

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

In the Matter of:

SYLVAN UNION SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH NO. N 2006040395

DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on June 29 and 30, 2006, in Modesto, California.

Petitioner Sylvan Union School District (District) was represented by attorney Sarah Daniel. Bonnie Santos, the District's Director of Special Education, attended the hearing on behalf of the District. Also present on behalf of the District was Regina Hedin, the director of the Stanislaus County Special Education Local Plan Area (SELPA).

No one made an appearance on behalf of Respondent Student (Student) at the hearing.<sup>1</sup>

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<sup>1</sup> Student's counsel, attorney David M. Grey of the law firm Grey & Grey located in Santa Monica, CA, filed an untimely motion for continuance on June 28, 2006. The motion was denied. On June 29, 2006, Mr. Grey failed to appear at the scheduled start time. An

On April 14, 2006, District filed a request for a due process hearing. On June 19, 2006, ALJ Skarda conducted a telephonic prehearing conference and issued a prehearing conference order.<sup>2</sup> Sworn testimony and documentary evidence were received at the hearing on June 29 and 30, 2006. Upon receipt of the District's written closing argument, the record was closed on July 11, 2006, and the matter was submitted.

## ISSUES<sup>3</sup>

1. Did the District appropriately assess and/or offer to assess Student in all areas of suspected disability during the 2005-2006 school year? May the District conduct the assessments it proposed in the April 4, 2006 Assessment Plan? Are additional assessments necessary?
2. Do the January 26, 2006 individualized education program (IEP) and the March 29, 2006 IEP addendum, offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

## CONTENTIONS OF THE PARTIES

The District contends that it assessed Student in all areas of suspected disability in the fall of 2005. Nonetheless, the District offered to conduct additional assessments in

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OAH clerk called Mr. Grey's office and confirmed that Mr. Grey would not attend the hearing. Student's parent, Mother, also failed to attend the hearing.

<sup>2</sup> Student's Mother, who was not represented by counsel at the time of the prehearing conference, failed to participate in the prehearing conference.

<sup>3</sup> For purposes of clarity and organization, the ALJ has reorganized District's issues as identified in the due process hearing request that were clarified at the prehearing telephonic conference and again at the beginning of the due process hearing.

April 2006 at the request of Student's Mother. All but one of the proposed assessments would be conducted by individuals not employed by the District. Although Mother requested the assessments, she has refused to sign the assessment plan. The District contends that because it appropriately assessed Student in all areas of suspected disability in the fall of 2005, and/or because it has offered to complete additional assessments, it is not required to conduct any additional assessments. The District requests an Order allowing it to proceed with the April 2006 assessment plan.

The District contends that the IEP developed on January 26, 2006 is a FAPE for Student. The March 29, 2006 IEP is substantively identical to the January 2006 IEP; accordingly, the District contends that the March IEP is also a FAPE.

## FACTUAL FINDINGS

1. Student is an eight-year-old child who is eligible for special education under the primary category of autism due to a diagnosis of Asperger's disorder.<sup>4</sup> Student resides with his Mother within the geographical boundaries of the District.

### SUSPECTED AREAS OF DISABILITY

2. Student enrolled in the District in the fall of 2005, about one month after school began. Student previously attended school in Modesto City Schools (MCS) District.

3. Student's last triennial evaluation was conducted on or about January 2003 by MCS.

4. Part of the MCS triennial evaluation included a psychological evaluation completed by Arnold E. Herrera, Ph.D. Dr. Herrera noted, in pertinent part, that Student had no delay in the development of basic language skills, but he nonetheless had

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<sup>4</sup> Student also qualifies as a child with an "other health impairment" (OHI) and a specific learning disability.

"difficulty with conversation unless it regards one of his very particular interests," and even then, Student tended to talk "at you." Dr. Herrera found Student's communication skills to be within the "low-average level." He found Student's nonverbal skills to be "deficient in the form of poor eye contact and difficulty reading the nonverbal cues that regulate social interaction." Dr. Herrera noted that "behavioral idiosyncrasies do interfere with him conversing normally."

5. Dr. Herrera also found mild delays in adapted/social functioning. He noted, in relevant part, that Marcus displayed "limited interest in others' activities," that he had difficulty sharing, turn-taking and that he tended to "force his own interests or routines on others." Dr. Herrera also found that Student "does not share his achievements and has significant difficulty in judging as well as respecting personal space."

6. Upon enrollment in the District in August 2005, Student was placed in a thirty- day interim placement. Services were provided in conformity with Student's last IEP developed by his previous district, MCS. The thirty-day interim placement was later extended by agreement of Student's Mother.

7. The District determined that assessments were necessary at an IEP team meeting convened on October 6, 2005. Because Student's last triennial evaluation was conducted on or about January 2003, nearly three years prior, the District and Student's Mother agreed that the District's assessments would serve as Student's triennial evaluation.

8. The District developed an assessment plan at the October 6, 2005 IEP team meeting. The assessment plan proposed to assess Student in the following areas: (1) academic achievement; (2) social/adaptive behavior; (3) psychomotor development; and, (4) intellectual development. The assessment plan also proposed two evaluations to determine Student's ongoing need for occupational therapy (OT) services, one to be conducted by school personnel and another by a nonpublic agency which provides OT

services (Brighter Futures). Finally, the assessment plan included an observation by a psychologist.

9. On October 20, 2005, the District convened an IEP team meeting. Student's Mother requested that she be present during all assessments, the District agreed, and she signed the October 6, 2005 assessment plan.

10. A second assessment plan was developed at the same October 20, 2005 IEP team meeting. The second plan proposed a functional behavioral assessment (FBA) "with a report" to be conducted by a behavioral intervention case manager (BICM). The District also offered to conduct a multisensory screening called a "slingerland screening"<sup>5</sup> to be completed by a resource specialist program (RSP) teacher. Finally, the District proposed "observations" by the BICM, a program specialist and a school psychologist. Mother signed the assessment plan on the same day it was developed; as before, the District and Mother agreed that Mother could be present at all assessments. The assessments were to be completed and reviewed at an IEP team meeting on November 18, 2005.

11. The District failed to establish that its proposed assessments in the fall of 2005 encompassed all of Student's suspected areas of disability. The District read and considered the MCS triennial evaluation conducted in January 2003 during the course of its fall 2005 assessment of Student. As discussed in Factual Findings 4, 5 and 6, the MCS triennial evaluation found deficits in the area of speech and language/communication. While Student's last IEP developed by MCS lacked speech and language/communication goals or services, Dr. Herrera's report identified significant speech and language/communication deficits which should have been, at a minimum, assessed by the District.

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<sup>5</sup> "Slingerland" is a multisensory multi-modal teaching methodology used to teach children with certain learning disabilities reading and writing.

## ACADEMIC ACHIEVEMENT

12. Student's special day class teacher, John Bettencourt, was Student's special day class teacher at District's Stockard Coffee Elementary school from Student's enrollment in August 2005 until the end of November 2005. Mr. Bettencourt conducted the academic testing in November 2005. Mr. Bettencourt gave a standard administration of the Kaufman Test of Educational Achievement (KTEA). He found significant deficits in all academic areas. Mr. Bettencourt's assessment was discussed at the November 18, 2005 IEP team meeting.

13. The District established that it appropriately assessed Student in the suspected area of disability of academic achievement.

## INTELLECTUAL DEVELOPMENT

14. James Merchant is a school psychologist in the District. He assessed Student's intellectual development on November 15 and 16, 2005, using a variety of assessment tools, including: (1) a review of Student's educational records; (2) the Wide Range Assessment of Memory and Learning (WRAML); (3) the Test of Language Development-Primary (TOLD- P); (4) the Test of Auditory Processing and Reasoning Skills (TARPS); and, (5) the Developmental Test of Visual-Motor Integration (DTVMI). Mr. Merchant prepared a report of his assessment results. His report was shared with the IEP team on November 18, 2005.

15. Mr. Merchant did not administer standardized tests of intellectual functioning because Student is African American.

16. Student experienced difficulties with his vision during testing because his prescription glasses were broken and unavailable. Mr. Merchant delayed his testing until Student's mother could procure new glasses. Eventually, Student's Mother requested that Mr. Merchant complete his testing of Student without Student's prescription eyeglasses.

Instead, Student wore non-prescription glasses, which Student removed during testing because they made him uncomfortable

17. Student was distractible during testing, particularly on the first day when his mother was present.

18. Mr. Merchant's report states the following with regard to the validity of his assessment:

Overall test results are felt to be a low estimate of Marcus' skill due to impulsiveness and distractibility. Accuracy on visual tasks is highly questionable and scores are not felt to be a reasonable estimate of his skill, due to vision difficulties.

19. The District failed to establish that it appropriately assessed Student in the suspected area of disability of intellectual development. Student was experiencing difficulties with his vision and was impulsive and distractible during the testing. Accordingly, Mr. Merchant's assessment was invalid.

#### SOCIAL/ADAPTIVE BEHAVIOR

20. Mr. Merchant also assessed Student's social adaptive behavior. He administered the Vineland Adaptive Behavior Scales (Vineland), classroom addition, to Student's classroom teacher, Mr. Bettencourt. The Vineland provides standard scores of a pupil's functioning in the areas of, in pertinent part, communication and daily living skills. It also provides an adaptive behavior composite. Mr. Merchant prepared a report of this assessment, which was shared with the IEP team on November 18, 2005.

21. Larry Michelotti, a District school psychologist who is also an autism specialist, conducted two observations of Student. He observed, in pertinent part, Student's social/adaptive behavior both in class and outside of the classroom in

November 2005. Mr. Michelotti shared his observations and impressions with the IEP team on November 18, 2005.

22. The District established that it appropriately assessed Student in the suspected area of disability of social/adaptive behavior.

#### FUNCTIONAL BEHAVIOR ASSESSMENT

23. As discussed in Factual Finding 10, the District agreed to conduct an FBA of Student on October 20, 2005.

24. Larry Michellotti conducted two observations of Student, as discussed above. He did not conduct an FBA because he did not observe behaviors that interfered with learning. He concluded that Student did not require a behavior support plan. He shared his observations with the IEP team on November 18, 2005.

25. At the November 18, 2005 IEP team meeting, the IEP team agreed that Amalie Holly, Behavior Intervention Case Manager (BICM) for the Stanislaus County Office of Education (SCOE), would "consult with the school, parent ..." The IEP further states that Ms. Holly would "complete" Mr. Michellotti's observations of Student in school and contact Student's parents.

26. Student was "off-track" beginning on or about November 25, 2005. He returned to the District on or about January 23, 2006, and his Mother permanently removed him from school on February 9, 2006. Ms. Holly was unable to complete the observation of Student because she works two days per week and because of Student's frequent absences.

27. The District failed to complete an appropriate FBA of Student, and failed to provide a sufficient reason for its failure. The assessment plan dated October 20, 2005, states that the District would conduct an FBA and prepare a report; it does not state that Mr. Michellotti would observe Student to determine if there were behaviors that interfered with learning, necessitating an FBA. Moreover, while Student was off-track and/or absent



after November 18, 2005, the District failed to establish that it had insufficient time to complete the FBA due to absences/scheduling conflicts *before* the November 18, 2005 IEP team meeting.

#### PSYCHOMOTOR DEVELOPMENT

28. On November 5, 2005, adapted physical education (APE) specialist Wendy Vessels assessed Student's psychomotor development and prepared a report. Ms. Vessels was Student's APE specialist at Stockard Coffee school. She administered the Test of Gross Motor Development (TGMD). Ms. Vessels obtained standardized scores from the TGMD, and drafted proposed goals and objectives. Her assessment and proposed goals and objectives were shared at the November 18, 2005 IEP team meeting, and adopted and agreed to by the entire team.

29. The District established that it appropriately assessed Student in the suspected area of disability of psychomotor development.

#### FINE MOTOR/SENSORY-MOTOR

30. Miriam Bermann, an occupational therapist employed by the Stanislaus SELPA, assessed Student and completed an occupational therapy report in the fall of 2005. She administered several tests over four separate test sessions, and prepared a thorough and detailed report of her findings, which was shared at the November 18, 2005 IEP team meeting. Ms. Bermann determined that her test results accurately reflected Student's abilities.

31. Lucinda Williams, an occupational therapist employed by the nonpublic agency Brighter Futures, also assessed Student on October 28, 2005. Ms. Williams' assessment included observations, a sensory history obtained from Student's Mother, administration of the Sensory Integration Inventory –Revised, the Sensory Performance Analysis, and a parent interview. She prepared a lengthy, detailed report which was shared

at the November 18, 2005 IEP team meeting. Ms. Williams drafted goals and objectives, which were reviewed, adopted and agreed-to by the entire IEP team.

32. The District established that the sensory-motor/fine motor assessments were appropriate.

#### SLINGERLAND SCREENING

33. Helen Katotakis is a resource specialist in the District. Ms. Katotakis has substantial experience administering "slingerland screenings."<sup>6</sup> Ms. Katotakis administered a slingerland screening on November 10, 2005, and November 16, 2005. She presented the results of her assessment at the November 18, 2005 IEP team meeting, although she had not prepared a written report of the screening at the time of the meeting.

34. Ms. Katotakis prepared a written report on February 16, 2006. The report was forwarded to Student's Mother. The report contained several errors. Ms. Katotakis substituted another child's name for Student several times in the report.

35. Ms. Katotakis corrected her report on April 4, 2006.

36. The District failed to establish that Ms. Katotak conducted an appropriate multisensory/slingerland screening of Student. Although she shared her screening results with the IEP team, she failed to prepare a written report until months later. (See, Ed. Code § 56327.)

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<sup>6</sup> A slingerland screening is an assessment related to a specific instructional methodology of the same name. It is a screening tool designed to "identify children with ... dyslexia and to pinpoint modality and integration difficulties" in the areas of reading, spelling, writing and written expression.

## THE APRIL 2006 ASSESSMENT PLAN

37. The District convened an IEP team meeting on March 29, 2006, to discuss, in pertinent part, Student's Mother's request for independent educational evaluations (IEEs). The team agreed that no further assessment in the area of occupational therapy was necessary. The District agreed to pay for IEEs requested by Mother. The District also agreed to conduct a speech and language/communication assessment using District staff.

38. On April 4, 2006, the District mailed a letter to Student's Mother enclosing a proposed assessment plan, as discussed and agreed to at the March 29, 2006 IEP team meeting. The assessment plan and letter propose to assess Student in multiple areas, including: (1) an independent social/adaptive behavior, intellectual development and psychomotor development assessment, to be conducted by school psychologist Bill Sanborn, who is employed by the Stanislaus County Office of Education (SCOE); (2) communication development, to be conducted by District speech and language pathologist Beth Rokaitis; (3) a functional behavioral assessment (FBA), to be conducted by nonpublic agency staff from Genesis; and (4) a "slingerland screening," to be conducted by staff from Valley Oaks, a certified nonpublic school which utilizes the Slingerland methodology to teach language. The assessment plan also proposes observations by a school psychologist, speech and language pathologist, and the Genesis staff.

39. Student's Mother has not consented to the assessment plan.

40. The District established that circumstances warrant assessment in all areas discussed in Factual Finding 36. Student's parent requested all of the proposed IEEs. The District has never assessed Student's need for speech and language services, and, as discussed in Factual Finding 11, speech and language/communication is an area of suspected disability. Finally, as determined in Factual Finding 19, 27 and 36, three of the District's assessments were not appropriate (intellectual development, the FBA and the slingerland screening).

## FAPE- STUDENT'S UNIQUE NEEDS

41. As discussed in Legal Conclusion 5, a substantively appropriate IEP must be designed to meet Student's unique needs. The District established that Student has unique needs in all core academic areas (reading, writing and mathematics). Student also has gross- motor deficits, including difficulty with bilateral coordination, crossing the midline, loco- motor skills and object control skills. Student has fine-motor and sensory processing deficits as well as motor planning deficits necessitating considerable OT services. Student frequently bumps into objects and people, and has poor handwriting as well as scissor skills.

42. Student also has unique needs in the areas of social/adaptive behavior. James Merchant's assessment found Student to have deficits in "communication and daily living skills." Larry Michellotti observed Student experience difficulties initiating and sustaining interactions with peers in unstructured activities, such as recess. Gini Weiss observed Student to have difficulty with working in groups, inappropriate reactions to the conduct of other students, and isolated name-calling, during the approximate twelve days she worked with him.

43. As previously determined, the District failed to assess (or appropriately assess) Student in all areas of suspected disability. Accordingly, Student may have as-yet unidentified unique needs in those areas.

## FAPE – DESIGNED TO MEET STUDENT'S UNIQUE NEEDS

44. The January 26, 2006 IEP is designed to meet the bulk of Student's unique needs. The District drafted, and Student's Mother approved, goals and objectives in the fall of 2005 which address Student's gross motor, sensory-motor/fine motor as well as his academic unique needs. Those goals were incorporated into the January 26, 2006 IEP.

45. However, as discussed above, Student also had deficits in the area of social/adaptive behavior as of January 26, 2006. The IEP does not address those deficits

through measurable annual goals and short term objectives or benchmarks. In that regard, Student's IEP is deficient. Moreover, as discussed, Student may have additional unique needs that, because of the District's inappropriate/incomplete assessments, have not yet been identified.

46. In sum, the January 26, 2006 IEP was designed to meet Student's gross-motor, sensory-motor/fine motor and academic needs. It failed, however, to address Student's social/adaptive behavior needs. Moreover, Student may have unidentified unique needs which have not been identified because of the District's inappropriate assessments; accordingly, the District failed to establish the IEP is designed to meet all of Student's unique needs.

#### FAPE – SERVICES AND PLACEMENT

47. As discussed in Legal Conclusion 3, to be substantively appropriate, the January 26, 2006 IEP must also be reasonably calculated to provide Student with some educational benefit. The IEP offers Student placement in a mild-to-moderate learning-handicapped (LH) special day class (SDC) for third, fourth and fifth grade children at Woodrow Elementary taught by Gini Weiss. It also offers related services including transportation, a 90-day interim aid, OT, APE and unspecified behavioral services.

#### MS. WEISS' LH SDC CLASS AT WOODROW ELEMENTARY

48. Ms. Weiss is a credentialed special education teacher with more than fourteen years experience working with children with disabilities similar to Student's. She is qualified to teach Student.

49. Student attended Ms. Weiss' class for several days prior to the January 26, 2006 IEP team meeting. Ms. Weiss observed Student to be in the lowest group academically, although he was not the lowest functioning student in the class. She was able to implement Student's academic goals in her class.

50. Student's Mother requested that Student be placed in Ms. Weiss' class.

51. The District established that Ms. Weiss' class was appropriate for Student, i.e., it was reasonably calculated to provide Student with some educational benefit. Ms. Weiss is qualified to teach Student's LH SDC. She has a tremendous amount of experience (14 years) teaching students like Student, and she was able to implement his academic goals, albeit briefly, before and after the subject IEP was developed. Moreover, Student's Mother requested that Student be placed in her class.

#### RELATED SERVICES – OT, APE AND TRANSPORTATION

52. The January 26, 2006 IEP offers Student related services including: (1) adapted physical education (APE) services, two times each week for thirty minutes, to implement Student's gross-motor goals and objectives; (2) occupational therapy, two times each week for between forty-five minutes and one hour, to be provided by a nonpublic agency (Brighter Futures), and one forty-five minute session each week to be provided by the Stanislaus SELPA, to implement Student's sensory-motor goals and objectives; (3) a 90-day interim classroom aid; (4) unspecific "behavior specialist consultation" services; and (5) transportation for the OT services provided by Brighter Futures.

53. The District established that the OT, APE and transportation services are all reasonably calculated to provide Student with some educational benefit. Student had gross- motor as well as sensory-motor goals and objectives requiring the subject related services.

#### RELATED SERVICES – THE 90-DAY INTERIM AIDE

54. The 90-day interim classroom aide was offered to placate Student's Mother. There was no evidence that such an aide was necessary. Indeed, Gini Weiss' testimony

established that Student did not require the services of an aide in order to receive some educational benefit.

#### RELATED SERVICES – BEHAVIOR SPECIALIST SERVICES

55. The District failed to establish that the unspecified “behavior specialist consultation” services were reasonably calculated to provide Student with some educational benefit.<sup>7</sup>

#### THE SAFETY AND HEALTH PLANS

56. In October 2005, the District developed a safety plan for Student. The safety plan addresses concerns raised by Student’s Mother, including her concern that Student would be injured before school and/or during recesses, and that his eyes would be damaged.

Student has had surgery on his eyes. The safety plan was incorporated into the January 26, 2006 IEP.

57. Student’s Mother consented to the safety plan.

58. The District established that the safety plan was appropriate.

59. The District also developed a health plan; the health plan addresses Student’s Mother’s concerns regarding potential eye injuries. It requires District staff to notify Mother if Student sustains head injuries of any type.

60. The District established that the health plan was appropriate.

61. In sum, aspects of the January 26, 2006 IEP are reasonably calculated to provide Student with some educational benefit. Specifically, Ms. Weiss’ LH SDC, the 90-

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<sup>7</sup> As previously discussed, the District failed to complete the FBA of Student. It is unclear what the consultative services would address given that the District had not completed its assessment as of January 26, 2006.

day interim aid, APE, OT and transportation services were all sufficient. Moreover, the health and safety plans were appropriate. However, the IEP failed to address Student's social/adaptive behavior needs, and therefore, in that regard, it was not reasonably calculated to provide Student with some educational benefit. Finally, the District failed to establish that the IEP was reasonably calculated to provide Student with some educational benefit in all areas in which the District failed to appropriately assess Student (intellectual development, speech and language/communication, behavior and Student's needs which may be identified upon completion of an accurate and appropriate slingerland screening).

#### LEAST RESTRICTIVE ENVIRONMENT

62. As discussed in Legal Conclusions 6 and 7, a substantively appropriate IEP must be provided in the LRE, i.e., Student must be educated with his non-disabled, typically developing peers to the maximum extent appropriate. The IEP states that Student would be educated with his non-disabled peers for five percent of each day in the following subjects: art, enrichment and music.

63. The District established that the January 26, 2006 IEP is the LRE for Student. The testimony of Ms. Weiss established that Student's many educational deficits necessitate placement in Ms. Weiss' SDC for the majority of the day. The services offered are the LRE for Student.

#### FAPE – JANUARY 26, 2006 IEP

64. In sum, the District failed to establish that the January 26, 2006 IEP was a FAPE for Student. It did not address all of his identified unique needs. Further, there may be additional unique needs which have not been identified due to the District's deficient assessment. Additionally, while aspects of the subject IEP are appropriate, e.g., Ms. Weiss' LH SDC, OT, APE, the 90-day interim aid, and the health and safety plans, the IEP includes no services to address Student's social/adaptive behavior needs.



## FAPE – THE MARCH 29, 2006 IEP

65. The March 29, 2006 IEP team meeting was convened by the District in order to persuade Student's Mother to return her son to school. As previously indicated, Student's Mother removed her son from school on February 9, 2006.

66. The services, placement and goals and objectives in the March 29, 2006 IEP are the same as the January 26, 2006 IEP. Accordingly, for the identical reasons discussed above in Factual Finding 65, the March 29, 2006 IEP was not a FAPE.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly

provides that DIS, California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.C. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198- 200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

4. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE,

even if Student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

6. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (*Id.*) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1044-45; see also *Sacramento City Unified School Dist. v. Rachel H.*, (9th Cir. 1994) 14 F.3d 1398, 1404, *cert. denied*, 114 S.Ct. 2679 (1994).)

7. In determining the placement of a child with a disability, each public agency shall ensure that the placement decision is made in conformity with LRE provisions, that the child's placement is based on the child's IEP, and that the placement is as close as possible to the child's home. (34 C.F.R. § 300.552.) The public agency shall also ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. (34 C.F.R. § 300.552(c).)

8. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks, of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress

progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

9. The Ninth Circuit Court of Appeal has endorsed the “snapshot” rule, explaining that the actions of the school cannot “be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

10. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S.\_\_\_\_ [126 S.Ct. 528, 163 L.Ed 2d 387].)

11. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider appropriate strategies, including positive behavioral interventions, strategies, and supports to address that behavior. (Ed. Code § 56341.1; 34 C.F.R. § 300.346.)

12. Special education students must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (a), (b).)

13. A local educational agency must reevaluate a child with a disability if the child’s parent or teacher requests an evaluation, every three years or if “conditions warrant a reevaluation.” (34 C.F.R. § 300.536.)

14. If parents want their child to receive special education and related services, they are required to allow a local educational agency to assess their child. (*Gregory K. v. Longview School Dist.*, (9th Cir. 1987) 811 F.2d 1307, 1315.) Before a school system becomes liable for a special education placement of a student, it is entitled to up-to-date evaluative data and may insist on evaluation by qualified personnel it finds satisfactory. (*Lorraine Dubois v. Connecticut State Board of Education, et al.* (2nd Cir. 1984) 727 F.2d 44, 48.) A local educational agency is not required to rely solely on an independent evaluation and must be allowed to reassess a student itself – there is no exception to this rule. (*Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178.)

15. The personnel who assess the pupil must prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code § 56327.)

## DETERMINATION OF ISSUES

Issue 1: Did the District appropriately assess and/or offer to assess Student in all areas of suspected disability during the 2005-2006 school year? May the District conduct the assessments it proposed in the April 4, 2006 Assessment plan? Are additional assessments necessary?

16. As discussed in Legal Conclusion 12, the District was required to assess Student in all areas of suspected disability in the fall of 2005. As determined in Factual Finding 11, the District failed to assess Student's speech and language/communication needs.

17. As determined in Factual Findings 19, 27, and 36, the District failed to conduct appropriate assessments of intellectual functioning, behavior (the FBA) and it failed to conduct an appropriate "slingerland screening."

18. As determined in Factual Finding 37 through 39, the District has proposed to reassess Student. Student's Mother refused to consent to the assessment plan, even though she requested the assessments. As discussed in Legal Conclusion 13, the District

must reassess Student if conditions warrant reassessment. As determined in Factual Finding 40, conditions warrant reassessment. The subject assessment plan addresses all areas in which the District's previous assessment was deficient, using outside (non-District) assessors for all but the speech and language/communication assessment. The District may assess Student pursuant to the proposed assessment plan using the proposed assessors.

19. The District failed to establish that additionally assessments are not necessary.<sup>8</sup>

Issue 2: Do the January 26, 2006 individualized education program (IEP) and the March 29, 2006 IEP addendum, offer Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

20. As discussed in Legal Conclusion 1 through 8, an IEP is a FAPE only if it (1) is designed to meet a child's unique needs; (2) is reasonably calculated to provide some educational benefit, and (3) is the LRE for the child.<sup>9</sup> As discussed in Legal Conclusion 9, the IEPs must be examined based upon what was objectively reasonable at the time the IEPs were developed. As determined in Factual Finding 64, based upon what was objectively reasonable at the time the IEP was developed, the January 26, 2006 IEP did not offer Student a FAPE. For the identical reasons, as determined in Factual Finding 66, the March 29, 2006 IEP did not offer Student a FAPE.

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<sup>8</sup> It may be that the proposed assessments, when conducted, will not be appropriate or that additional areas will be identified during the course of said assessments. As such, a determination that no further assessments are necessary is premature.

<sup>9</sup> Services must also be provided "in conformity" with the IEP. This is not at issue in the present case because the District was never able to implement the subject IEP. Mother removed Student from school shortly after the January 26, 2006 IEP.

## ORDER

1. The District may assess Student pursuant to the April 4, 2006 Assessment Plan.
2. All of the additional relief sought by the District is denied.

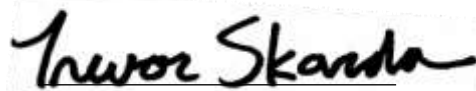
## PREVAILING PARTY

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 following findings are made in accordance with this statute: *The District partially prevailed on Issue No. 1; the District may assess Student pursuant to the April 4, 2006 Assessment Plan. The Student otherwise prevailed.*

## RIGHT TO APPEAL THIS DECISION

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

IT IS SO ORDERED THIS 4th DAY OF August 2006.



TREVOR SKARDA

Administrative Law Judge

Office of Administrative Hearings

Special Education Division