

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the matter of:

PARENTS on behalf of STUDENT,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. N2007090371

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AMENDED DECISION<sup>1</sup>

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings (OAH), State of California, heard this matter in Laguna Hills, California on March 4-5, and 20, April 9 and 30, May 7, and June 3-4, 2008.

Attorney Tania L. Whiteleather of the Law Offices of Tania L. Whiteleather represented Student. Dr. Susan Burnett, an educational advocate, and Student's mother (Mother) were present throughout the hearing. Student and her father (Father) attended a portion of the hearing. Also attending a portion of the hearing were members of Ms. Whiteleather's staff.

Attorney Jennifer Brown of Rutan & Tucker represented Saddleback Valley Unified School District (District). Also attending throughout the hearing were Dr. Rona

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<sup>1</sup> The Decision has been amended to correct a typographical error in Legal Conclusion One of Issue One. Education Code section 56505, subdivision (I), provides for a two-year statute of limitations when requesting a due process hearing.

Martin, the District's special education director, and Dr. Susan De Pass, a program specialist. Attorney Karen Van Dijk of Rutan & Tucker and Deborah Miller, a district program specialist, attended a portion of the hearing.

Student called Nancy Lazerson; Mother; Nancy E. Markel, Ph.D.; Father; Teri Morelli; Janet Way; Chris Russell; and Perry D. Passero, Ph.D. as witnesses. The District called Charlie Wu; Robert E. White; Lynn Pash; Darlene Carney, D.Ed.; Susan Stenberg-White; Larry Luby, Ph.D.; and Brent Call as witnesses.

Parents filed their request for due process hearing on September 14, 2007. The District filed a motion to dismiss one issue on September 17, 2007. On October 15, 2007, OAH issued an order granting District's motion to dismiss issue. Thereafter, an amended request for due process hearing was filed on December 13, 2007, pursuant to an order from OAH. On November 17, 2007, the District requested that a hearing be held on the issue of whether the statute of limitations is applicable. On December 13, 2007, at a trial setting conference, the request for a separate hearing on the issue of the applicability of the statute of limitations was granted. At the close of the hearing, the parties requested time for written arguments. Closing briefs were filed by the parties on June 24, 2008. A rebuttal brief was filed by the District on June 27, 2008. The matter was submitted on June 27, 2008.

## ISSUES

- (1) Whether the statute of limitations in this case is two years (Ed. Code, § 56505, subd. (l)), or three years (Ed. Code, § 56403, subd. (r))?
- (2) Whether the applicable statute of limitations should be waived because:
  - (A) The District made misrepresentations that it had solved the problem forming the basis of the due process request, and/or
  - (B) The District withheld information from Student's parents that it was obligated to provide?

## ISSUE ONE

### FACTUAL FINDINGS<sup>2</sup>

1. Education Code section 56403, subd. (r) states, in pertinent part, that “[a]ny request for a due process hearing...shall be filed within three years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.”

2. Education Code section 56505, subd. (l) states, in pertinent part, that “[a] request for a due process hearing...shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.

3. On June 28, 2007, the state legislature enacted AB 685 which amended Education Code section 56403. The bill was chaptered on July 12, 2007. AB 685 was effective on January 1, 2008.

4. On October 10, 2007, the state legislature enacted, as an emergency measure, AB 1663 which reenacted and amended Education Code section 56505. AB 1663 was enacted and went into effect on October 12, 2007.

### LEGAL CONCLUSIONS

1. Parents contend that the three year limitations period contained in Education Code section 56403, subdivision (r) is applicable in this matter. The District contends that the two year limitations period of Education Code section 56505, subdivision (l) applies.

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<sup>2</sup> The ALJ is taking official notice of the following facts pursuant to Government Code section 11515.

2. The objective of statutory interpretation is to ascertain and effectuate legislative intent. (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178.)

3. "The rule is well settled that, when there are two affirmative acts upon the same subject, the latter repeals by implication, the former." (*Dobbins v. Board of Supervisors of Yuba County* (1855) 5 Cal. 414, 415.) Where two laws governing the same subject matter are passed at different times and are inconsistent with each other, the last one enacted must prevail. (*Western Mobilehome Assn. v. County of San Diego* (1971) 16 Cal.App.3d 819, 828; *Los Angeles Police Protective League, supra*, 27 Cal.App.4th at 178; *Canteen Corp. v. State Board of Equalization* (1985) 174 Cal.App.3d 952, 960.)

4. Where there is a conflict between laws passed at different times which are inconsistent with each other, the one enacted last shall be conclusively presumed to be intended to prevail. Here, AB 1663 was the last enacted. Thus, it is conclusively presumed that the AB 1663 is intended to prevail over AB 685. Therefore, the relevant period of limitations is the two year period provided in Education Code section 56505, subd. (l).

## ISSUE TWO

### FACTUAL FINDINGS

#### JURISDICTIONAL MATTERS AND GENERAL INFORMATION

1. At the time that the due process hearing request was filed, Student was 16 years old. Student has lived and continues to live with her family within the boundaries of the District. Student was found eligible for special education on March 28, 1995. She currently attends the New Vista School, a non-public school.

2. Student was born prematurely on December 31, 1990. Two days after birth, Student suffered from hyperbilirubinemia. Treatment for this condition was improper causing developmental delays.

3. California Code of Regulations, title 5, section 3030 lists the eligibility criteria for pupils with exceptional needs who require special education and related services. Section 3030, subdivision (c) states where a pupil has a language or speech disorder defined in section 56333 of the Education Code and includes subdivision (c)(4) a language disorder where the pupil has an expressive or receptive language disorder.<sup>3</sup>

Section 3030, subdivision (h) states: "A pupil has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil's educational performance." The California Department of Education (CDE) uses the term "mental retardation" for pupils in this category.<sup>4</sup>

4. The diagnostic features of mental retardation are (A) significantly subaverage general intellectual functioning; (B) accompanied by significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home-living, social/interpersonal skills, use of community resources, self-direction,

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<sup>3</sup> Education Code section 56333 defines a language or speech disorder as a pupil who "demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services."

<sup>4</sup> The Code of Federal Regulations, part 34, section 300.8, subd. (c)(6) reads: "Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."

functional academic skills, work, leisure, health, and safety; (C) with onset before age 18 years. (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision (DSM-IV) (2000), p. 41.)

5. The District is part of the South Orange County Special Education Planning Area (SELPA). The SELPA used the term "Limited Intellectual Functioning" (LIF) for the eligibility category listed under California Code of Regulations, title 5, section 3030 subdivision (h) until 2003. The SELPA adopted the LIF designation in lieu of the CDE's use of mental retardation, which the SELPA felt was a negative term.<sup>5</sup> The term LIF is also utilized in several other jurisdictions (e.g., Pennsylvania). The CDE approved the District's use of LIF during its audit of District procedures, manuals and forms which are done every three years.<sup>6</sup> When the District reported to CDE, the District would report such pupils as "mental retardation" in accord with the CDE description of the category.

6. Student became eligible for special education on March 28, 1995 under the eligibility criteria of "speech and language impaired" ("S/L") under California Code of Regulations, title 5, section 3030, subdivision (c). On September 6, 1996, Student's eligibility criteria was changed to LIF pursuant to California Code of Regulations, title 5, section 3030, subdivision (h). On December 13, 2005, Student's eligibility criteria was again changed to S/L.

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<sup>5</sup> The SELPA began using "mental retardation" because the electronic reporting system used that description for eligibility pursuant to section 3030(h).

<sup>6</sup> Robert E. White, the SELPA director from 1981-2005, testified the CDE approval was a general approval as to all procedures, manuals and forms and that the CDE never specifically commented on the use of LIF.

## KNOWLEDGE OF PARENTS OF THEIR RIGHTS UNDER THE IDEA AND STATE LAW

7. Parents understood their rights under the IDEA and state law. Parents received a written statement of their rights and procedural safeguards under the IDEA and state law when they received the request for parental consent to conduct the initial assessment on February 10, 1995. Following the initial IEP meeting of March 28, 1995, there were more than 24 subsequent IEP meetings to the time that the request for due process hearing was filed. Parents received a copy of parental rights with each notice of meeting, with each request for assessment by the District, and at each meeting. An oral review of parental rights was given at each meeting unless waived by the parents. At no time did either parent ever state that he or she did not understand their rights and they indicated in writing that they understood their rights under the IDEA and state law. As an example, Parents had requested IEP meetings to review expert reports on September 4, 1996 and September 12, 1997. Additionally, each or both parents actively participated in each and every IEP team meeting clearly indicating that they understood their rights under the IDEA and state law.

## THE INITIAL ASSESSMENT AND THE MARCH 28, 1995 IEP MEETING

8. On February 10, 1995, Mother consented to an assessment plan to have Student assessed by the District. As part of this initial assessment, W.M. Heskett, a District school psychologist, conducted a psycho-educational evaluation. Student was given the Leiter International Performance Scale, an IQ test. Student received an IQ score of 52 which placed her in the range of "Limited Intellectual Abilities."<sup>7</sup> Vineland

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<sup>7</sup> A standard score of 90-109 indicates average intellectual ability. Low average is 80-89 with 70-79 being classified as well below average. Scores of 69 and below are considered intellectually deficient. (Groth-Marnat, Handbook of Psychological Assessment, 4th ed. (2003) p. 143). Scores from 50-55 to 70 are classified as mild mental

Adaptive Behavior Scales were administered to Mother.<sup>8</sup> The Vineland results included an adaptive behavior composite standard score of 64 with domain scores of 64 in communications, 67 in daily living skills, 73 in socialization, and 73 in motor skills. Mr. Heskett concluded:

[Student] is a four year old, preschool girl who appears to be functioning between a two to three year level with regards to nonverbal reasoning ability, visual motor ability, and adaptive behavior. The [sic] places her within the Limited Intellectual Functioning range. These delays may not be a valid predictor of her capacity for learning in two to three years. They do indicate, however, that she is at risk for learning problems when she begins kindergarten. What these problems, if any, will look like remains to be seen.

An accompanying assessment report by Eileen West, a District speech and language pathologist (SLP), and Mr. Heskett, found Student to have delays in all language areas. The report described Student's handicapping condition as "significant developmental delays in language, cognition, and adaptive behaviors." The reports recommended Student is eligible for special education under the category of S/L.

9. On March 28, 1995, an IEP meeting was convened. The IEP team consisted of Mother, Ms. West, Mr. Heskett, and Janet Cook (student's grandmother). The IEP

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retardation. (Sattler and Hoge, *Assessment of Children: Behavioral, Social, and Clinical Foundations*, 5th ed. (2006) p.433.)

<sup>8</sup> The Vineland is a survey filled out by an individual, such as a teacher or parent, and then scored by computer.



team found Student eligible for special education services under the eligibility category of S/L due to a “deficit in receptive and expressive language result [sic] in a delay in communication and socialization.” The IEP team reviewed Student’s present levels of performance and adopted goals and objectives. Student was placed in a preschool special day class (SDC). Mother consented to the District’s offer.

#### THE JUNE 4, 1996 IEP

10. On April 30, 1996, Dr. Ira Lott, chair of the Department of Pediatrics and a professor of Pediatrics and Neurology at the University of California, Irvine, prepared a written report at the request of the parents. Dr. Lott found that Student had an idiopathic development delay of about 50 percent, and that she was “making progress slowly, consistent with her overall potential.” He concluded that Student should continue in her special education setting.

11. On June 4, 1996, the IEP team convened for an annual meeting. The IEP team was comprised of Student’s parents; Char Rus, the SDC teacher; Pam Barrington, O.T.R. of Orange County Therapy Services (OCTS); and a District administrator. The IEP reviewed Student’s present levels of performance, reviewed an Occupational Therapy (OT) initial evaluation by Ms. Barrington, adopted goals and objectives, continued Student’s placement at the preschool SDC for the 1996 Extended School Year, and placed her in a kindergarten SDC at the San Joaquin Elementary School for school year 1996-1997. The team continued Student’s eligibility category as S/L. Parents consented to the IEP. Student entered Char Rus’ kindergarten SDC for children with communicative handicaps. The IEP team also agreed to provide Student with OT once per week with a reevaluation in three months.

## THE SEPTEMBER 4, 1996 AND NOVEMBER 19, 1996 IEP MEETINGS

12. On September 4, 1996, the IEP team reconvened for a meeting to review expert reports pursuant to parents' request. Both Mother and Father were present at the meeting. Student's eligibility category was changed to LIF. District staff recommended that Student continue in the SDC, while parents requested that placement be changed to a regular education kindergarten with supporting services. The team agreed to place Student in a regular kindergarten with two 30 minute sessions of speech and language therapy and one session of OT. The team also re-adopted Student's speech and language goals and objectives from the June 4, 1996 IEP. There was no discussion of the reason for the change in eligibility category nor did the parents receive a written explanation of the reasons for the change either prior to or after the meeting.

13. The IEP team, including parents, reconvened on November 19, 1996, to adopt an addendum to the IEP. The team reviewed an OT evaluation and progress report; reviewed Student's present levels of performance; and adopted goals and objectives. The team also added resource specialist program (RSP) services twice per week to further support Student.<sup>9</sup> Parents consented to the addendum.

## THE JUNE 12, 1997 IEP MEETING

14. Dr. Stephen Ashwal, a professor of Pediatrics and Neurology at Loma Linda University School of Medicine, examined Student and wrote a report on May 7, 1997, at the request of the parents. Dr. Ashwal concluded that Student's "major difficulties relate to her speech and language delay as well as learning disabilities."

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<sup>9</sup> RSP is a service where the child receives individual or small-group instruction from a "resource specialist," who is a credentialed special education teacher.

15. On June 12, 1997, the IEP team convened for an annual meeting. The IEP team reviewed Student's present levels of performance, reviewed the results of the Woodcock Johnson Revised (WJ-R) and the Wide Range Achievement Test-III (WRAT-3) tests given prior to the meeting, reviewed an OT report, and an annual evaluation by Student's RSP teacher. Student's standard scores on the WJ-R were letter word identification-91 (28th percentile), passage comprehension-87 (19th percentile), dictation-60 (0.4 percentile), writing samples-86 (17th percentile), broad reading-83 (13th percentile), broad written language-86 (17th percentile), calculation-89 (23rd percentile), applied problems-69 (2nd percentile) and broad math-75 (5th percentile). On the WRAT-3, Student scored an 88 in reading (21st percentile), an 80 in spelling (9th percentile) and a 73 in arithmetic (3rd percentile). The team continued Student's placement in the preschool SDC for ESY 1997, and placed her in non-severe SDC for the next school year with speech and language therapy twice per week and OT once per week.

REPORTS BY DOUGLAS E. HARRINGTON, PH.D. AND PAULINE FILIPEK, M.D.

16. Parents submitted to the IEP team an August 29, 1997 written nine page neuropsychological evaluation by Douglas E. Harrington, a licensed psychologist.<sup>10</sup> Dr. Harrington tested Student in the area of measured intelligence (Wechsler Intelligence Scale for Children-III (WISC-III)), neuropsychological measures (McCarthy Scales of Children's Abilities (MSCA)-Motor Scale), visual perception (Motor-Free Visual

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<sup>10</sup> In addition to being a licensed psychologist, the late Dr. Harrington also was a licensed educational psychologist and a Diplomate of the American Board of Professional Neuropsychology. In his report, Dr. Harrington noted that Student was referred by Connie Kirby, a District speech and language pathologist.

Perception Test), memory function (MSCA-Memory Scale; California Verbal Learning Test-Children's Version), language skills (Peabody Picture Vocabulary Test-Revised; Expressive One-Word Picture Vocabulary Test-Revised), quantitative ability (MSCA-Quantitative Scale), higher reasoning skills (Children's Category Test), and academic achievement (Wechler Individual Achievement Test; Peabody Individual Achievement Test (PIAT)). Student scored a 57 in verbal I.Q., a 65 in performance I.Q., and a 57 on the full scale IQ. Student's scores on the Wechler were 90 in basic reading (25th percentile), 81 in mathematics reasoning (10th percentile), and an 80 in spelling (9th percentile). On the PIAT, Student scored a 94 in reading recognition (34th percentile), 82 in mathematics (11th percentile), and an 82 in spelling (11th percentile). Dr. Harrington concluded that Student was within the range of mild mental retardation<sup>11</sup> in measured intellectual functioning and exhibited perceptual skills approximately one year below her chronological age. Student was at the first percentile in receptive vocabulary, and she was in the second percentile in expressive vocabulary and higher reasoning. Although Student scored "reasonably strong" in academic ability, Dr. Harrington opined that "[t]he test data supports a diagnosis of mild mental retardation," and that Student was not ready to transition into first grade. Mother testified that she was aware that Dr. Harrington had diagnosed her daughter as mildly mentally retarded, and that she disagreed with his diagnosis.

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<sup>11</sup> Mild mental retardation is defined as an IQ level 50-55 to approximately 70. "[P]eople with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth grade level." (DSM-IV, pp. 42-43.)

17. Parents also submitted a three page written report by Pauline Filipek, M.D., an Assistant Professor of Pediatrics and Neurology at the University of California, Irvine. Dr. Filipek opined that Student's current placement was appropriate. She also noted that she "would like to speak personally with Dr. Harrington about the discrepancy between the achievement test scores and the I.Q. scores."

#### THE SEPTEMBER 12, 1997 IEP MEETING

18. On September 12, 1997, the IEP team, including Mother, convened at Parents' request to discuss the Harrington and Filipek reports. The team discussed Dr. Harrington's diagnosis of mild mental retardation and his recommendations. Dr. Darlene Carney, a District school psychologist attended and discussed the meaning of LIF and that Student's test scores indicate that she is mildly mentally retarded. Dr. Carney testified that Mother asked if the labeling of Student's handicapping condition as mental retardation or LIF would prevent her from receiving services or placement being limited to an SDC. Dr. Carney assured her that services are determined based on the pupil's needs.<sup>12</sup> The IEP team added RSP services for two and a half hours per day to the services provided in the June 12, 1997 IEP.

#### THE JUNE 5, 1998 TRIENNIAL ASSESSMENT

19. The triennial assessment consisted of a psychoeducational assessment by the San Joaquin School psychologist, Dr. Darlene Carney;<sup>13</sup> an OT report by Sharon Fritz,

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<sup>12</sup> Dr. Carney also testified that she and Mother had similar discussions on other occasions.

<sup>13</sup> Dr. Carney received her B.A. in Psychology from the University of California, Irvine; a master's in counseling from California State University, Long Beach; and a doctorate in education from the University of Southern California. She received a

OTR of Orange County Therapy Services; a speech and language assessment by Connie Kirby, a District SLP; and academic testing by Student's classroom teacher. At the time of the evaluation, Student was seven years, four months old.

20. Kirby conducted the speech and language evaluation by administering the Clinical Evaluation of Language Fundamentals-3 (CELF-3), the Expressive Vocabulary Test, the Peabody Picture Vocabulary Test-III, and the Boehm Test of Basic Concepts. Student's standard scores with age equivalency were 66 (four years, ten months) on the CELF-3; an 85 (five years, 11 months, 16th percentile) on the Expressive Vocabulary Test; a 76 (five years, four months, 5th percentile) on the Peabody Picture; and 1st percentile on the Boehm. Ms. Kirby noted that Student had made significant progress compared to the 1995 assessment results, but that "her language skills appear to be significantly compromised in the area of semantics and pragmatics, with scores below the 7th percentile."

21. Student's social/emotional and adaptive functioning was measured by the Vineland Adaptive Behavior Scales (Vineland) which was completed by Student's classroom teacher. Student had standard scores of 73 in communication (age-equivalent of four years, five months), 72 in daily living skills (four years, four months), and an 84 in socialization (four years, one month). Student's communication and daily living skills scores placed her within the lower limits of the borderline region. Her socialization score placed her within the lower limits of the low average range.

22. Student was administered the Kaufman Assessment Battery for Children (KABC) to measure cognitive functioning. Student's scores were within the borderline range and consistent with previous assessment results. In the mental processing

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multiple subject teaching credential in 1990 and a school psychologist credential in 1993. Dr. Carney has been a school psychologist since June 1993.

subtests, Student's percentile scores were 5th for hand movements, 16th for gestalt closure, 16th for number recall, 25th for triangles, 5th for word order, 14th for spatial memory, and 5th for photo series. In the achievement subtest, Student's percentile scores were 3rd for faces and places, 4th for arithmetic, 4th for riddles, 7th for reading/decoding, and 7th for reading/understanding. On the global scales, Student's percentile scores were 5th for sequential processing and the 4th in simultaneous processing, mental processing, achievement and nonverbal. Student was also administered the Developmental Test of Visual-Motor Integration (VMI). Student achieved a standard score of 83 which was within the lower limits of the low average range. On the subtests, she scored between the 1st and 5th percentiles. On the WJ-R, Student had standard scores ranging from a low of 81 to a high of 109 (10th to 72nd percentile).

23. In her written evaluation, Dr. Carney concluded that Student's "cognitive abilities were within the borderline to the significantly below average range" and that Student's adaptive behaviors were within the lower limits of the borderline range in the areas of communication and daily living skills. Dr. Carney recommended that Student be eligible for special education services as LIF.

#### THE JUNE 5, 1998 IEP MEETING

24. On June 5, 1998, the IEP team convened for its triennial review. Parents were present. The team reviewed a report by Student's RSP teacher stating that Student had met her annual goals. The team also reviewed the triennial assessments, Student's present levels of performance, and adopted new goals and objectives. The team found Student eligible for special education under the LIF category and described her handicapping condition as "[Student] exhibits limited intellectual functioning and deficits in adaptive behavior which adversely impacts academic achievement." The team considered an SDC but decided to continue Student's placement in a regular education

class supplemented with daily RSP services in language arts and math, OT once per week, and speech and language therapy for three 30 minute sessions per week. Parents consented to the IEP.

#### THE JUNE 7, 1999, OCTOBER 26, 1999 AND JANUARY 18, 2000 IEP MEETINGS

25. On June 7, 1999, the IEP team, including Mother, convened its annual meeting. The team discussed Student's present levels of performance and new goals and objectives; reviewed an academic assessment by Student's teacher (Susan Hammond); results of a recently administered WJ-R;<sup>14</sup> an OT report; and a speech and language progress report by Lynn Epstein, a speech and language pathologist from OCTS.<sup>15</sup> The team decided that Student should be placed in a non-severe SDC (SDC/NS) with OT services once per week and speech and language services twice weekly. Mother refused to consent to the IEP because direct speech and language services were reduced from three times weekly in the prior IEP.

26. The IEP team, including Mother, reconvened on October 26, 1999, to review the frequency of speech and language services and Student's placement. The District SLP stated that Student's speech and language development is commensurate with her cognitive ability and that her needs can best be met in a SDC/NS classroom with teachers who are credentialed speech and language pathologists. Mother did not consent to the IEP as she desired that speech language services be in a pullout setting.

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<sup>14</sup> Student's standard scores and percentiles were 72 (3rd percentile) for Broad Reading, 77 (6th percentile) for Broad Written Language, and 67 (2nd percentile) for Broad Math.

<sup>15</sup> Parents provided Student speech and language therapy at OCTS once per week in addition to the services provided by the District.



27. The IEP team reconvened on January 15, 2000 with both parents participating. The team decided to continue the goals and objectives from the June 7, 1999 IEP. The team also decided to continue speech and language services twice weekly but in a pullout setting per parents' request. The parents consented to the IEP.

#### THE JUNE 15, 2000 IEP MEETING

28. On June 15, 2000, the IEP team, including Mother, convened for an annual meeting. Diane Bourassa, a District SLP, reported that Student continued to test in the 1st percentile in the CELF-3. She concluded that Student's "receptive and expressive language abilities are commensurate with her cognitive functioning." The team placed Student in a SDC with S/L services twice weekly.

#### THE 2001 TRIENNIAL ASSESSMENT AND THE APRIL 26, 2001 IEP MEETING

29. On April 26, 2001, the IEP convened for an annual meeting. Both parents were present. The IEP team reviewed the triennial assessment comprising a psychoeducational report by Lynn Pash, a District school psychologist; a speech and language evaluation by Marybeth Brown, a District SLP; and an OT report by Sharon Fritz, O.T.R. of OCTS. Pash concluded that Student's "cognitive ability is within the intellectually deficient range of intellectual functioning," and Student's "overall reasoning abilities exceed those of approximately one percent of children her age." Student scored below the 1st percentile on the WISC-III with standard scores of 54 verbal, 59 performance and 52 on the full scale IQ. Student scored in the 6th to 7th percentiles on the Adaptive Behavior Evaluation Scale (ABES) which had been administered to the teacher and a parent. On the WIAT, Student had standard scores and percentiles as follows: Reading- 75 (5th percentile), Mathematics-62 (1st percentile), Language-74 (4th percentile), and Writing-71 (3rd percentile). Pash concluded that Student's scores were consistent with the scores obtained by Dr. Harrington in 1997. In

the Speech and Language assessment, Student obtained scores ranging from the first to second percentiles. Brown reported that Student's "receptive and expressive language abilities are commensurate with her cognitive functioning." The OT report concluded that Student had made substantial progress and no longer required OT services.

The team reviewed Student's current levels of progress, adopted new goals and objectives and discussed placement and level of services. The team placed Student in a SDC/NS and determined that she should receive speech language services twice weekly with one session being individualized and one session in a group. OT services were discontinued per the Fritz recommendation. Parents consented to the IEP.

#### THE 2001-2002 AND 2002-2003 SCHOOL YEAR ANNUAL IEP MEETINGS

30. On September 14, 2001, the IEP team convened for a review meeting and placed Student in a SDC and RSP program. On February 6, 2002, the IEP reconvened and placed Student in Ms. Susan Sternberg-White's SDC with mainstreaming in social studies, science and physical education. On May 21, 2002, the IEP convened for its annual meeting. Student's present levels of performance and progress as to the prior year's goals were discussed as well as Student's test results. Student's grade equivalency scores<sup>16</sup> (Student was in the fourth grade) in the Brigance were between second and third grade, five months, and on the WJ-III between kindergarten, eight months and second grade, five months. Student's placement and services were continued as in the prior IEP. Mother consented to the annual IEP.

31. On April 10, 2003, the IEP convened its annual meeting with Mother present. The team reviewed Student's present levels of performance, progress on

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<sup>16</sup> During annual IEP meetings, test scores were often reported to Parents in grade equivalency terms rather than standard scores.

meeting last year's goals, and a review of the most recent testing. Student once again scored in the first and second percentile ranges in the CELF-3. Student, who was now in the fifth grade, scored grade equivalency scores on the WJ-III ranging from second grade, one month to third grade, eighth month with an academic knowledge score of third grade, two months. Student's placement was continued in the SDC of Ms. Sternberg-White with speech language services of one 30-minute small group session weekly. Mother consented to the IEP. Later that day, the team reconvened to discuss Mother's request to increase speech language services to two sessions weekly. After discussion, the team amended the IEP to increase speech language services to twice per week. Mother consented to the addendum.

#### THE APRIL 5, 2004 TRIENNIAL IEP MEETING

32. On April 5, 2004, the IEP team, including Mother, convened a triennial evaluation meeting. The team discussed Student's progress on the prior year's goals, reviewed her present levels of performance, and reviewed the results of the triennial evaluation. Brent Call supervised the psychoeducational portion of the assessment, and Jennifer Starkey, a District SLP, conducted the speech language assessment. Student was given the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) by Leticia Scott, an intern under Mr. Call's supervision. Student received standard and percentile scores of 59 (less than the 1st percentile) in verbal comprehension, 84 (14th percentile) in perceptual reasoning, 50 (less than the 1st percentile) in working memory, 53 (less than the 1st percentile) in processing speed, and a full scale score of 54 (less than the 1st percentile). The SIB-R was given to Mother. Student's functional independence was comparable to a child of eight years, six months which equates to a standard score of 63 and is in the 1st percentile range (Student's age was 13 years three months). Student's scores on the WJ-III ranged from grade equivalents of second grade, three months to fourth grade, one month. Student was given the Test of Pragmatic Language (TOPL), the

Peabody Picture Vocabulary Test-III (PPVT-III), the Expressive Vocabulary Test (EVT), and the Comprehensive Assessment of Spoken Language (CASL). Student scored in the 14th percentile on the TOPL with an age equivalency of eight years, three months. She received a standard score of 70 on the PPVT-III which was in the 2nd percentile and an age equivalency of seven years, 10 months. She had standard scores of 56 (2nd percentile, age equivalency of seven years, one month) on the EVT, and a core composite of 55 (1st percentile) on the CASL. Starkey concluded that Student's receptive/expressive language skills were commensurate with her cognitive functioning. Mother requested that Student remain in her SDC rather than be transferred to the junior high school. The team continued Student's placement, at Mother's request, in the sixth grade severe SDC class of Ms. Sternberg-White with speech language services once per week. Mother consented to the IEP.

#### FALL 2005

33. In the fall of 2005, parents retained an educational consultant and child advocate, Chris Russell. Mr. Russell reviewed the 2001 and 2004 IEPs and speech and language assessments plus the 2004 triennial evaluation. At a lunch meeting in November 2005, with parents and Student, Russell informed parents that the eligibility category of "LIF" was actually a politically correct way of referring to mental retardation.

34. On December 9, 2005, Dr. Harrington wrote a letter report to Parents following a review of the April 2004 triennial test data. Dr. Harrington noted that Student performed in the low average range in non-verbal perceptual reasoning skills and in the severely impaired range in verbal comprehension. Dr. Harrington opined that such a profile is seen in children with a communicatively handicapped disorder. Since Student had "relatively strong non-verbal perceptual reasoning skills, he believes that Student's "cognitive ability is beyond that what the speech pathologist suggests." Dr. Harrington recommended that Student's primary handicapping condition be S/L and

that she be placed in "a SDC classroom with a teacher having Speech and Language credentials and an emphasis in language development and academic pursuits."

35. On December 13, 2005, the IEP team convened for a review meeting. Parents and Russell attended. The team received and discussed a copy of the December 9, 2005 Harrington letter. Parents distributed a protocol for discussion which included challenging the SIB-R conclusions of Call. Parents requested a change in Student's eligibility category from LIF to S/L. The team also discussed the current goals and objectives and placement. Parents requested that Student be placed in a non-severe SDC and to continue the goals and objectives from the April 2005 IEP. The team acquiesced to change the eligibility category to Speech and Language Impaired as requested by Mother although the team felt that such a determination "may not be accurate at this time."

#### THE LAZERSON SPEECH AND LANGUAGE EVALUATION

36. On April 4, 2006, Nancy Lazerson, a licensed SLP retained by parents, submitted a written evaluation.<sup>17</sup> Student was given the PPVT-III, EVT, Oral and Written Language Scale (OWLS), and the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4). On the PPVT-III, Student had a standard score of 73 which was in the 4th percentile. On the EVT, Student was in the 1.3 percentile with a standard score of 58.

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<sup>17</sup> Ms. Lazerson received a B.S. in special education in 1983 from the University of Hartford and an M.A. in speech-language pathology in 1985 from Northwestern University. She is a California licensed SLP and possesses a Certificate of Clinical Competence (CCC). She has been a SLP since August 1998. She currently is in private practice in Carlsbad, California specializing in treating and evaluating children with speech and language disorders and disabilities.

On the OWLS, Student received standard scores of 55 in listening comprehension (less than the 1st percentile) and 68 in oral expression (2nd percentile). On the CELF-4, Student's core language standard score was 40 with subtest scores ranging from 45 to 58 (all of which placed Student below the 1st percentile). Lazerson concluded that Student has "profound language impairment compounded by significant memory deficits." She also concluded that recent psychological testing "revealed non-verbal cognition to be in the low-average range." Lazerson disagreed with the conclusion of District SLPs that Student's language skills were commensurate with her cognitive skills. Lazerson recommended eight long-term language therapy goals be adopted.

#### NEUROPSYCHOLOGICAL ASSESSMENT BY DR. MARKEL

37. During April 2006, Student was given a neuropsychological assessment by Nancy Markel, Ph.D.<sup>18</sup> Student was administered numerous tests including the WISC-IV, the Comprehensive Test of Nonverbal Intelligence (CTONI), WJ-III and the Wide Range Assessment of Memory and Learning, Second Edition (WRAML2). Student's standard and percentile scores in the WISC-IV were 59 (0.3 percentile) in verbal comprehension, 82 (1.2 percentile) in perceptual reasoning, 54 (0.1 percentile) in working memory, 62 (1st percentile) in processing speed, and a full scale IQ of 57 (0.2 percentile). On the CTONI, which does not utilize language and is not timed, Student received standard scores and percentiles of 86 (18th percentile) in nonverbal IQ, 85 (16th percentile) in pictorial nonverbal IQ, and 89 (23rd percentile) in geometric nonverbal IQ. Student's

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<sup>18</sup> Dr. Markel received a B.F.A. in Film and Television at New York University in 1970. She received a M.A. in clinical psychology in 1980 and a Ph.D. in clinical psychology from the United States International University. She has been a practicing clinical psychologist since 1985.

standard scores (percentiles) ranged from 55-71 (0.1 to the 3rd percentile) on the WRAML2. On the WJ-III, Student's standard scores (percentiles) were 54 (0.1 percentile) in total achievement, 71 (3rd percentile) in broad reading, 50 (less than 0.1 percentile) in broad mathematics, and 74 (4th percentile) in broad written language. Dr. Markel noted that "[w]hen language and processing speed are not utilized in the measure of intelligence, [Student's] innate abilities fall in the low average range."

#### THE APRIL 11, 2006 IEP MEETING

38. On April 11, 2006, the IEP team reconvened for its annual meeting. Parents and Russell attended. Dr. Larry Luby, LHHS school psychologist, Rona Martin, the District's special education director, Judy McIntyre, a District SLP, and its attorney, Epiphany Owens, were among the attendees on behalf of the District. Parents stated that they felt that Student required additional speech and language services and they were in disagreement with the goals and objectives in the prior IEP. Mother requested that the IEP team implement the Lazerson recommendations into the IEP. McIntyre stated that she felt that the expectations by Lazerson were "too high" for Student and that working on drills, as recommended, is less desirable than working Student's thinking and information processing and comprehension skills as proposed by the District. The District proposed that Student continue in the LHHS SDC and receive weekly services of two pull-out sessions of speech therapy, one speech therapy session weekly in the SDC classroom, and five sessions for 55 minutes of social skills. The team also proposed to reconvene to further discuss and adopt new goals and objectives as Mother objected to the proposed goals. Mother refused to consent to the IEP.

#### EXPERT TESTIMONY

39. Dr. Markel testified as Student's expert. Dr. Markel's opinion was based on the assessment she had conducted, District assessments and testing, and the Lazerson

report. Dr. Markel opines that Student is suffering a brain injury which was caused by bilirubin toxicity at the time of her birth. This injury is the cause of Student's neurocognitive impairments including her significant language and processing deficits. Dr. Markel disagrees with the District's finding of mental retardation and believes that Student's intellectual functioning falls in the low average range. In reviewing Student's testing results prior to 2005, she believes that the District should have known that Student should not have been classified as LIF (or mentally retarded) as she has disparate scores in perceptual reasoning on the 2004 WISC-IV (standard score of 84) and various other tests. Also, Student's 2006 CTONI score of nonverbal IQ score of 86 confirms her opinion. Dr. Markel testified that the designation of LIF as Student's eligibility criteria is a misrepresentation of her handicapping condition. Additionally, she testified that it is her opinion the use of LIF, instead of mental retardation, would amount to a withholding of information by the District if Student's parents did not know what the term meant. Dr. Markel offered no opinion testimony as to how this prevented parents from filing for a due process hearing.

40. Dr. Perry Passaro, a licensed educational psychologist, also testified on behalf of Parents.<sup>19</sup> Dr. Passaro has never met Student and his opinions were based on reviewing Student's test results, the Markel report, and some IEPs. Dr. Passaro, in effect, corroborated Dr. Markel's opinion. Dr. Passaro opined that the District's school

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<sup>19</sup> Dr. Passaro received a B.S. in biology from Mesa State College, an M.S. in education and a Ph.D. in educational psychology from the University of Kentucky. He has been a school psychologist since 1996. From August 2002 through June 2008, he was a school psychologist with the Santa Ana Unified School District. He began in private practice in December 2005.



psychologists had misinterpreted Student's test results. He pointed to the divergence of scores between the composites and the full scale IQ tests as evidence that Student was not mentally retarded. Dr. Passaro would discount the full scale IQ and lower subtest scores and use the highest subtest score as the measure of Student's intellectual potential. He also criticized the sole use of the SIB-R to measure adaptive behavior skills. Dr. Passaro opined that the CTONI is a valid measurement of global intellectual ability, even though he admits that the CTONI primarily measures just nonverbal fluid intelligence, and that it is an appropriate method to determine whether a pupil is mentally retarded.

41. Dr. Luby testified as an expert on behalf of the District.<sup>20</sup> Dr. Luby has not assessed Student but is her case carrier. Dr. Luby explained that general intelligence consists of a number of categories: fluid intelligence (problem solving), quantitative knowledge, crystallized intelligence (ability to learn and store knowledge), reading and writing, short-term memory, visual processing, auditory processing, long-term storage and retrieval, processing speed, and decision/reaction time/speed.<sup>21</sup> Dr. Luby opined that Student's 10 years of test results appear to be consistent, and that Student is mildly mentally retarded. Dr. Luby disputed using the CTONI itself as a measure of full IQ since the CTONI is a unidimensional test that measures a portion of fluid intelligence. In order to obtain a true measure of IQ, a multidimensional test, such as the WISC-IV, should be

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<sup>20</sup> Dr. Luby received his B.A. in psychology from California State University, Dominguez Hills, an M.A. in psychology from Pepperdine University, and a Ph.D. in psychology from the United States International University. He has been a school psychologist since 1971 and with the District since 1975. Since 1996, he has taught psychology at Saddleback College in Mission Viejo.

<sup>21</sup> This is known as the Cattell-Horn-Carroll theory of cognitive abilities.

utilized so as to measure more than one category. Since the CTONI measures fluid intelligence and visual processing, it corresponds to the perceptual reasoning portion of the WISC-IV. Dr. Luby noted that Student's 84 in the perceptual reasoning on the 2004 WISC-IV is consistent with her scores on the CTONI administered by Dr. Markel.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

1. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Student v. Vacaville Unified Sch. District* (2004) S.E.H.O case SN 04-1026, 43 IDELR 210, 105 LRP 2671, quoting *Alexopolous v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555.)

2. California implements the Individuals with Disabilities Education Act (IDEA) through its special education laws. (*Miller v. San Mateo-Foster City Unified Sch. District* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860.) Education Code section 56505, subd. (l) provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (See also, *Draper v. Atlanta Ind. Sch. System* (11th Cir. 2008) 518 F.3d 1275, 1288, 20 U.S.C. §1415(f)(3)(c).) The two year limitations period does not apply if the parent was prevented from filing a due process request due to either (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request, or (2) the local educational agency withheld information from the parent which is required to be

provided to the parent.<sup>22</sup> (See also, *J.L. v. Ambridge Area Sch. District* (W.D. Pa. February 22, 2008) 2008 U.S. Dist. LEXIS 13451, \*23-24.)

3. "[A] cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which is the basis of his action." (*Miller, supra*, 318 F.Supp.2d at 861(quoting *Alexopoulos, supra*, 817 F.2d at 554).)

4. The "'knowledge of facts' requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights." (*Miller, supra*, 318 F.Supp.2d at 861 (citing *Jolly v. Eli Lilly & Co.* (1988) 44Cal.3d 1103, 1111); *Ashlee R. v. Oakland Unified Sch. District Financing Corp.* (N.D. Cal. 2004) 2004 U.S. Dist. LEXIS 17039, p. 16.)

5. The narrow exceptions of misrepresentation and withholding of information require that the local education agency's actions be intentional or flagrant rather than merely a repetition of an aspect of determining whether a student received a free appropriate public education (FAPE). "The statutory requirement that the misrepresentation or withholding prevented (the parent) from requesting the hearing further evidences the stringency, or narrowness, of these exceptional circumstances."

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<sup>22</sup> The two year statute of limitations and exceptions were added when the IDEA was revised and signed into law in December 2004, becoming effective July 1, 2005. (20 U.S.C. § 1415(f)(3)(C)-(D).) By its terms, section 56505(l) sets forth the two exceptions in accordance with part 300.516(c) of title 34 of the Code of Federal Regulations. Thus, California has in effect adopted the IDEA statute of limitations and its two specific exceptions.

(*School District of Philadelphia* (Pa. State Educational Agency, Appellate Panel, March 5, 2008) 49 IDELR 240, p. 5, 108 LRP 13930.)

## LEGAL ANALYSIS

6. Parents contend that the statute of limitations should be waived because the District prevented Parents from filing for a due process hearing prior to September 14, 2005 because the District (1) made specific misrepresentations that it had solved the problem forming the basis of the due process hearing request, and (2) withheld information from Parents that it was required to provide by using the eligibility category of LIF when the District “knew or should have known that Student’s primary disability was speech and language and that she was not mentally retarded.”<sup>23</sup> Parents also contend that they were misled that Student was labeled LIF because they were not aware that this designation meant mental retardation.

## DATE THE LIMITATIONS PERIOD COMMENCED

7. Parents knew, or should have known, their rights under the IDEA and the facts underlying Student’s learning disability as early as September 12, 1997. Parents were aware as early as the initial assessment and IEP meeting of March 28, 1995 that Student was experiencing severe language and speech delays since Parents were presented with Heskett/West assessments and that Student had an IQ of 52 which demonstrated “limited intellectual abilities.” Dr. Lott, in his April 30, 1996 report, which was presented by Parents to the IEP team, found that Student was experiencing a 50 percent idiopathic developmental delay. Dr. Harrington, in his August 29, 1997 evaluative report, found Student having an IQ of 57 and being mildly mentally

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<sup>23</sup> Parents’ Closing Brief, pp. 13-15.

retarded.<sup>24</sup> At the September 12, 1997 IEP meeting, Parents had been given their rights under the IDEA several times and had indicated that they understood their rights. Also, Parents had actively participated in the March 28, 1995, June 4, 1996, September 4, 1996, November 19, 1996, and June 12, 1997 IEP team meetings. In fact, Parents had requested IEP meetings to review expert reports on September 4, 1996 and September 12, 1997. This clearly demonstrates that Parents were aware and understood their IDEA rights. At the September 12, 1997 IEP meeting, the team discussed Dr. Harrington's assessment and his conclusion that Student was mildly mentally retarded. Dr. Carney reviewed with the team Student's test results, the meaning of LIF, and whether Student being labeled LIF or mentally retarded would effect decisions on placement and services in the future. (Factual Findings 7 through 18.)

#### MISREPRESENTATIONS BY THE DISTRICT

8. Parents contend that the District made specific misrepresentations to Parents that Student's speech and language difficulties were being solved as Student was LIF. Student contends that the specific misrepresentation is that Student is mentally retarded or LIF when she is not. The basis for Parents' position is the testimony of their experts, Drs. Markel and Passaro, that the District should have known that Student was not mentally retarded if the test scores had been correctly interpreted.

9. Parents have failed to meet their burden to demonstrate that the District made specific misrepresentations that the problem, underlying their due process

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<sup>24</sup> Dr. Filipek, in her undated report, questioned Dr. Harrington's diagnosis of mild mental retardation by citing the discrepancy between achievement test results Student's IQ scores. Thus, Parents knew, or should have known, at that time that the mental retardation diagnosis may not be accurate.

request, prevented them from filing for a due process hearing. Pursuant to Legal Conclusion 4, the actions of the District in making as misrepresentation must be intentional or flagrant. Here, Parents aver that the District made a negligent misrepresentation in that the District psychologists incorrectly interpreted Student's test scores. The District psychologists and the Parents' experts have reviewed the same data and have reached different conclusions. (Factual Findings 8 through 41.) Because there are professional differences in interpreting Student's test results, Parents have failed to prove that the District was guilty of an intentional, or even negligent, misrepresentation. Additionally, Parent failed to offer any evidence that they were prevented from filing a due process request.

#### WITHHOLDING OF INFORMATION BY THE DISTRICT

10. Parents contend that the District prevented Parents from filing a due process request because it withheld information that it is required to provide to the Parents. Parents aver that (1) the District withheld from them a copy of the computer report the District submitted to CDE which indicated that Student's eligibility category was Mental Retardation, and (2) the District failed to share information with Parents that Student was not mentally retarded.<sup>25</sup>

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<sup>25</sup> Parents, in their closing brief, stated that "it was objectively reasonable for the District to know of...her lack of mental retardation," which should have been "evident to any school psychologist with basic training." The parents concluded, "The District, in the past ten years, has had knowledge of [Student's] lack of mental retardation, as well as information that her disability was in Speech and Language or in Other Health Impairment, yet failed to ever share that information with her parents."

11. Parents have failed to meet their burden to prove that the District withheld any information to the Parents. The record demonstrates that the Parents received progress reports, the IEP team discussed present levels of performance, test results, and progress on goals were discussed at each annual IEP meeting. At each triennial meeting, Parents were given copies of every assessment. Though the Parents were not given a copy of the computer printout submitted by District to the CDE, Parents have failed to show how that prevented them from requesting a due process hearing. As to the allegation that the District failed to inform them that Student was not mentally retarded, there is no merit to this contention (see Legal Conclusion 9 and Factual Findings 8 through 42).

## ORDER

Parents' request to waive the statute of limitations is denied.

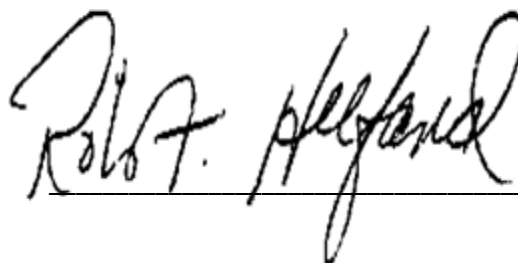
## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: July 11, 2008

A handwritten signature in black ink, reading "Robert F. Helfand", written over a horizontal line.

ROBERT F. HELFAND

Administrative Law Judge

Office of Administrative Hearings