily the school homework center, and for the teacher to check his understanding periodically and provide a visual format for his note-taking. In January 2009, the team added that Student needed to sit next to an appropriate role model (or student) to help with his organization, peer tutoring in geometry at the homework center, and teacher praise and positive reinforcement for homework and class successes.

#### Observations of Parent and Student's Experience

21. Parent testified that Student struggled with comprehension and listening since early childhood. Parent also expressed his concern for Student's poor eye contact,

lack of friends, rigidity, tantrums, self esteem, and to a lesser degree, bullying. Parent communicated similar concerns to the Kaiser evaluators and independent educational therapist in 2007. Parent acknowledged he has had no reports from school of temper tantrums, hitting his head against the wall, or "melt downs."

22. Parent indicated that during the 2008-2009 and 2009-2010 school years, Student could not complete his homework without assistance and had a difficult time comprehending what he read. Parent asserted that Student may be passing his courses, but continues to struggle with listening. Parent stated during the current school year, the school transferred Student from a regular high school chemistry class to an easier chemistry course without notifying Parent. Parent stated he provided Student a binder as required by his 504 plan, but did not receive regular reports from school officials.

23. Parent contended that Student had a high IQ with high academic potential, but by 2007 was diagnosed with PDD-NOS. Parent asserted that Student's IQ significantly decreased, his grades have steadily declined despite tutoring and private counseling. Student used to play on his school baseball team, but no longer plays sports and does not dress for his physical education class due to a poor self-image. Parent credibly conveyed his concern as a worried parent trying to help his child.

24. Student testified that he had difficulty understanding his academic subjects and felt he needed help. Student said he did not need help in social skills and enjoys music more than academics. Student wants to attend college. His GPA is 1.8 and he feels "dumb." School is harder, but he understands chemistry and finds geometry confusing. Student does not seek help at the school's homework center or use a homework binder. Student does not want special education, but would prefer to be with his classmates. Student likes to talk about music with his friends at school. Student appeared shy and tentative during his testimony, but communicated his thoughts in a coherent manner.

## Observations of Teachers and School Providers

25. Student's high school providers persuasively established that Student made educational progress during the time period from January 2008 to the present. Student was able to communicate with his classmates and teachers, participate in class, and exhibited no signs of anxiety.

26. Robert Iverson teaches Student chemistry and leadership in the current school year (2009-2010). Mr. Iverson believes that Student is a capable student, that he is confident in math, outgoing with others, occasionally needing "hand holding," pays attention, has a good work ethic, and was an active participant in his leadership class until he dropped the class. Student was one of three students moved approximately six weeks into the start of the current school year from a regular chemistry course to a less demanding chemistry course (Community Chemistry) due to overcrowding and because Student would benefit from the focus on practical applications. The Community Chemistry course is for students with lower math skills and satisfies college entrance requirements. Mr. Iverson was credible in his opinion that Student was making educational progress, had a firm grasp of practical chemistry applications, and that Student's 504 accommodations were helpful and he did not need special education.

27. Sylvia Dyal taught Student English during the 2008-2009 school year. The English class was an honors class in which Student held his own, better than special education students in the class. Ms. Dyal stated that Student understood the lessons, raised his hand, and actively participated in class more than other students. Student made friends, told jokes and stories, communicated well, and exhibited no behavior problems. Ms. Dyal was credible in her opinion that Student made educational progress during the 2008-2009 school year.

28. Nabil Shahin was Gunderson High School Assistant Principal for the 2008-2009 and 2009-2010 school years. Mr. Shahin oversaw Student's 504 plan. Mr. Shahin

knew Student from several individual counseling sessions last year and this year and from observing Student on campus almost daily. Mr. Shahin indicated Student was more interested in music than sports such as baseball. Mr. Shahin saw Student with friends after school. Based on his observations and compared with other Gunderson High School Students, Mr. Shahin opined that Student was average academically and socially.

29. Mr. Shahin had not noticed that Student had any self-esteem issues or undue stress from physical education class. Mr. Shahin was made aware Student did not want to dress for his physical education class at the November 2009 504 Plan meeting. However, Mr. Shahin explained that Student's grades for physical education for the previous terms were C, C-, and B-, which indicated Student participated in class. Mr. Shahin did not consider Student a discipline or behavior problem. Mr. Shahin was aware of one behavioral incident Student had in chemistry class when he made obscene comments. He spoke with Student about it and did not consider it to be a serious incident.

30. Mr. Shahin moved Student from a regular chemistry class earlier in the current school year to a less demanding class to improve his performance. Student was at risk of failing and needed a course that matched his math skills. Student achieved a 1.83 GPA (not counting physical education) during the 2009 fall semester, which decreased from the previous year. Student's overall GPA for the fall semester (including physical education) was 2.0, which placed him with 35 to 50 percent of Gunderson High School students. Student has the potential to graduate and attend college.

31. Gordon Giretti, school psychologist, attended the Student Success Team meeting on May 1, 2007, and spoke with Student's teachers in preparation for the June 6, 2007 IEP meeting. Student's teachers at the time characterized him as occasionally "off task," but otherwise doing acceptable work. Mr. Giretti reviewed and considered the

2007 Kaiser report, which provided a medical diagnosis, which differs from an educational assessment which focuses on educational proficiencies.

32. The evidence established that Student's speech and language were in the average range. None of the school providers reported he had speech or pragmatic language deficits that warranted assessment.

#### Need for Special Education Assessment

33. Parent did not request a special education assessment until he filed the amended complaint on November 16, 2009. In response, school psychologist Ida Tang prepared an assessment plan. District Special Education Manager Kaia Hamilton sent the proposed assessment plan to Parent. Parent has not consented to the assessment plan.

34. At the end of Student's first term of the 2008-2009 school year, he maintained a 2.2 GPA on a 4.0 scale; for the second term, his GPA was 1.8. Both terms included passing grades in physical education. At the end of Student's first term of the 2009-2010 school year, he maintained a 1.8 GPA on a 4.0 scale. His GPA was 2.0 when physical education is included. On the spring 2008 annual statewide test, California's Standardized Testing and Reporting (STARS), Student scored above the statewide targets in algebra (scored at the proficient level) and science (scored at the proficient level). Student scored below the state target in English-language arts (scored at the basic level) and history/social science (scored at the basic level). On the spring 2009 STARS, Student scored above the state target in algebra (scored at the advanced level) and biology (scored at the proficient level), and slightly below the state target for English-language arts (scored at the basic level). Inexplicably, Student did not receive a test score in history.

35. The evidence does not support Student's contention that his levels of academic and functional performance significantly changed in the period since January 24, 2008. Student's teachers established that the accommodations and supports

provided by his 504 Plan have enabled him to make educational progress from January 2008 to the time of the hearing. Neither District staff nor Parent referred Student for assessment at any time during the relevant time period. District did not otherwise have notice of any significant change in Student's circumstances since the implementation of the 504 Plan that gave rise to a duty to assess him.

#### Vocational and Other Areas of Assessment

36. Parent contends District should have conducted a vocational assessment. Vocational assessments are for students who are 16 years of age and eligible for special education services. Student was 14-years-old on January 25, 2008, the beginning of the relevant period. Student was under 16 years of age for most of the relevant period. Since Student was neither eligible for special education nor the requisite age, District had no duty to conduct a vocational assessment.

37. The evidence establishes that Student made educational progress from January 25, 2008, to the time of the hearing and that District did not have notice of any significant change in Student's circumstances. Therefore, there was no new information to give rise to a duty to conduct the other assessments at issue: health and development, social skills, neuro-psychological, pragmatic speech and language, assistive technology, Connors' Rating Scale (or similar rating scale), and behavioral.

#### ELIGIBILITY FOR SPECIAL EDUCATION

38. Eligibility requires an assessment, followed by a determination of eligibility for special education by Student's IEP team. Student contends that he is eligible for special education by reason of autistic-like behaviors. Autistic-like behaviors include the inability to use appropriate oral communication, extreme withdrawal or relating to people inappropriately, continued impairment in social interaction, obsession to maintain sameness, extreme preoccupations with objects or inappropriate use of



objects, extreme resistance to controls, peculiar mannerisms, and self-stimulating behavior.

39. Student's teachers and District staff testified to Student's overall performance and behavior in school. None could describe Student having these types of behaviors. The evidence showed that Student struggled with some aspects of high school, as do other students of the same age. Student's teachers' observations contrasted with Parent's description of Student, who did not observe Student daily in the classroom.

40. Student's teachers and District staff acknowledged Student required additional assistance when they developed and implemented the 504 Plan in January 2008 in order to accommodate Student's needs. Student's 540 Plan was updated annually in November 2008 and November 2009 with Parent's consent. The evidence established that Student's 504 Plan provided the appropriate supports and accommodations for Student's needs. As a result, District was not required to find Student eligible for special education as a result of autistic-like behavior.

#### FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

41. Districts are required to give prior written notice to the parents of a child with exceptional needs, or parents of a child upon initial referral for assessment, a reasonable time before District proposes (or refuses) to initiate or change the identification, assessment, or educational placement of the child, or the provision of a FAPE. Failure to provide notice is a procedural violation that denies a FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits.

42. Parent requested an assessment in November 2009 and District proposed an assessment plan in response. Parent refused consent because he disagreed with the plan. There was no refusal to timely assess Student. Therefore, there is no procedural

violation. Even if there was a violation, there was no indication it impeded Parent's opportunity to participate in the decision-making process or caused a deprivation of educational benefits. The evidence established that Parent actively participated in the IEP and 504 meetings on January 31, 2008; November 18, 2008; and November 10, 2009. Parent was present at these meetings and signed each plan indicating his agreement.

## STUDENT'S EDUCATIONAL RECORDS

43. A parent has the right and opportunity to examine all school records of his or her child and to request and receive copies. Failure to provide records is a procedural violation that denies a FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits.

44. Student asserts District did not provide records for a separate speech and language assessment or a nurse's assessment. District did not perform separate speech and language or independent nurse's assessments. The speech and language assessment was embedded within District's 2007 IAR, which was ultimately included in the June 6, 2007 IEP. The evidence established that District provided all requested educational records. There is no procedural violation. Even if there was a violation, there was no indication it impeded Parent's opportunity to participate in the decision-making process or caused a deprivation of educational benefits. The evidence established that Parent actively participated in the IEP and 504 meetings on January 31, 2008; November 18, 2008; and November 10, 2009.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

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

## RELEVANT TIME PERIOD

2. The enforceability of settlement agreements is based on 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 face 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.) In addition, parties may waive claims that, at the time of the settlement agreement, are unknown to them. (Civ. Code, § 1542.)" (*Student v. Buena Park School Dist.* (2006) Cal.Ofc.Admin.Hrngs. Case No. 2006010294.)

3. As determined in Factual Findings 2 through 4 and Legal Conclusion 2, Parent waived all claims prior to January 24, 2008, when he signed the settlement agreement on January 24, 2008. The release clearly stated that the settlement resolved all special education claims and the parties agreed to waive any special education claims against each other up to the date the agreement was signed. Accordingly, the relevant period at issue in this matter begins on January 25, 2008.

## CHILD FIND DUTIES

4. Under the IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents. The district must “actively and systematically seek out all individuals with exceptional needs . . . who reside in the district.” Accordingly, “[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.” (Ed. Code, § 56303; see also, *Hood v. Encinitas Union Sch. Dist.* (9th Cir. 2007) 482 F.3d 1175, 1184 [finding student with specific learning disorder properly placed in regular education under previous version of California statute].)

5. A district’s child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.*, at p. 1195.) A district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) Following initial assessment, a school district is obligated to assess upon a referral for assessment from a teacher or request from a parent, or when changed circumstances reveal a need to assess. (Ed. Code, § 56381, subd. (a)(1).)

DID DISTRICT DENY STUDENT A FAPE FROM JANUARY 25, 2008, TO THE PRESENT BY FAILING TO ASSESS STUDENT IN ALL AREAS RELATED TO HIS SUSPECTED DISABILITY WHEN IT FAILED TO PERFORM THE FOLLOWING ASSESSMENTS: HEALTH AND DEVELOPMENT, SOCIAL SKILLS, NEURO-PSYCHOLOGICAL, PRAGMATIC SPEECH AND

LANGUAGE, ASSISTIVE TECHNOLOGY, CONNORS' RATING SCALE (OR SIMILAR RATING SCALE), VOCATIONAL, AND BEHAVIORAL?

6. The issue is whether District denied Student a FAPE by failing to assess Student for special education eligibility. As determined in Factual Findings 7 through 37 and Legal Conclusions 1, 4 and 5, District did not fail in its child find obligations because it was not under a legal obligation to reassess Student during the relevant time period. District properly determined in January 2008 that it would implement a 504 Plan with general education supports to address Student's needs. Although Student had received the PDD-NOS diagnosis in 2007, he thereafter made educational progress with the 504 Plan and general education supports. The evidence did not establish any new or different circumstances regarding Student's academic, speech, assistive technology, behavioral, or other functional performance that gave rise to a duty to assess him anew. District had no legal obligation to assess Student in health and development, social skills, neuro-psychological, pragmatic speech and language, assistive technology, Connors' Rating Scale (or similar rating scale), and behavioral.

7. Parent asserts that District failed to conduct a vocational assessment. Vocational assessments are part of the IEP's post-secondary transition planning for students who are 16 years of age (or younger if determined appropriate by the IEP team), and eligible for special education services. Districts are required to include transition planning no later than the first IEP in effect when the student is 16 years old. (Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8), 56345.1.)

8. As determined in Factual Findings 35 through 37 and Legal Conclusion 6, District had no obligation to assess for special education eligibility. Even if they did, under Factual Findings 1 and 36, Student was not 16-years-old for most of the relevant time period. Therefore, District did not fail to conduct a vocational assessment.

## ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

9. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairment, emotional disturbance, orthopedic impairments, autism (or autistic-like behaviors), traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C. §1401 (3)(A)(i) and (ii); Cal. Code Regs., tit. 5, § 3030.)

10. California Education Code section 3030, subdivisions (g)(1) through (g)(7), sets forth the standards for determining a student eligible for special education services due to autistic-like behaviors:

- a) An inability to use oral language for appropriate communications;
- b) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood;
- c) An obsession to maintain sameness;
- d) Extreme preoccupations with objects or inappropriate use of objects, or both;
- e) Extreme resistance to controls;
- f) Peculiar motoric mannerisms and motility patterns; and/or
- g) Self-stimulating, ritualistic behavior.

DID DISTRICT DENY STUDENT A FAPE FROM JANUARY 25, 2008, TO THE PRESENT BY FAILING TO DETERMINE STUDENT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES IN THE CATEGORY OF AUTISTIC-LIKE BEHAVIORS?

11. As determined in Legal Conclusions 6 and 8, District was not obligated to assess Student for special education eligibility during the relevant time period. As a result, District was not obligated to find him eligible for special education services due to autistic-like behaviors.

## ELEMENTS OF A FAPE

12. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

13. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 2010 WL 103678, at \*\*7-12.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

14. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the decision whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light

of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d 1141, 1149.)

15. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

DID DISTRICT DENY STUDENT A FAPE FROM JANUARY 25, 2008, TO THE PRESENT BY FAILING TO OFFER AN EDUCATIONAL PROGRAM TO MEET HIS UNIQUE NEEDS THAT FAILED TO INCLUDE: PLACEMENT IN AN APPROPRIATE SPECIAL EDUCATION PROGRAM, INTERVENTIONS TO ADDRESS STUDENT'S AUDITORY PROCESSING DEFICITS, WRITING INTERVENTIONS, INTERVENTIONS TO ADDRESS STUDENT'S SOCIAL SKILLS DEFICITS, ASSISTIVE TECHNOLOGY, TRANSITION SERVICES, AND COUNSELING?

16. As determined in Factual Findings 35 through 37 and Legal Conclusions 1, 6 8, and 11, District had no legal obligation to assess Student and no obligation to find Student eligible for special education due to autistic-like behaviors. Therefore, based on Legal Conclusion 12, it did not have a legal obligation to offer an educational program addressing auditory processing deficits, writing deficits, social skills deficits, assistive technology, transition services, or counseling.

#### FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

17. A district must give prior written notice to the parents of a child with exceptional needs (or parents of a child upon initial referral for assessment), and a



reasonable time before proposing (or refusing) to initiate or change the identification, assessment, or educational placement of the child, or the provision of a FAPE. (Ed. Code, § 56500.4 subd. (a).)

DID DISTRICT DENY STUDENT A FAPE FROM JANUARY 25, 2008, TO THE PRESENT BY FAILING TO PROVIDE PRIOR WRITTEN NOTICES REGARDING ITS REFUSAL TO TIMELY ASSESS IN ALL AREAS OF DISABILITY, WHICH IMPEDED PARENT'S OPPORTUNITY TO PARTICIPATE IN THE DECISION-MAKING PROCESS AND RESULTED IN A DENIAL OF EDUCATION BENEFITS TO STUDENT?

18. As determined in Legal Conclusions 1, 6, 8 and 17, District did not have an obligation to assess Student during the relevant time period. As a result, there were no notice requirements. In addition, as determined in Legal Conclusions 14 and 15, failure to provide notice is a procedural violation that denies a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. There is no evidence of how lack of notice, if it was required, impeded Parent's opportunity to participate in the decision-making process or caused Student educational harm.

#### STUDENT'S EDUCATIONAL RECORDS

19. A parent has the right and opportunity to examine all school records of his or her child and to receive copies within five business days after an oral or written request. (Ed. Code, § 56504.)

DID DISTRICT DENY A FAPE FROM JANUARY 25, 2008, TO THE PRESENT BY VIOLATING STUDENT'S AND PARENT'S PROCEDURAL RIGHTS BY FAILING TO PROVIDE PARENT WITH A FULL AND COMPLETE COPY OF STUDENT'S EDUCATIONAL RECORDS?

20. As determined in Factual Findings 14 and 44, and Legal Conclusions 1 and 19, District did not fail in its obligations to provide a full and complete copy of Student's

educational records. There were no separate speech and language and independent nurse's assessments to provide.

21. As set forth in Legal Conclusions 14, 15, and 19, failure to provide records is a procedural violation that denies a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. There is no evidence of how failure to provide records, if it occurred, impeded Parent's opportunity to participate in the decision-making process or caused Student educational harm.

#### DISTRICT'S REQUEST FOR SANCTIONS

22. District requests sanctions based on Government Code section 11455.30 due to Parent's refusal to recognize January 25, 2008, as the start of the appropriate time frame for the complaint. Government Code section 11455.30 provides that an ALJ may order a party, the party's attorney or representative (or both), to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (See *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

23. There is no evidence that Parent's claim was meritless or frivolous or solely to cause unnecessary delay. It is reasonable that Parent had a sincere good faith belief that he did not waive all his special education claims by signing the settlement agreement on January 24, 2007. And as such, he was within his rights to raise them at the due process hearing. In addition to not being indicative of evil motive or intent, this also does not rise to the level of subjective bad faith warranting sanctions.

#### ORDER

1. Student's requests for relief are denied.
2. District's request for sanctions is denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all substantive issues decided in this case. Student prevailed on District's request for sanctions.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: April 26, 2010

\_\_\_\_\_/s/\_\_\_\_

TROY K. TAIRA

Administrative Law Judge

Office of Administrative Hearings