

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

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007030660

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on October 25, 26 and 30, 2007, in Laguna Hills, California.

Cynthia Yount, Esq., represented Petitioner Newport-Mesa Unified School District (District) at the hearing. Diana Casato, Special Education Director, appeared on behalf of the District.

There was no appearance at the hearing by Student or anyone representing Student.¹

¹ Student and Student's parents are represented in this case by Stefan R. Hanson, Esq. Approximately 45 minutes prior to the start of the hearing on October 25, 2007, Mr. Hanson telephoned OAH. Mr. Hanson informed the OAH staff that neither Student's parents nor their counsel Mr. Hanson would be attending the hearing in this matter. At the request of the ALJ, OAH staff telephoned Mr. Hanson to find out why no one would be

The District's due process complaint was filed on March 20, 2007. An amended due process complaint was filed on April 19, 2007. The District filed its second amended due process complaint on July 10, 2007. On July 30, 2007, OAH granted the District's request to continue the hearing. The case was taken under submission at the close of the hearing on October 30, 2007.

ISSUES

1) Were the psychoeducational, academic, occupational therapy, speech and language, and adapted physical education assessments conducted by the District as part of the Student's triennial IEP review (Multidisciplinary Report dated 12/6/06, and Adapted Physical Education Report of September and October 2006 observations) appropriate?

2) Did the District's proposed IEP dated February 14, 2007, as revised on May 17, 2007, offer Student a free and appropriate public education (FAPE)?

FACTUAL FINDINGS

THE DISTRICT'S TRIENNIAL ASSESSMENT

1. Student is an 11-year-old boy who lives within the jurisdiction of the District. Student is eligible for special education and related services under the category of autism/autistic-like behaviors. During the 2006-2007 school year at issue in this case, Student was in a general education fifth grade classroom in the District with a full time, one-to-one aide.

2. Under California and federal law, a school district is required to reassess a special education student at least once every three years to determine the student's continued eligibility for special education and the educational needs of the student. That

attending the hearing on behalf of Student. Mr. Hanson declined to state a reason, but explained that Student was not seeking to continue the hearing.

three-year assessment is often referred to as a “triennial” assessment. If a parent disagrees with the district’s assessment, the parent may request that the district pay for an independent educational evaluation (IEE) in one or more of the areas included in the district’s assessment. The law requires the district either to fund the IEE(s) or to file a due process complaint which seeks to prove the validity of the district’s assessment.

3. In the fall of 2006, the District began conducting a triennial assessment of Student. The multidisciplinary report of that triennial assessment was completed on December 6, 2006. Around the same time period, the District also conducted an adapted physical education (APE) observation and prepared a report.

4. The District’s triennial assessment report was reviewed over the course of two IEP meetings held on December 6, 2006, and January 17, 2007. Student’s parents attended both meetings. The parents asked questions and participated in the meetings, but did not raise any objections during the meetings to the assessments conducted by the District.

5. On April 3, 2007, Student’s attorney Stefan Hanson sent a letter to the District’s counsel explaining that Student’s parents disagreed with the District’s triennial assessment and APE assessment. Student requested IEEs for Student in the following areas: psychoeducational, academic, occupational therapy (OT), speech and language, and APE.

6. On April 4, 2007, the District sent a reply letter denying Student’s request for the IEEs. On April 19, 2007, the District amended its existing due process hearing complaint to add the issue of the validity of the District’s triennial assessment and APE assessment.

THE PSYCHOEDUCATIONAL ASSESSMENT

7. Traci Eseltine conducted the psychoeducational portion of the District’s triennial assessment. Eseltine has a degree in educational psychology, an educational

specialist degree (Ed. S.) in school psychology, and a pupil personnel services credential in school psychology. She is employed as a school psychologist in the District.

8. Eseltine was familiar with Student prior to the assessment. She had seen Student in his general education class when she was working with Student's teacher to make sure things were going smoothly in the classroom. In connection with her assessment of Student, Eseltine reviewed Student's records and conducted three formal observations of Student, two in the structured classroom setting and one during recess time.

9. To determine Student's cognitive level of functioning, Eseltine administered the Kaufman Assessment Battery for Children, Second Edition (KABC-II). The KABC-II is designed to examine the cognitive and processing abilities of children ages three through 18. It is validated for that purpose and normed for a population that includes Student.

10. Based on the results of the KABC-II, Eseltine also administered portions of the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition (WJ-III-Cog) to Student. She did not administer the entire WJ-III-Cog to Student, because she was only using the test to cross-validate some of her findings in the KABC-II in areas in which Student scored low. For this reason, the administration of only portions of the test did not invalidate the test.

11. Eseltine followed all the test publisher's instructions in administering the KABC-II and WJ-III-Cog, with the exception of one subtest of the WJ-III-Cog. In the "pair cancellation" subtest of the WJ-III-Cog, Eseltine permitted Student to finish the subtest after the time had expired, even though the publisher's instructions mandated that it be a timed test. She marked where Student was after the three minutes permitted by the test, but allowed him to continue working on the test. Student really wanted to finish the test, and Eseltine felt it was important to let him do so in order to maintain a rapport with him. Eseltine's actions in doing so did not invalidate the results of that subtest or the rest of her assessment because she did not score the responses he gave after the three minutes.

12. Eseltine also administered the Beery-Buktenica Developmental Test of Visual- Motor Integration, Fifth Edition (VMI). That test is designed to look at a child's integration of visual and fine motor abilities (hand-eye coordination). To measure Student's auditory processing, Eseltine administered the Test of Auditory Processing Skills, Third Edition. Both of these tests are validated for the purposes for which Eseltine used them and are normed for a population that includes Student.

13. One of the tests administered by Eseltine was the Test of Visual-Perceptual Skills, Third Edition (TVPS-3). This test is used to examine Student's visual processing. It is validated for that purpose and normed for a population which includes Student. At some point during the fall of 2006, Beth Ballinger, an optometrist who specializes in visual processing disorders, conducted an independent assessment of Student at the request of Student's parents. Ballinger also administered the TVPS-3 to Student as part of her assessment. However, Eseltine did not know about Ballinger's assessment until the January 2007 IEP meeting.

14. Because Student took the TVPS-3 twice within a short span of time, only the results of the first administration of the test would be considered valid. Ballinger's report does not state the date of her administration of that test, and the evidence did not establish whether Eseltine's administration of the test came before or after Ballinger's. Student scored higher on the test administered by Eseltine than the one administered by Ballinger. However, even if Eseltine's testing was second, it does not invalidate the District's assessment. Even before Eseltine was aware of Ballinger's testing, Eseltine recognized the differences in her own subtest results on the TVPS-3, and reported that the test results must be viewed with caution. She relied, in part, on portions of other tests, such as the WJ-III-Cog and KABC-II, which also tested visual processing, in order to help her determine Student's needs in that area. The IEP team considered Ballinger's report as well as Eseltine's report in determining Student's areas of unique need and drafting his goals during the IEP meetings in January and February 2007.

15. In order to obtain input from Student's parents and teachers, Eseltine used several rating scales as part of her assessment. These rating scales are administered in the form of questionnaires filled out by the parents and teacher. These rating scales included the Gilliam Autism Rating Scale (GARS), the Behavior Assessment System for Children, Second Edition (BASC-2), the Adaptive Behavior Assessment System, Second Edition (ABAS-2), and the Behavior Rating Inventory of Executive Functioning (BRIEF).

16. The GARS is designed to tell if a child's behaviors are consistent with children who have autism. The GARS is validated both to determine if a child has autism and to examine how a child's behaviors affect him so that those behaviors can be addressed in an IEP. It is standardized and normed for children with autism.

17. The BASC-2 looks at a variety of internalizing, externalizing and adaptive behaviors for students. The ABAS-2 examines a child's adaptive skills (those skills people need to function in the every day environment, such as eating and self-care). The BRIEF examines the executive functioning skills necessary for daily living. It looks at the types of skills used to organize, monitor and control cognitive processes, behavior, and emotional responses. Each of the rating scales used by Eseltine is validated for the purposes for which Eseltine administered it and normed for a population that includes Student.

18. When Eseltine received the rating scales filled out by the parents, she attempted to meet with the parents to discuss some of the answers. In particular, there was one question to which the parents provided no response. Eseltine set up an appointment to meet with Student's mother in November 2006. However, on the day scheduled for the meeting, Student's father called to cancel the meeting. When Eseltine explained that one question had not been answered, Student's father gave her the answer over the telephone.

19. Each of the tests administered by Eseltine was given in Student's primary language of English, and the tests were free of racial, cultural and sexual discrimination. In each case, Eseltine had been trained in the administration of the tests, and was

knowledgeable and competent to administer the tests. With the exception of the pair cancellation subtest of the WJ-III-Cog, discussed in Factual Finding 11, Eseltine administered the tests in accordance with the publisher's instructions. Eseltine's assessment was comprehensive in the area of Student's psychoeducational needs and tailored to evaluate those areas of need. The evidence supports a finding that the psychoeducational assessment conducted by Eseltine as part of the District's triennial assessment was valid and met the statutory requirements.

ACADEMIC ASSESSMENT

20. Linda Roberts, a special education teacher working for the District, conducted the academic testing of Student for the triennial assessment. Roberts has a degree in special education and a mild/moderate education specialist credential. She has worked for the District since 2006, and has frequently visited Student's general education classroom.

21. Roberts administered the Wechsler Individual Achievement Test, Second Edition (WIAT-II) to Student. The test was designed to assess Student's academic achievement in the areas of reading, writing, mathematics and oral language. It has been validated for that purpose and normed for a population that includes Student. The test was administered to Student in English and is not racially, culturally, or sexual discriminatory. Roberts has been trained to administer the WIAT-II, and has administered the test to other students in the past. She administered the test in accordance with the test publisher's instructions. Roberts explained that the WIAT-II is a particularly good test instrument to use with children on the autism spectrum because it has better visual elements than other, similar tests.

22. Roberts was knowledgeable and competent to administer the WIAT-II. The test was comprehensive and tailored to evaluate Student's academic areas of need. The

evidence supports a finding that the academic assessment conducted by Roberts as part of the District's triennial assessment was valid and met the statutory requirements.

OCCUPATIONAL THERAPY ASSESSMENT

23. The OT portion of the District's triennial assessment was conducted by Claudell Gapultos. Gapultos is a licensed occupational therapist who received his Master of Arts Degree in Occupational Therapy from the University of Southern California in 2001. He holds a certification with the National Board of Certified Occupational Therapists, and has worked as an occupational therapist for the District since January 2004. He is the lead occupational therapist for the District and is also a treating therapist at Children's Hospital in Los Angeles.

24. Gapultos had worked with Student relating to OT issues prior to his assessment and was generally familiar with Student's OT needs. To assess Student, Gapultos used the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), the Evaluation of Sensory Processing (ESP), and the Sensory Profile. He administered two supplemental portions of the VMI that were not administered by Traci Eseltine (the visual perception and motor coordination supplemental tests). He also observed Student on the playground, and obtained input from Student's parents through the ESP.

25. The BOT-2 is designed to measure fine motor precision, fine motor integration and manual dexterity. Gapultos chose that test, in part, because it has a "game-like" feel that would catch Student's attention. The two supplemental tests of the VMI were designed to measure Student's visual discrimination and fine motor coordination. The ESP is a questionnaire given to parents that addresses different sensory systems, such as vision and hearing. The Sensory Profile looks at these same systems, but also includes sensory modulation.

26. All of the tests and questionnaires used by Gapultos, with the exception of the ESP, are validated and normed for a population which includes Student. The ESP is not

a standardized, normed test, and Gapultos used it in order to get parental input to supplement the parental input given at the IEP meetings and in the Sensory Profile.

27. Gapultos is trained, knowledgeable, and competent to administer each of these tests, and followed the publisher's instructions in administering each of the tests. The tests were administered in English, and were not racially, culturally or sexually discriminatory. The tests were comprehensive and tailored to evaluate Student's OT needs. The evidence supports a finding that the OT assessment conducted by Gapultos as part of the District's triennial assessment was valid and met the statutory requirements.

SPEECH AND LANGUAGE ASSESSMENT

28. The speech and language portion of the triennial assessment was conducted by Sondra Leonard, a speech-language pathologist working for the District. Leonard has a Master of Science Degree in Communicative Disorders. She has attended training classes dealing with autism, and has worked in both private clinics and hospital settings to assist individuals with language disorders.

29. Leonard administered four tests – the Clinical Evaluation of Language Fundamentals – 4 (CELF-4), the Comprehensive Assessment of Spoken Language (CASL), the Oral and Written Language Scales (OWLS), and the Test of Problem Solving 3 Elementary (TOPS-3). Leonard was familiar with Student prior to the assessment, and had previously reviewed Student's records. In addition to the formal testing, Leonard conducted an informal assessment of Student during their conversation prior to the start of the formal testing. Leonard had also visited Student's classroom prior to the assessment.

30. The CELF-4 and CASL are designed to look at overall language abilities, including receptive and expressive language. Leonard administered the core subtests of each of these tests to help determine if Student had a language disorder and to examine the nature of that disorder. She attempted to administer the nonliteral language portion

of the CASL to Student, but was unable to do so. In order to be given that subtest, a child must get a certain number of questions correct to reach a "basal score." Student was unable to reach even that base level, so Leonard could not administer that subtest.

31. The results of the CELF-4 and CASL showed that language processing was one of Student's primary deficits in the speech and language area. Leonard administered the OWLS to obtain further information in the language processing area. The TOPS-3 is designed to measure higher level cognitive skills, such as determining causes and predicting outcomes. This was another area of weakness for Student.

32. All of these assessments are validated for the purpose for which Leonard used them, and are normed for a population that includes Student. Leonard had been trained to administer these assessments, was knowledgeable and competent to administer them, and had administered them in the past. The tests were given in accordance with the publisher's instructions, were given in Student's primary language of English, and were not racially, culturally or sexually discriminatory. Leonard also gave a questionnaire to Student's teacher to get a sense of Student's academic skills, but that was not a standardized test.

33. There was a discrepancy in the reporting of the results of the CELF-4 test. The District's triennial report listed Student's scaled scores and percentile ranking for each of the subtests of the CELF-4. According to the report, a scaled score between eight and 12 would put Student in the "average" range of abilities. This is incorrect. According to the publisher's manual, an "average" scaled score should be between seven and 13. Student had a scaled score of seven on four of the subtests on the CELF-4, which should put him at the bottom of the average range, instead of below average. Leonard had relied upon her memory of the test, and did not review the publisher's manual in preparing the report. However, Leonard explained during the hearing that Student's scores were on the borderline between the two categories, and the error did not change his eligibility for services, the goals proposed, or the services proposed in the IEP. The error did not involve

the administration of the test, only the written report of the results, and it did not invalidate the administration of the test.

34. Leonard's testimony in this regard was supported by the opinion of Kathleen Bryan, an expert in speech-language pathology, who has worked in the field for over 30 years. She reviewed Leonard's assessment and explained that the error in scoring did not affect the overall findings of the report or invalidate Leonard's assessment of Student.

35. The tests given by Leonard were comprehensive and appropriate to evaluate Student's speech and language needs. The evidence supports a finding that the assessment conducted by Leonard as part of the District's triennial assessment was valid and met the statutory requirements.

THE ADAPTED PHYSICAL EDUCATION ASSESSMENT

36. Ted Williams conducted the APE assessment on behalf of the District. Williams is an APE teacher working for the District. During the 2006-2007 school year, Student was in a general education class for physical education (PE), not an APE class. When the parents considered the District's February 14, 2007 IEP offer, the general education PE class was one of the portions of the IEP to which they agreed. There was no evidence presented at hearing to show why they subsequently requested an IEE in the area of APE.

37. Williams conducted his assessment through observation of Student in the classroom, at lunch, and on the playground. Williams observed Student on the playground on four occasions. He saw Student playing handball with his peers. Student's gross motor abilities were average. Student was competitive when he played with his peers and was knowledgeable about the rules of the game. At one point in the assessment, Williams asked Student to explain the rules of handball to him. Student was able to do so. Williams also spoke with the general education PE teacher to see how Student performed in PE class. She said he did fine.

38. Williams telephoned Student's parents to talk with them as part of the assessment, but could not recall if he actually spoke to them prior to the December 2006 IEP meeting where his report was discussed. During the IEP meeting, the parents had an opportunity to discuss the assessment and ask questions. At the end of the meeting the parents told Williams that he knew their son well and thanked him for the evaluation.

39. Williams's findings regarding Student were supported by Student's successful participation in general education PE, and the parents' agreement that he was properly placed in a general education PE class.

40. The evidence supports a finding that Williams's observations and assessment of Student were appropriate to determine whether he had any unique needs in the area of APE, and that no further assessment was necessary.

THE DISTRICT'S PROPOSED IEP DATED FEBRUARY 14, 2007, AS REVISED ON MAY 17, 2007

41. The District contends that the IEP proposed by the District on February 14, 2007, as revised on May 17, 2007, offered Student a FAPE. In order to provide a FAPE to a child, a district's proposed special education placement and services must be designed to meet a child's unique needs, be provided at no cost to the parents, provide educational benefit to the child, be provided in accordance with the child's individualized education program (IEP), and be provided in the least restrictive environment appropriate for the child.

42. Student's unique needs were identified in the District's triennial assessment. Student has unique needs in the areas of pragmatic language (such as conversational skills), socialization, attention, reading comprehension, auditory, visual and sensory processing, and mathematical reasoning. He also has needs in the higher functioning areas of language, including "meta-linguistic" abilities such as understanding figurative language, problem solving, and comprehending spoken paragraphs. Although his

knowledge of grammar and writing mechanics is good, he has difficulty maintaining a topic when writing and his expressive vocabulary is poor. Student has behavioral needs relating to voice modulation, shutting down when frustrated by work, and attention issues.

43. In order to review the District's triennial assessment and prepare an appropriate education program for Student, the District held an IEP meeting on December 6, 2007. The IEP team was not able to finish its work on that date, so two continuation meetings were held on January 17, 2007, and February 14, 2007. Student's parents attended all three meetings.

44. The IEP team discussed goals and objectives, placement and services during the meetings, and the District made an offer of FAPE at the February 14, 2007 IEP meeting. Student's parents did not agree to the IEP on that date, and indicated that they would take the IEP home with them to review. On March 4, 2007, Student's counsel wrote a letter to the District's Director of Special Education stating that Student's parents had consented to certain portions, but not all, of the proposed IEP offer. The letter outlined the portions of the IEP to which the parents consented.²

45. On May 4, 2007, the District sent notice to Student's parents that the District planned to hold an addendum IEP team meeting. The letter proposed three dates in May for the meeting, but indicated that the District planned to hold the meeting on May 17, unless the parents requested otherwise. The meeting was held on May 17, 2007, but neither Student's parents nor their attorney appeared at the meeting. The IEP meeting

² To avoid confusion between the two IEP offers, the contents of the letter will be discussed below in connection with the District's May 17, 2007 IEP offer. In filing this due process complaint, the District seeks an order establishing the validity of the May 17, 2007 IEP offer, not the earlier offer. Therefore the February 14 offer and the letter from Student's attorney are relevant only insofar as they relate to the May 2007 IEP offer that was ultimately made.

notes for the meeting state that “Parents did not respond to IEP notices sent on May 4, 2007 via email and on May 7, 2007 via letter sent home with [Student]; therefore district held addendum IEP without the presence of the parents. Addendum will be sent home to the parents.”

46. The District’s offer of FAPE made at the May 17, 2007 IEP meeting called for Student to be placed in a general education classroom with a one-to-one aide trained in Applied Behavior Analysis (ABA) to accompany Student throughout the school day for the remainder for the 2006-2007 school year and the first part of the 2007-2008 school year.³ The District offered the following designated instruction and services (DIS) during the school day: resource center services, speech and language services and occupational therapy services. Student would also be provided with ABA services at home.

47. The proposed speech and language DIS services consisted of two 30-minute individual sessions per week, two 30-minute group sessions per week, and one 15-minute collaboration session between the speech-language therapist and the classroom teacher per week. These speech language services would be provided by District staff during the school day, and Student would be pulled from his general education classroom to attend the individual and group sessions. There would also be speech and language services provided by a non public agency (NPA) provider outside of the school day, once a week, for 60 minutes each session, until September 1, 2007. During the month of September, there would be two hours of collaboration time between the school personnel and the NPA speech- language therapists to assist the transition of Student away from the NPA services.

³ Because the May meeting was an addendum to the February meeting, the IEP goals, placement and services only continued through February 2008. The offer included services during the summer of 2007.

48. The proposed OT services included one 45-minute session of OT per month until June 2007. The IEP meeting notes indicated that "4 lessons to be completed in the area of utilizing sensory motor activities in the general education setting." The IEP also called for collaboration between the occupational therapist and the general education teacher for one session per month, 45 minutes each session.

49. The resource center services consisted of three 45-minute sessions per week in a group setting and two five-minute sessions per week to address visual processing and perceptual goals. These resource center sessions would occur during the school day and would take place in the school's resource center. Student would be pulled from his general education classroom to attend the sessions. The IEP also called for one 30-minute collaboration session per week between the special education teacher in the resource center and Student's general education teacher. The visual processing sessions would be conducted by an aide who had been trained by Jane Vogel, the District's visual processing expert consultant.

50. ABA is a teaching methodology that is very successful when used to instruct students on the autism spectrum. It looks at a child's overt behaviors and manipulates the environment to change or shape behaviors. It should occur throughout a child's day at school, and does not require a child to be in a certain room or facility. An ABA-trained aide can assist a student by breaking down the things being taught in the general education classroom to meet the needs of that student. Any educator or instructional assistant trained in ABA methodology can provide the services. There is no requirement that the ABA services be provided by an NPA.

51. The February and May IEP offers provided for the same amount of direct ABA services for Student, but differed regarding who would provide those services. Both IEPs called for Student to receive 32 hours per week of ABA-trained aide services during the school day. The February IEP offer called for those services to be provided by an NPA provider. The May IEP offer continued those services, but called for those services to be

provided by an ABA-trained District aide after September 4, 2007 (when the 2007-2008 school year began). The IEP also called for eight hours per week of ABA services at Student's home to be provided by an NPA provider, with six hours of supervision by the NPA provider per month, one hour of which would be utilized at the school site, and four hours of ABA clinic per month by the NPA provider.

52. The ABA services outlined above would only be provided during the school year. Separate services were offered for the extended school year (ESY) during the summer months. Those services consisted of a speech and language social skills program four times a week for two hours per day from July 2, 2007, to July 30, 2007. During the hearing, speech-language pathologist Sondra Leonard explained that the social skills group program was called "Camp Friendship" and was designed to assist "high-functioning" students on the autism spectrum who have difficulties with pragmatic language. The sessions are held four days a week, and there is an optional field trip on Fridays. During the sessions they work on conversational skills, problem solving skills and skills involving higher level cognitive functions. These are all areas of need for Student. If Student participated in this program, Student would be provided with a one-to-one aide to assist Student during that time.

53. The District also offered ABA tutoring services provided outside the school program by an NPA provider one time per week, for eight hours each session, from July 2, 2007, to August 31, 2007, and NPA supervision and clinic hours during that same time period.

54. The IEP contained 27 goals for Student, covering the areas of speech and language, social/emotional, writing, mathematical reasoning, reading comprehension, sensory processing, behavior, and visual/perceptual. The IEP also called for modifications to the classroom environment for Student, including things such as preferential seating, visual aids, extra time for tests, and sensory-motor breaks. The IEP offered transportation to and from the school for Student's program.

55. In Hanson's letter dated March 4, 2007, Student's parents consented to many portions of the February 14, 2007 IEP. To the extent that the District's May 2007 proposal was the same as the February proposal, the parents' consent letter is relevant to the May proposal. Student's parents consented to: 1) Student's eligibility category of autism; 2) Student's placement in the fifth grade regular education classroom at Newport Coast Elementary School, including participation in general education PE; 3) the occupational therapy services; 4) all the goals and objectives set forth in the IEP, with the exception of the two visual/perceptual goals;⁴ 5) the "program modifications, supplementary aids and accommodations" portion of the IEP; and 6) most of the "supports/modifications provided to school personnel" except for the vision consultant.⁵

56. In the letter from Student's counsel, Student's parents consented to part of the District-provided speech and language services, but did not want Student pulled from Student's general education room for speech and language services. Instead, the letter stated that "Since the District is unable or unwilling to schedule speech and language services after school, [Student's parents] request that [Student] continue to receive his individual, direct speech and language services" from an NPA provider. The parents also

⁴ In the letter, when Student's counsel recites the parents' approval to the third behavioral goal, the letter substitutes "60%" instead of the "80%" called for in the goal. However, that appears to be a typographical error rather than an attempt to revise the District's proposed goal.

⁵ This list contains only the areas to which the parents consented that remained unchanged in the District's May 2007 IEP proposal. Because Student's parents consented to these items, there is no need for this Decision to review them to determine if they provided a FAPE. Only the contested portions of the May IEP will be addressed here.

objected to Student receiving group, direct resource services because they did not want Student to be pulled from the general education classroom and miss time in that class.

57. During the hearing, the District's experts explained that it is appropriate and necessary to pull Student from his general education classroom for his resource center services and speech and language services. Although Student is making educational progress, the triennial assessment findings and the observations of his general education teacher confirmed that he has trouble in higher level mathematical reasoning, reading comprehension, socialization, and pragmatic language. Student's slow processing speed and other disabilities cause him to spend additional time to complete tasks, and he requires one- to-one aide assistance in the classroom. At times, the interventions provided for Student are different enough from what is happening in the general classroom that they are best provided outside of class. Student is now old enough to perceive his differences from other children and can grow anxious when it takes him longer to complete a task than the other children in his class. Student's parents are concerned about Student being perceived as different by his peers. By pulling Student out of his general education setting for a short time each week to work on his academic goals and speech and language goals, the school can provide him with greater service in a setting that will avoid embarrassment. The special education teacher, general education teacher and speech-language pathologist will collaborate to make certain that his pull-out services compliment and assist his general school work rather than detract from it. The pull-out services will be provided at times that will least disrupt his regular education schedule.

58. The testimony of the District witnesses is persuasive in this regard. The triennial assessment shows significant areas of weakness that require special education. Although Student is making progress in the regular education environment, he is still behind grade level in areas such as reading comprehension. The intensive intervention of the resource center is warranted. In addition, the pull-out services will save Student from anxiety and loss of self-esteem. Because the District staff will collaborate to ensure that

Student's pull-out services will not interfere with his general education studies, there is no need to have services provided by an NPA after school.

59. Districts are required to educate disabled children in the same class as their nondisabled peers, and removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This requirement is known as the "least restrictive environment." There are four factors to consider when determining if a placement is in the least restrictive environment: (1) the academic benefit of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom.

60. The evidence supports a finding that the District's May 2007 IEP proposal called for Student to be educated in the least restrictive environment appropriate for Student. Student already has a one-to-one aide and many other supplementary aids and services in the regular education classroom, but he is still below grade level in certain academic areas. At this point it is necessary to try more intensive interventions in the resource center. Those resource center services are necessary for Student to achieve academic benefit from his education. Because Student will be in the general education classroom for most of the school week, he will still enjoy the non-academic benefits of being with his typically developing peers. There would be no significant extra cost to the District from mainstreaming Student, because the District is already mainstreaming Student. Likewise, there will be no detrimental effect on Student's teacher or classmates from being mainstreamed. The evidence supports a finding that, as of the May 2007 IEP, the nature and severity of Student's disability was such that, even with supplementary aids and services, he still needed services outside the classroom to meet grade level standards.

61. The District's May 2007 proposal regarding District-supplied ABA services is also supported by the evidence. At the time of the February 2007 IEP offer and prior offers, the District did not have a sufficient District-run ABA program to provide appropriate ABA tutoring and aide services to Student. However, as of May 2007, the District had developed its own ABA program.

62. Dr. Lori Williams is the Coordinator of Autism Programs for the District. She described the training given to all general and special education staff at Student's elementary school. The school's instructional assistants who will be working as ABA aides must attend training consisting of 12 hours of lecture and five days of hands-on training working with autistic children to practice the ABA techniques. The aides must also pass an examination. Because the District now has its own trained ABA staff, it is no longer necessary for the District to contract with NPA providers to provide aide support during the school day. In Williams's opinion, it is preferable to use District-trained aides because the District can oversee their training and provide quality control. There are no training requirements for NPA providers of ABA services, and the amount and type of training varies from agency to agency. Williams believes that Student's goals and objectives can be fully met by using District ABA aides during the school day. There was nothing in Student's IEP or the triennial assessment to show that he required services by an NPA or a particular provider.

63. Williams's testimony was supported by the testimony of other witnesses, including Marie Baba. Baba is the District's autism specialist. She helps to coordinate the District's ABA training program and provides strategies for use in the classroom, including behavior management systems. She conducted both formal and informal observations of Student, and participated in Student's May IEP meeting. She explained that NPA providers are only used to provide ABA services when the District does not have sufficient numbers of trained aides to provide ABA services or when a child requires such a high level of expertise to benefit from his education that the District does not have appropriate

personnel. The District now has trained aides with a sufficient level of expertise to meet Student's needs during the school day.

64. Student's general education teacher agreed that having District-provided aides would assist Student by allowing the teacher to collaborate with the aides regarding Student's program on a daily basis. The NPA aides used during the 2006-2007 school year were only present during the school hours that Student was present or at clinic meetings and did not meet with the teacher immediately before or after class. In addition, one of the NPA aides was not fully cooperative with the classroom teacher regarding Student's education. Having District-employed aides will avoid both of these problems.

65. Dr. Williams, Marie Baba, and other District witnesses were unanimous in their testimony that Student would not have difficulty transitioning from his NPA aide to a District aide. Although autistic children often have difficulty with transitions, Student has not demonstrated that difficulty in transitioning to new people. For example, when his NPA provider changed aides during the last school year, Student had no trouble making the change. He likes people and readily worked with each of the District's assessors, even though he had not met some of them prior to their assessments. In addition, in order to ease the transition process, the May IEP called for the change from NPA to District aides to be made at the beginning of the 2007-2008 school year.

66. The District witnesses also testified that it was appropriate to reduce the number of hours that Student received for his home ABA program in light of the progress he was making with following directions and attentiveness.

67. The letter from Student's attorney stated that the parents wanted the ABA services to be provided throughout the school year with only a one-week break. However, there was no evidence presented at the hearing that Student needed such services. Instead, the District experts testified that the ESY services called for in the IEP were appropriate to meet Student's needs, and that the Camp Friendship summer program was

precisely the right type of program to address the areas in which Student has the greatest weakness.

68. The evidence supports a finding that the District's offer of school and home ABA services in the May 17, 2007 IEP was appropriate. While a District may use outside agencies to provide services when the District has no appropriate program, there is no need to do so once an appropriate program has been established. The uncontested testimony established that the District's program provides appropriate training in ABA methodology, and that the ABA program proposed by the District in May was appropriate.

69. Although Student's parents agreed to most of the goals in the February IEP (which were carried over unchanged in the May IEP), they requested the addition of a "group activities" goal. However the goal proposed by the parents was very broad and covered a large range of activities, so it was not appropriate to include that proposed goal in the IEP. Instead, portions of that goal were already included in the IEP goals, but in smaller increments which were more appropriate for Student's rate of learning. The evidence supports a finding that the District's proposed goals and objectives were appropriate and covered all of Student's areas of need.

70. In addition, Student's parents did not consent to the two visual processing goals, or the visual processing DIS services called for in the IEP. It is unclear why they did not agree to these goals or services, since they brought Ballinger's visual processing report to the January IEP meeting. Both Ballinger's report and the District's assessment found that Student had needs in the area of visual processing. Jane Vogel, the District's visual processing expert, explained that Student's visual processing needs should be addressed in a school setting, not in private lessons. In a school setting, the District staff can pull from Student's curriculum and give Student an opportunity to generalize his skills in his academic work during the school day. If those services are provided in an optometrist's office, there is little chance to generalize the skills into the school setting.

71. The evidence supports a finding that placement, goals and services proposed in the May 17, 2007 IEP were appropriate to meet all of Student's needs, were reasonably calculated to provide educational benefit to Student, and offered Student a FAPE.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The District has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

THE DISTRICT'S TRIENNIAL ASSESSMENT AND APE ASSESSMENT WERE APPROPRIATE

2. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.)⁶ The request for an initial assessment to see if a child qualifies for special education and related services may be made by a parent of the child or by a state or local educational agency. (20 U.S.C. § 1414(a)(1)(B).) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

3. School districts must perform assessments and reassessments according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student's native language and that are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1); Ed. Code, § 56320,

⁶ The federal code uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning for these purposes.

subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).)

4. In performing a reassessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, § 56381, subd. (b)(1).) Based upon that review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student and to decide whether modifications or additions in the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).)

5. As more particularly set forth in Factual Findings 1 – 40, the District's triennial assessment met the requirements of law and assessed Student in all areas of suspected disability. The various tests were given in Student's native language of English, and were not racially, culturally or sexually discriminatory. They were given by trained, knowledgeable, and competent individuals, and the District did not rely on any one test or assessment to make its findings. With the exception of the ESP and one questionnaire given to Student's teacher, all the tests and other assessment instruments used in the assessment were valid and reliable for the purpose for which they were used and normed

for a population that included Student. The school psychologist administered the intellectual and social/emotional portions of the assessment. The tests given were comprehensive and tailored to address Student's areas of unique need.

6. As set forth in Factual Findings 36 – 40, although no formal testing was done in connection with the APE assessment, that assessment was also appropriate to determine that Student did not have any areas of unique need with respect to APE and that no further testing was needed. The findings in the District's report were supported by Student's success in the general education PE class and the parents' agreement to that class in their letter of March 4, 2007.

THE DISTRICT'S PROPOSED IEP DATED MAY 17, 2007, OFFERED STUDENT A FAPE

7. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

8. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (*Rowley*), the Supreme Court discussed what is required for an offer of FAPE. The court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education

that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

9. As set forth in Factual Findings 41 – 71, the testimony of the District witnesses shows their clear understanding of Student's unique needs. They were unanimous in their testimony that the program, goals and services the District offered are designed to meet those unique needs and are reasonably calculated to provide Student with educational benefit.

LEAST RESTRICTIVE ENVIRONMENT

10. The law requires that to "the maximum extent appropriate, children with disabilities...are educated with children who are not disabled...." (20 U.S.C. § 1412(a)(5).) "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5).)

11. Case law has provided guidance for determining whether a particular program for a student constitutes the least restrictive environment. In order to measure whether a placement is in the least restrictive environment, four factors must be considered: (1) the academic benefit of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 – 1404 (*Rachel H.*))

12. In the instant case, as set forth in Factual Findings 56 – 60, Student is being educated in a regular education classroom along with his typical peers. The District is

proposing that Student be pulled from that regular education classroom for a few hours each week to receive special instruction in the resource center and for speech and language sessions. Considering the four factors of the *Rachel H* case, it is clear that the critical factor here is the academic benefit to Student from the pull-out services. The educational experts at the hearing agreed that Student needs a certain amount of special instruction outside of the general classroom to help him benefit from his education. As set forth in Factual Findings 56 – 60, Student has been receiving supplementary aids and services in his general education classroom and is making educational progress, but he is still behind grade level in certain areas. The intensive, personalized instruction in the resource center and his speech and language sessions will provide him with an opportunity to work on his deficits. It will also help prevent erosion of his self-esteem and prevent Student from being perceived as “different” because he cannot finish his class work on time. He will still receive the non- academic benefits of a general education placement because most of his week will still be spent in a general education classroom.

13. The evidence supports a finding that the District’s proposed IEP of May 17, 2007, offered Student a FAPE in the least restrictive environment appropriate to meet Student’s unique needs.

ORDER

In accordance with the evidence presented at the due process hearing, the ALJ makes the following determinations:

1) The psychoeducational, academic, occupational therapy, speech and language, and adapted physical education assessments conducted by the District as part of the Student’s triennial IEP review (Multidisciplinary Report dated 12/6/06, and Adapted Physical Education Report of September and October 2006 observations) were appropriate.

2) The District’s proposed IEP dated February 14, 2007, as revised on May 17, 2007,

offered Student a free appropriate public education.

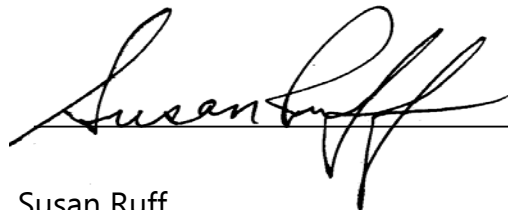
PREVAILING PARTY

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. In accordance with that section the following finding is made: The District prevailed on all issues.

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 90 days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: November 13, 2007

A handwritten signature in black ink, appearing to read "Susan Ruff", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

Susan Ruff

Administrative Law Judge

Special Education Division

Office of Administrative Hearings