

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

In the Matter of:

SANTA MONICA–MALIBU UNIFIED
SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2007050008

DECISION

Administrative Law Judge Debra R. Huston, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in Santa Monica, California on September 25 through 28, 2007.

Santa Monica–Malibu Unified School District (District) was represented by Mary Kellogg, Attorney at Law. District Special Education Coordinator Dr. Michael Jason attended all days of the hearing, with brief periods of absence.

Student was represented by Jodi Bynder, Attorney at Law. Student's mother (Mother) attended the hearing on all days, with brief periods of absence.

District filed the due process complaint in this matter on April 30, 2007. District's request for a continuance was granted on May 21, 2007. At the close of hearing on September 28, 2007, the parties' request for the opportunity to file written closing arguments was granted, and closing briefs were filed and the matter submitted on October 12, 2007. The parties stipulated that the decision would be due 30 days after the submission.

ISSUE

Were District's December 2006 assessments of Student appropriate?

CONTENTIONS OF THE PARTIES

The District contends that it assessed Student in all areas of suspected disability, and that its assessments complied with the requirements of law in all respects.

Student contends that District's assessments were inappropriate because District failed to properly assess him in all areas of disability and failed to identify all areas of disability. Those areas of disability, according to Student, include reading comprehension, reading fluency, writing fluency, communicating ideas in writing, math calculation, visual/motor perceptual ability, phonemic processing, and spelling. According to Dr. Byrd, Student needs accommodations *and* remediation in math, reading, and written language, including spelling. In addition, Student contends that the assessments are inappropriate because they do not contain sufficient relevant developmental information, academic information, or written language information to assist in determining Student's educational needs or in developing Student's IEP because the tests did not test what was expected of a tenth grader. Student also contends that District used only one measure, the Woodcock Johnson Tests of Achievement, to determine whether a discrepancy between ability and achievement existed, and that the use of one instrument rendered the assessments inappropriate. Finally, Student contends the District's assessment was inappropriate because there were several scoring errors in District's assessment.

FACTUAL FINDINGS

BACKGROUND

1. Student is 16 years of age and his legal residence is within the geographical boundaries of the District. Student attended Malibu High School in his freshman and sophomore years and is currently in his junior year of high school in Texas, where he is

temporarily staying with relatives while his mother recovers from surgery. Student will return to Malibu and to Malibu High School as soon as his mother is physically able to care for him. Student's primary language is English.

2. In 2003, Student was identified by District as a student with a specific learning disability (SLD), and was receiving resource specialist program services (RSP), learning resource center services (LRC), and designated instruction and services (DIS) counseling. In December 2006, during Student's tenth grade year, District conducted assessments in preparation for Student's December 11, 2006, triennial IEP team meeting. It was determined as a result of the assessments that Student's overall cognitive abilities were in the average range. Ms. Juliette Boewe, the school psychologist who prepared the psychoeducational report of Student for District's assessment of Student, determined that Student had a severe discrepancy of at least 1.5 standard deviations between ability and achievement in the area of written expression that could not be corrected solely through other regular or categorical services offered within the regular education program. Ms. Boewe also found that the discrepancy was directly related to a processing disorder in one or more of the basic psychological processes defined in the Individuals with Disabilities Education Act (IDEA), including sensory motor skills (specifically, processing speed) and cognitive abilities (specifically, attention).

3. Student's IEP team met on December 11, 2006, and determined that Student qualified for special education and related services under the category of "other health impaired" (OHI) as a result of his attention deficit hyperactivity disorder (ADHD), and also under the category of "specific learning disability" (SLD) as a result of deficits in written expression and processing speed.

4. On March 14, 2007, District received notice from Mother that she disagreed with District's assessments and wanted an independent educational assessment, to be conducted by Dr. Robert Byrd, the licensed clinical psychologist who had assessed Student

three years earlier. On April 30, 2007, District filed a request for due process.¹

DISTRICT'S ASSESSMENT OF STUDENT

5. In general, a local educational agency is required to assess a student in all areas of suspected disability prior to making any determination regarding special education eligibility. A local educational agency is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including technically sound instruments that may assess the relative contribution of cognitive, behavioral, physical and developmental factors. The assessments are required to be all of the following: 1) selected and administered so as not to be discriminatory based on race, culture, or gender; 2) administered in the language and form most likely to yield accurate information; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of the assessments. In order to obtain an IEE at public expense, the parent is required to provide notice that he or she disagrees with an evaluation obtained by the public agency and request an IEE. The public agency must then, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the

¹ Thereafter, in June 2007, Student obtained an assessment from Dr. Byrd. During the prehearing conference in this matter, Student's counsel indicated that Student wanted reimbursement for Dr. Byrd's report as a remedy in this proceeding. However, that remedy was unavailable since Student did not file his own request for a due process hearing. Student's counsel elected to go forward with the hearing as scheduled, rather than file a request for a due process hearing seeking reimbursement for Dr. Byrd's report.

parent did not meet agency criteria.

6. District's assessment of Student consisted of a psychoeducational assessment by school psychologist Ms. Juliette Boewe; an assessment of reading abilities conducted by LRC teacher, Ms. Ann Keller; an academic assessment conducted by RSP teacher, Ms. Chloe Hammer; and a health assessment conducted by the school nurse. Student's areas of suspected disability included visual processing, processing speed, attention, reading (including fluency, decoding, and comprehension), writing, and academic fluency.

7. As a result of its assessments of Student, District identified two handicapping conditions under the IDEA, including SLD and OHI. In addition, District identified areas of deficit that were not "handicapping conditions" within the meaning of the IDEA. For example, District identified "fluency" as an area of deficit. Student's fluency was low in all areas, which is why processing speed was identified as an area of need. Fluency affects reading comprehension, and while District identified unique needs in the area of reading comprehension, Student did not qualify for special education and related services under the category of reading comprehension as a handicapping condition because Student tested in the average range in that area. However, Student's IEP team developed a goal in the area of reading comprehension to address reading fluency, which was specifically related to the context of grade-level text. Pursuant to that goal, Student was being provided specific, research-based intervention in reading and writing in the LRC. The programs used by Student included Language, Reading Naturally, Lindamood Bell, and Lexia.

Reading assessment

8. Ms. Keller, a credentialed teacher since 1971 and one of the first resource specialists in California, is employed by District as a learning resource center specialist and inclusion specialist. Ms. Keller conducts assessments of students as part of her job in the LRC. Ms. Keller worked as a school psychologist for 20 years prior to returning to teaching

as a learning resource specialist. Ms. Keller is a licensed educational psychologist and has a private practice in which she conducts assessments and consults with various school districts. Ms. Keller holds a master's degree in special education and also one in education administration. She holds a general education credential, a learning handicapped credential, a pupil personnel services credential, a preliminary educational administration credential, and a CLAD credential. Ms. Keller has 36 years of experience working in education, with 10 of those years spent working as a learning resource specialist. Ms. Keller is properly licensed and qualified to conduct the type of assessment she conducted in this case.

9. Ms. Keller was Student's teacher in the LRC for one and one-half years, during his freshman and sophomore years at Malibu High School. Student was in the LRC two to three times a week for 55 minutes each time. Ms. Keller worked with Student on fluency in the LRC. Ms. Keller is aware that Student has a reading disability—specifically, dyslexia. Ms. Keller is very familiar with that disability.

10. Specifically, in her assessment Ms. Keller wanted to examine Student's decoding, reading comprehension, and reading rate. Ms. Keller observed Student in the classroom, reviewed Student's work for the past one and one-half years in the LRC, spoke with Student's other teachers, interviewed Student, reviewed his records, including IEPs and assessments, and administered several tests. The instruments Ms. Keller administered were the Comprehensive Test of Phonological Processing (CTOPP), the Gray Silent Reading Test, the Slossen Oral Reading Test, the Graded Word List, the Test of Silent Word Reading Efficiency, the Reading Fluency Monitor, and the Informal Reading Sample.

11. Ms. Keller has administered the CTOPP approximately 500 times. This test was the appropriate one to use for Student because he had difficulty in the area of reading fluency, and this test determines which areas in reading are the most difficult for the student. Student's scores in phonological awareness were in the 84th percentile, which is in the above average range. His score in phonological memory was in the 73rd percentile,

which is the high average range. His score in rapid naming, which was in the 12th percentile and the below average range, was low in comparison to his overall ability and scores on other portions of the assessment. Student also had difficulty with rapid naming or processing speed, which will cause Student to have difficult reading fluently, and will cause a slower reading rate than average. Ms. Keller believes that Student's scores on the CTOPP were valid because she had worked with him for one and one-half years, and had repeatedly noticed his difficulties. In addition, Student's results on the test were supported by the results of the psychoeducational evaluation.

12. Ms. Keller administered the Gray Silent Reading Test, which she has administered approximately 50 times, to address the area of reading comprehension. This test is not timed. Timed tests are an area of difficulty for Student. This test has two to three paragraphs of passages to read, followed by multiple choice questions about them. The raw score determines Student's grade level. Student performed well on this test with encouragement. He received a standard score of 100, which is in the 75th percentile and in the high average range. Ms. Keller believes that this standard score is valid for Student. According to Ms. Keller, Student is strong in reading comprehension. This opinion is supported by the scores student received on the Wechsler Individual Achievement Test (WIAT) administered by the RSP teacher and the WIAT administered by Student's expert, Dr. Byrd.

13. Ms. Keller also administered the Slossen Oral Reading Test, which she has administered approximately 750 times, to test Student's decoding skills. Student read all the words in the test from the first grade to high school age level, missing only six words in the entire test of grade-selected words. His score was in the high school range on this test. Student had made major gains in decoding over since his last assessment and could read most any word if given time to do so. Student's scores on the Slossen Oral Reading Test were supported by other measures and also by Ms. Keller's clinical experience with Student, and were valid.

14. In addition, Ms. Keller administered the Test of Silent Word Reading Efficiency, in which Student was asked to read three passages at the tenth grade level. Student read at a rate of 80 words per minute, which is slow compared to the average rate of 125 to 150 words per minute for other students of Student's age, and placed Student in the ninth percentile. This score indicates difficulty in fluency. Ms. Keller believes this score is valid because she saw Student's difficulty with fluency daily as his teacher in the LRC and because Student read at a rate of 85 to 95 words per minute on informal assessments in the LRC using Read Naturally 8.0, which is one of the programs Ms. Keller used to teach Student there. Ms. Keller believes this score is valid. However, a slow fluency rate does not necessarily affect Student's reading comprehension if Student is allowed to re-read the material.

15. In her written report, Ms. Keller determined that Student's decoding is in the average range, and that Student's reading comprehension is average if Student is given enough time. This is consistent with Student's standard score of 99, which is the 47th percentile, on the WIAT reading subtest administered by Ms. Hammer and with Student's reading comprehension score on the Woodcock Johnson Tests of Achievement (WJTA) administered by Ms. Hammer, which was in the average range. According to Ms. Keller, reading fluency is a significant weakness for Student. His reading fluency was variable, according to Ms. Keller, and was weaker when he was not feeling good about himself.

16. Ms. Keller's assessment showed that Student had the ability to work within curriculum standards of his grade level. Consistent with this, Student was receiving average grades in his college preparatory and advanced placement classes at Malibu High School.

Student contends the reading assessment was inappropriate based on the testimony of his expert, Dr. Byrd. Dr. Byrd assessed Student in June 2007² and also three

² Dr. Byrd administered a number of testing instruments to Student, including the Children's Depression Inventory, the Minnesota Multiphasic Personality Inventory –

years prior to that. Dr. Byrd has provided counseling to Student as well. Dr. Byrd is a licensed clinical psychologist employed by a community mental health agency as the coordinator of children's assessments.³ Dr. Byrd had concerns about the Gray Silent Reading Test (GSR), administered by Ms. Keller, on which Student received a standard score of 110, which is in the high average range, because of the way it is scored. For example, a person can miss two questions on every subtest, but if the next one is right erases all prior errors and inflates the score. If the person gets three incorrect, he or she stops. Dr. Byrd believes that a person can pass that test without even reading the passages if the person has a lot of general knowledge. Student reported to Dr. Byrd that there is "no way" he performed in the high average range on that test, and that the score was incorrect. According to Dr. Byrd, Student's score of 110 is inconsistent with his grade of C- in English and an F he received on a progress report in world history, both of which courses require reading comprehension. In addition, the student is given unlimited time to

Adolescent, the Nelson Denny Reading Test, Form H, the Revised Child Manifest Anxiety Scale, the Test of Written Language – Third Edition, and the Wechsler Individual Achievement Test – Second Edition. In a number of areas, Dr. Byrd's assessment of Student yielded results that were consistent with those of District's assessment. Those will not be addressed here.

³ Dr. Byrd also maintains a private practice in which he completes evaluations, provides therapy, and does consulting work. He received his academic degrees from fully accredited academic institutions, and Dr. Byrd is licensed by the State of California as a nonpublic agency to conduct individual and group therapy and psychological evaluations. Various school districts contract with Dr. Byrd to conduct psychoeducational evaluations. Dr. Byrd has completed approximately 500 to 600 psychoeducational evaluations. He has also participated in many IEP team meetings, and he has testified at due process hearings two or three times. He was called by the Student in each instance.

complete the GSR, and this is not consistent with an academic environment with classes 45 minutes in length and more distractions and novel information. Dr. Byrd disagrees with Ms. Keller's opinion that Student's reading comprehension is "quite good" if given enough time.

17. Student's reading speed score, based on Dr. Byrd's administration of the WIAT, was in the first quartile. Student needed to refer back to a passage to understand what he read. Based on Student's scores on the Nelson Denny Reading Test, Form H (Nelson Denny), Dr. Byrd determined that Student's reading comprehension and his reading rate are both in the first percentile, which is well below average. Student's reading comprehension score under the Extended Time Administration of the Nelson Denny was in the second percentile. However, the score Student achieved on the Nelson Denny administered by Dr. Byrd was not consistent with Ms. Keller's testing or observation of Student and, further, was not consistent with the reading comprehension score Student received on the Wechsler Individual Achievement Test – Second Edition (WIAT) administered by Dr. Byrd for his June 2007 assessment. According to Dr. Byrd's administration of the WIAT Student's reading comprehension was in the 47th percentile. Dr. Byrd emphasized, however, that this score likely provides an overestimate of Student's ability because Student took extra time to read the passages. Yet, Dr. Byrd acknowledged that Student should have extra time in completing reading tasks. Moreover, neither Ms. Keller nor Ms. Boewe, both experienced assessors, had seen the Nelson Denny used in high school assessments or in psychological evaluations. It is not a test that is widely used in high school for purposes of making recommendations relating to special education. In addition, Dr. Byrd testified that the Nelson Denny is normed on a high school, junior college, and four-year college population. It is not normed for less than a ninth-grade level. The test is recognized by the College Board in determining if accommodations are needed for the Scholastic Aptitude Test (SAT), and it is used by universities to aid in determining if students require accommodations. In addition, the Nelson Denny is a timed

test, which Dr. Byrd conceded would present difficulties for Student given his identified disabilities. On the regular version of the Nelson Denny, the student is expected to read 80 items in 15 minutes for the vocabulary portion, and to read 80 items in 24 minutes on the extended version. On the reading comprehension portion, the standard administration time is 20 minutes and for the extended version it is 32 minutes. In that time, the Student is expected to read approximately seven to nine passages, and the booklet is 22 pages in length. The passages are single-spaced. The first question is a full page of content, followed by eight or nine questions. The remainder of the passages are each about a half-page in length. The questions are one to two sentences each, with five possible multiple-choice answers. Dr. Byrd conceded that it is a lot of material to read within 20 minutes, and that even a fourth-year college student would not get through all of the content before the time is up. Dr. Byrd has never seen this test used for purposes of a psychoeducational assessment by a school district, and conceded that there are different expectations for college students than for high school students eligible for special education.

Ms. Keller's testimony and assessment results were more credible than Dr. Byrd's. Dr. Byrd has never worked in a public school. The Nelson Denny was not normed for testing students for the purpose of determining whether they qualify for special education and related services. Dr. Byrd acknowledged that Student needs double the amount of time that other students need for reading because of his dyslexia, which is a condition that is not curable and one with which Student will always struggle, according to Dr. Byrd. In addition, Student had been identified as having a disability in the area of processing speed, which relates to reading fluency, which was the category of eligibility for which Student met the criteria of the IDEA, based on credible testimony of Ms. Boewe.

Academic assessment

18. Ms. Hammer, Student's RSP teacher at Malibu High School for one and one-half years, has 29 years of experience as a teacher in special education. She has been

employed by District for seven years. She is credentialed in California to teach students with mild to moderate learning handicaps, and also holds a CLAD credential which enables her to teach English language learners. She taught in special education for 20 years on the East Coast, and is credentialed in Rhode Island in special education, French, German, and chemistry. Ms. Hammer is trained and qualified to conduct academic assessments.

19. Student was in Ms. Hammer's resource class, along with three or four other students. For over half the time she taught Student, Ms. Hammer had an instructional aide who supported Student in some of his general education classes, and that aide reported to Ms. Hammer. Ms. Hammer gathered information from all of Student's general education teachers every two weeks and discussed Student regularly with Ms. Boewe, Ms. Keller, and Mother. Ms. Hammer is very knowledgeable about Student's educational needs and his performance in general education classes.

20. Ms. Hammer did not observe Student in other classes as part of her assessment. However, she interviewed all of Student's teachers and collected written reports from them, received daily reports from her aide who worked with Student in his general education math and English classes, and observed Student working on a variety of subjects in the resource room. Student was in her class four days a week for an hour a day, and she worked with him daily. Ms. Hammer, in essence, interviewed him every time he was in her resource room regarding his needs and the supports he required. Ms. Hammer was very familiar with Student and his academic and study skills needs. Student was very good at letting her know the areas in which he wanted help. This fulfilled the requirement that she "interview" Student. She also reviewed Student's previous IEPs and previous WJTA scores, and looked at Student's most recent grades. Ms. Hammer is aware that Student has ADHD.

21. In her academic assessment of Student, Ms. Hammer tested him in the areas of oral language, reading, writing, and mathematics. Ms. Hammer administered the WJTA, which tests a student's skills to acquire knowledge, such as the ability to read, write, and

comprehend, which will allow the student to access the curriculum. She has administered this test at least 100 times, and is trained to administer this test. She administered the most recent version of the test.

22. Ms. Hammer prepared a comprehensive written report based on her assessment, in which she determined that Student possessed the academic skills to participate in the general education curriculum. Student had shown growth over the past three years in all areas tested. He had strengths in basic reading skills, word attack, picture vocabulary, and oral expression. He demonstrated relative weakness in his academic fluency skills. He has the skills to both decode and understand the test to gain information, but he required time to read the material. Student's reading comprehension was in the average range, his written expression was in the low average range, and his math was in the average range. Ms. Hammer had worked with Student on improving writing fluency by teaching him prewriting activities to help him with writing. Student was very capable of asking clarifying questions in order to help him respond in context. Student required additional reading and writing practice to continue to improve.

23. Student contends that District's assessment was in appropriate because District used only one measure, the WJTA, to determine whether a discrepancy between ability and achievement existed. District used a variety of instruments to assess discrepancies between ability and achievement. In addition, the IEP team makes recommendation by considering the entire picture, including the student's performance in class and in the resource room and on other tests and other assessors' opinions, and not on a single test. The IEP team had all of Student's academic information dating back several years, and also had the participation of experienced teachers who had taught him, were aware of his struggles and disabilities, and assessed him.

24. Student contends he was inappropriately assessed in the area of reading comprehension based on the fact that Student's test results on the WJTA were inconsistent with Student's reports to Dr. Byrd of his daily academic struggles. According to Dr. Byrd,

Student was having difficulty completing assignments and keeping up with the required reading, and these matters are not reflected in the WJTA, which shows an average level of achievement. Dr. Byrd was concerned because the WJTA requires the reading of short passages, but a high school language arts class requires reading of entire books and the WJTA does not test a Student's ability to read an entire book. As discussed previously, Dr. Byrd was aware that Student had reading speed difficulties, and that Student required extra time for reading tasks. Further, the Nelson Denny used by Dr. Byrd, which showed a low reading score, was not an appropriate instrument to use to determine whether a student qualifies for special education and related services under the IDEA.

In addition, Ms. Hammer was in a position to assess the validity of Student's scores and whether the scores presented a realistic picture of his skills and abilities because she had worked with him on assignments in math, English, and world history when he needed help, and she saw him work independently. She saw the scores he achieved on multiple choice tests in his world history class when he read the passages himself and those on which she read the passages to him. She was able to examine his affect and demeanor at the time of testing. Student's scores on the WJTA were consistent with his performance in class. Student's score in reading comprehension, which was in the average range, was consistent with what she observed in class in working with him on English and world history class work.

25. Student also contends that the WJTA did not yield an accurate assessment of his abilities in written expression because a student is not required to write a paragraph for the writing portion of the WJTA, but a tenth grade Student must do so in school. The WJTA is a "closure" exercise in which the student is required to fill in a blank with a word to demonstrate comprehension. Dr. Byrd determined based on his administration of the WIAT that Student is at the 3.1 grade level and in the first percentile. The WIAT requires a student to write an essay rather than a sentence, as is required by the WJTA. Student's overall score for written language based on the WIAT was in the third percentile. Student

had many spelling and punctuation errors, used simple and repetitive words, and offered no counter argument or examples in his “pro” argument. Dr. Byrd also administered the Test of Written Language – Third Edition (TOWL). On this test, Student performed at the fifth percentile on the contrived writing subtest, and at the fifth percentile on the sentence combining subtest, which is well below average. According to Dr. Byrd, the WJTA is a one-sentence test, and nothing in the WJTA requires more than a one-sentence response.

However, Dr. Byrd conceded that the WJTA is a widely used, well-respected, and appropriately normed test. In addition, Student’s results on the WJTA administered by Ms. Hammer were consistent with his results on other tests and with Ms. Hammer’s and Ms. Keller’s assessment of his reading based on personal observations and experience working with him for a year and a half. Also, Dr. Byrd acknowledged that the TOWL is a timed test, that a few minutes are allowed for a writing subtest, and that Student spent much of the time organizing. Dr. Byrd was of the opinion that Student required extra time for writing tasks. In sum, Ms. Hammer’s testimony was more credible than that of Dr. Byrd.

26. Student contends the assessment of his abilities in math calculation was inappropriate because Student is at the 10.8 grade level, according to his score on Ms. Hammer’s administration of the WJTA yet Student does not know all of the math facts and has difficulty with decimals, according to Dr. Byrd, and he received a D grade in algebra (which was not actually the final grade but, rather, a progress report grade). In Dr. Byrd’s opinion, the use of WJTA scores alone would miss weaknesses.

Student’s score in math calculation on the WJTA administered by Ms. Hammer, which was in the average range, was consistent with his performance on math tests he took in Ms. Hammer’s class. Student’s algebra teacher noted some lack of participation, but when he did participate, he demonstrated comprehension of the material. In addition, Student demonstrated a ready comprehension in algebra when Ms. Hammer showed him how to do algebra problems. However, District was aware of Student’s difficulty in performing basic math tasks. District recognized that Student’s fluency (how quickly

Student would work through problems) in math was weak, and he was provided access to a calculator as an accommodation. In addition, he was receiving RSP and LRC services to work on his processing speed. In addition, District identified needs in mathematics, provided an IEP goal in the area of math, and also offered resource center services and recommended accommodations to address Student's math needs, but did not identify mathematics as an area of deficit for purposes of special education law because he did not qualify under that category of eligibility based on his test scores.

27. Finally, Student contends that District's assessment was inappropriate because there were several scoring errors in Ms. Hammer's assessment. Dr. Byrd found several scoring errors in the WJTA administered by Ms. Hammer. For example, Ms. Hammer gave Student credit for three items that were written incorrectly in the writing fluency section. The correctly scored test would put Student in the fourth percentile, rather than in the ninth percentile in writing fluency. That, in Dr. Byrd's opinion, is a grade-level difference of one and a half to two years. In addition, he believes that those errors significantly affected Student's overall written expression score. Dr. Byrd could not say if the recommendations would be different based on the difference in score.

28. Ms. Hammer administered the WJTA herself, and she made some scoring errors in transferring the scores from the test to the form. Ms. Hammer's errors in scoring the writing fluency portion of the WJTA were not clinically significant in her opinion and did not affect her recommendations because Student had identified needs in the area of writing fluency. Student's score on the writing samples subtest was in the average range with or without the error, and the difference would not have affected Ms. Hammer's recommendation. In addition, Dr. Byrd based his scores on Version 2.0 of the WJTA, which is a different version, and which has a 90 percent confidence band. Ms. Hammer used a 68 percent confidence band. A 90 percent confidence band would have a wider range of scores. Based on Ms. Hammer's experience with Student, her experience as a teacher, her experience with conducting assessments, and her testimony that the scoring errors did not

change her recommendations, Ms. Hammer's opinion that the scores were valid and presented a realistic picture of Student's skills and abilities was credible.

29. Thus, while there were some scoring errors on District's part, these errors were not significant in terms of the assessors' recommendations or Student's eligibility for special education. In addition, Mother's conduct in this case may have contributed to the errors. Mother was given the assessment plan on October 19, 2008, but did not sign it until November 28, 2007. During the delay, Mother requested an independent educational evaluation from District, but District informed Mother that it was required to complete its own assessment. In addition, Mother delayed because she was concerned as to whether Student's drug use and incident of suicidal ideation would affect the report or be included in the report. While a district normally has 60 days after the signing of an assessment plan within which to complete an assessment, District in this matter received the signed assessment plan from Mother on November 29, 2006. Thus, District had only seven to eight school days within which to complete the assessment in order to hold the triennial IEP in a timely manner on December 11, 2006. In addition, Mother requested that Student not be pulled out of academic classes for testing, and that he be pulled out of study skills and art only. Student wanted to be tested outside school hours. Ms. Boewe acknowledged that Mother could have given consent for more time for the District to conduct an assessment, but Ms. Boewe thought that District could not legally conduct a late annual IEP team meeting or a late triennial IEP meeting. Therefore, Ms. Boewe took the entire information home over the weekend of December 8, 2006, and scored the assessments and completed the report over the weekend. Ms. Boewe received Ms. Hammer's report on Saturday, December 8, 2006. Ms. Boewe testified credibly that the calculation errors may have resulted from the short time in which District had to complete the assessment, but that the errors did not invalidate the scores. Dr. Byrd conceded that he has made errors in calculating scores, and in fact he made several errors in recalculating District's scoring of the various tests.

Health assessment

30. The school nurse conducted a health assessment of Student on December 5, 2005, including a review of Student's medical and developmental history. The health assessment included assessment of vision and hearing, which were normal. Student reported that he took no medication, and he reported no problems. The school nurse prepared a written report. The school nurse's findings were considered by Ms. Boewe and included in Ms. Boewe's psychoeducational assessment of Student. Nothing about the health assessment was challenged by Student.

Psychoeducational assessment

31. Ms. Boewe is in her fifth year as a school psychologist for District at Malibu High School, and has been a school psychologist for 20 years. She conducts psychoeducational evaluations and provides counseling to students, among other duties. Ms. Boewe also holds a master's degree in psychology and is working on a doctorate in educational counseling. She holds a pupil personnel services advanced credential, is licensed by the National Association of School Psychologists as a Licensed Educational Psychologist, and is licensed by the State of California as a marriage and family therapist. Ms. Boewe has completed post-graduate work in neuropsychology and in educational counseling. She has trained District employees to conduct assessments, has conducted trainings for the National Association of School Psychologists, and has taught a number of university courses in education as an adjunct professor at Mount Saint Mary's College and at California State University, Los Angeles. Ms. Boewe is qualified to conduct psychoeducational assessments as a result of being credentialed as a school psychologist. In addition, Ms. Boewe has been trained to conduct the tests she conducted, and has administered each of them dozens to hundreds of times.

32. At the time Ms. Boewe assessed Student, she knew him well because she helped him with his transition from his previous high school to Malibu High School as a freshman, she provided counseling to him regularly through the end of the 2005-2006

school year, and she was responsible for ensuring that the accommodations required by his IEP were implemented in his classes. Ms. Boewe had ongoing conversations with Mother, Ms. Hammer, and Ms. Keller regarding Student and his needs. In order to develop Student's assessment plan, she spoke with Ms. Hammer and Ms. Keller prior to selecting the instruments to be used to ensure that Student was assessed in all areas of suspected disability.

33. Ms. Boewe administered a number of instruments to Student, including the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Woodcock Johnson Psycho-Educational Battery – Third Edition (WJ-III), the Comprehensive Test of Nonverbal Intelligence (CTONI), the Naglieri Draw A Person (DAP), the Developmental Test of Visual-Motor Integration – 5th Edition (VMI), the Test of Visual Perceptual Skills Upper Level – Revised (TVPS), the Test of Auditory Perceptual Skills – 3rd Edition (TAPS- 3), and the Behavior Assessment System for Children Second Edition (BASC-2), including teacher, parent, and student forms.

34. Ms. Boewe also spoke with Student's world history teacher, his math teacher, his RSP teacher (Ms. Hammer), and his LRC teacher (Ms. Keller) to complete her assessment. Ms. Boewe gathered from Student's teachers' information on Student's class performance, whether he was completing work, whether he was turning in work late, whether he required extra time on tests, whether he was comprehending the material in class, what grades he was earning on homework and on tests, and how he was behaving in class. Ms. Boewe had ongoing conversations with Ms. Hammer regarding Student beginning the day Student arrived at Malibu High School for his freshman year because Ms. Boewe was responsible for ensuring that Student's accommodations were implemented. Ms. Boewe was aware from the time Student came to Malibu High School of his performance in class and of what Ms. Hammer was doing to support him. Ms. Boewe also had ongoing conversations with Ms. Keller about Student's performance in reading and his emotional status, and she received ongoing information from Ms. Keller as

to Student's ability to comprehend the material in class, his contribution to class discussions (which would demonstrate how well he was comprehending the material), and whether he was taking notes. Ms. Boewe was also aware that Student suffered anxiety as a result of academic testing.

35. Ms. Boewe did not conduct a formal observation of Student in class. The observation for purposes of the assessment was done by Ms. Hammer, as discussed above, and Ms. Boewe received that information from Ms. Hammer. The information Ms. Boewe received from Ms. Hammer regarding Student's performance in class was sufficient to inform the assessment and to fulfill the observation requirement. Ms. Boewe had a sufficient understanding of Student's performance in class to complete her assessment, and no further observation was required.

36. Ms. Boewe also conducted a clinical interview of Student for her assessment. She interviewed Student regarding whether he was struggling in academic classes, how he was doing, whether he was getting his accommodations, how his accommodations were working for him, how he was doing in copying from the board, whether he needed copies of notes from classes, how he was comprehending and following along in classes, and whether there was anything else he needed. Ms. Boewe and Student discussed Student's difficulty focusing and attending in class. Ms. Boewe also interviewed Mother by phone and email regarding Student. In addition, Ms. Boewe had ongoing discussions with Student's mother from the time Student arrived at Malibu High School. Mother wanted Student placed in college preparatory classes, and Ms. Boewe was concerned that with his reading problems those courses would be difficult for him. Ms. Boewe also spoke with Mother often about accommodations Mother requested for Student. Mother informed Ms. Boewe that Dr. Byrd had diagnosed Student with ADHD three years earlier. Mother also indicated during her interviews that Student had depression and anxiety in the past, and told Ms. Boewe an incident in which Student was hospitalized for suicidal ideation on November 12, 2006. Mother also indicated Student abused substances. Ms. Boewe spoke

with Student to verify the information regarding suicidal ideation and drug use because this information is educationally relevant and those could affect performance in school and on testing.

37. In addition, Ms. Boewe reviewed Student's records, including his cumulative file, which included transcripts, statewide standardized test scores, and elementary school information; his special education file, including IEPs and evaluations conducted by District; and private evaluations, including Dr. Byrd's report that was completed three years earlier. Ms. Boewe also followed up on information the school nurse gathered regarding Student.

38. Based on results of the WISC-IV Ms. Boewe administered to Student, Student's abilities were determined to be in the average range overall, with a global intellectual ability, or intelligence quotient (IQ), of 106. Of the four index scores included in the full scale IQ score, Student's Verbal Comprehension Index score was in the high average range, his Perceptual Reasoning Index score and the Working Memory Index score were in the average range, and his Processing Speed Index score was in the low average range. The scores on Ms. Boewe's administration of the WISC-IV were very similar to Student's scores from the administration of that instrument three years ago. Student performed to the best of his ability on the test, in Ms. Boewe's opinion. Student's scores were consistent with his history of performance, and his scores were valid.

39. The TAPS, which tests auditory processing, contains a subtest on phonological processing, which is related to dyslexia. Student's overall score was 105. Student made good efforts on this test, and Ms. Boewe could compare these scores to the verbal scores on the WISC and the WJ-III. This score on the TAPs is valid, in her opinion.

40. Ms. Boewe administered a number of instruments to assess Student's visual processing ability because visual processing is an area that can contribute to a discrepancy for purposes of finding SLD. The CTONI measures how Student processes visually, rather than verbally. Student's attention was variable during the administration of that test. His results were in the average range, although Student was able to complete items at a higher

level when Ms. Boewe asked questions that were beyond his ceiling, pursuant to the test instructions. Student scored in the high average range in some of those areas in which Ms. Boewe tested his limits. Scores obtained by Student on previous testing by Dr. Byrd on the perceptual reasoning portion of the WISC were higher than the scores Student achieved on the CTONI.

41. Ms. Boewe administered the TVPS to measure Student's ability in the area of visual processing, which includes identifying and discriminating visual-spatial relationships, visual part-whole relationships, visual memory, and items with visual interference. This is an untimed test. Ms. Boewe believed Student's scores on the TVPS were valid except for the score of 69 in visual form-constancy, which score placed Student in the "Mild Developmental Delay" range. Student's scores on the TVPS ranged from that low to a superior score of 127 in the area of visual figure-ground. Ms. Boewe believes that Student's attention during the administration of that test had an impact on his score in the area of visual form-constancy because Student had achieved a score of 81 on visual form-constancy when tested by a District psychologist three years prior. Also, when Ms. Boewe tested Student's limits in the area of visual form-constancy, Student showed ability in that area up to the average range. Finally, all assessments that assessed visual processing, including the WISC- IV, the WJ-III, and the CTONI, resulted in average to above-average scores, with the exception of those that included a timed component.

42. Ms. Boewe also administered the VMI to assess Student's visual-motor integration ability. The VMI involves a copying process that assesses fluidity of ability to draw and copy, and detects whether a processing speed deficit is paper-pencil related. Student scored in the low average range on this test. Ms. Boewe observed anxiety in Student during the administration of this test, which affected his performance. For example, on this test, if a test taker erases an answer to do a better job on the answer, the test taker receives no credit for the answer. Student wanted to be more exact in his responses on two of the questions to improve on his answer, so he earned no score on

those responses when his answers had been correct initially. However, these scores are valid overall. This test was administered by Ms. Perry of District three years prior, and also by Dr. Byrd, and the scores on all three administrations of this test were consistent.

43. Ms. Boewe also had Student complete a formal writing sample, which is used to assess writing skills and ability, including composition and content. The tester asks the Student to write one paragraph for this test. This test measures a student's writing skills and ability. Student still prints and has inconsistent spacing in his writing, but it is legible. He would benefit from use of an eraser, time to complete written work, and the provision of notes to ensure he has information that is on the board. He should also have access to a word processor. Ms. Boewe also used the formal writing sample to gather information regarding social/emotional status, discussed below, and prevocational data.

44. Ms. Boewe administered the BASC to assess Student's social/emotional needs. Specifically, Ms. Boewe wanted to examine Student's levels of anxiety and depression. She obtained BASC ratings from three of Student's teachers. Their ratings of Student all fell in the normal range, but Ms. Keller rated Student as "at-risk"⁴ for depression. Student and Mother also completed rating forms. Student rated himself as being in the at- risk range in several areas, which was consistent with his self-report of anxiety. Mother rated Student as being in the clinically significant ⁵range in several areas, which was consistent with the concerns she expressed during the assessment process. Ms. Boewe also obtained social/emotional information from Student's formal writing sample. Ms. Boewe was aware that Student had been hospitalized in November 2006 after discussing suicide, and she discussed this with Student and Mother separately. Student's discussion of suicide occurred just after another student at Malibu High School in fact

⁴ A rating of "at-risk" indicates that the rated behavior is not significant enough for interventions at this time, but should be monitored.

⁵ A rating of "clinically significant indicates an area in need of intervention.

committed suicide. Ms. Boewe did not believe that Student was suicidal or generally depressed. Ms. Boewe also elicited during the interviews with Student and Mother information regarding Student's use of drugs. Student had been participating in designated instruction and service (DIS) counseling since May 2006. However, because of Student's negative self image and anxiety, Ms. Boewe recommended in her report that Student be referred to the County Department of Mental Health for consideration of AB 3632⁶ mental health services. However, Student did not exhibit a pervasive depression sufficient to meet the criteria of emotional disturbance for purposes of special education eligibility. Student's expert agreed with this conclusion.

45. Ms. Boewe also administered the Naglieri Draw A Person (DAP), which is designed to give a score that is comparable to an IQ score, and it is a social/emotional indicator of sense of self. Student achieved a standard score of 76, in the fifth percentile, on the DAP. Student's score on this test was not the best indicator of intellectual capacity because the test is scored based on the number of elements the student includes in the drawing, and Student took a lot of time on this test because he likes art. For that reason, he did not complete the test. Student has an accurate perception of people in Ms. Boewe's opinion.

46. Prior to preparing her written report, Ms. Boewe reviewed the reports prepared by the other District assessors. Ms. Boewe's report included a determination that Student needed special education and related services, the basis for that determination, the relevant behavior noted during observation in the classroom and during testing, the relationship of that behavior to academic and social functioning, educationally relevant

⁶ Assembly Bill No. 3632, enacted as Chapter 1747 of the Statutes of 1984, operative July 1 1986, established interagency responsibilities for providing and funding mental health services to students with disabilities. This enactment is codified as Chapter 26.5 of Division 7 of Title 1 of the Government Code.

health and development and medical findings, and, because Student has a specific learning disability, a description of his discrepancy between ability and achievement that required special education and related services. Ms. Boewe's report contains recommendations required for Student's education based on the assessment results.

47. Student contends District failed to assess Student in all areas of suspected disability, and failed to identify areas of disability, including reading comprehension, reading fluency, writing fluency, communicating ideas in writing, math calculation, visual/motor perceptual ability, phonemic processing, and spelling. However, Dr. Byrd's testimony lacked credibility because Dr. Byrd has never worked in a public school, is not credentialed as a school psychologist, has never spoken with any of Student's teachers at Malibu High School or any other employee of District, and has never observed Student at school or in class, and does not have an understanding of special education law. While it was clear that Dr. Byrd knew Student well and had an understanding of how Student's academic difficulties resulting from his disabilities affected him psychologically and led to academic struggles, Dr. Byrd's testimony lacked credibility for a number of reasons. For example, Ms. Boewe testified credibly that Dr. Byrd's report shows that he relied on reporting by the parent and her interpretation of what services were provided, and it appeared as though he did not have or examine educational records, which Dr. Byrd conceded he did not. Ms. Boewe also testified credibly, based on her experience and training, that it is important, for purposes of assessing a student, to obtain information from general education teachers as to how the student is performing, the student's work habits, how the student is doing on homework, how the student is participating in class, whether the student is struggling academically in class, and how the student is responding to accommodations and modifications. A student may perform in the average range on the WJTA, but not in class, or a student may demonstrate better skills in a resource class than in a general education class. Teachers working with students have ongoing knowledge regarding the student, and how a student performs in the general education

classroom is relevant information to consider when conducting a psychoeducational assessment. Dr. Byrd conceded that Student's teachers and the IEP team would be best situated to know Student's performance in class, and that Student's teachers would be the best people to evaluate Student's performance.

48. In addition, Dr. Byrd did not have an understanding of the difference between a "handicapping condition" under the IDEA and an area of weakness or unique need. Most of Student's weaknesses that Dr. Byrd testified should have been identified as "areas of disability" did not qualify as handicapping conditions under the IDEA, such as spelling.⁷ The category of eligibility that would include spelling, according to Ms. Boewe, is written expression, and Student did not qualify for special education under that category based on his test scores. However, Student was receiving services in the area of writing, and that included spelling. He was also receiving accommodations in spelling. The

⁷ Although Ms. Hammer did not administer the spelling subtest of the WJTA, she was very familiar with Student's spelling ability, and knew that he required accommodations for spelling. The writing samples tests administered to Student further examined his spelling ability. In addition, Ms. Boewe testified credibly that schools typically do not do interventions in spelling in tenth grade. Rather, schools give accommodations in spelling, allowing the Student to progress academically with peers. Student was in college preparatory courses, and was progressing. District needed to help him pass his general education courses, rather than spending time remediating spelling and math calculation. According to Ms. Boewe, schools do not have a lot of success with remediation in spelling. Composition is more important at the high school level. District was addressing Student's needs through accommodations, the RSP program, and the LRC program, and those services were designed to help him across the curriculum. Dr. Byrd acknowledged that a spelling goal was added to Student's IEP during the May 2006 IEP team meeting.

evidence showed that District was aware of Student's visual-motor processing deficits, which contributed to his identified handicapping condition of SLD, and offered Student time in the study skills class so Ms. Hammer could support Student in his work on general education projects. Student was also given extra time on assignments and tests, and he was provided with note-taking services and word processing as accommodations to help with his visual-motor processing difficulties.

49. Essentially, Dr. Byrd and Ms. Boewe had a difference of opinion regarding whether Student's weakness in reading comprehension qualified as a handicapping condition. Ms. Boewe testified there was not a difference in Student's performance on the WIAT, administered by Dr. Byrd, and on the WJTA. In her opinion, using the Nelson Denny to test Student would have been inappropriate if it contained only passages at the high school level and higher. Because of the strength of Ms. Boewe's testimony, her background and experience in special education law, and her knowledge of Student from an educational perspective, as compared to Dr. Byrd's lack of experience, knowledge in the area of special education law, and knowledge of Student's performance at school and his educational and history, Ms. Boewe's testimony is more credible.

50. Student contends that the District's assessment was inappropriate because Ms. Boewe made certain scoring errors in completing her assessment. With the exception of the scoring errors discussed below, the scoring errors Dr. Byrd found in Ms. Boewe's assessments were not outside the confidence intervals and were not statistically significant. Some of the errors Dr. Byrd found were not errors at all. One of the errors that was statistically significant involved comprehension on the WISC-IV. However, the effect of the error on Student's comprehension score on the Verbal Comprehension Index is not significant, and Student was in the high average range overall, with or without the error. The difference in the score did not affect the clinical analysis or the educational recommendations. A scoring error Ms. Boewe made on the TAPS-III was outside the confidence interval, but the correct and incorrect scores both fall within the average range.

Therefore, the error was statistically significant in terms of the confidence levels, but not clinically significant because both scores fall within the average range. The error did not affect Ms. Boewe's clinical analysis or educational recommendation.

51. Ms. Boewe disagrees with Dr. Byrd's scoring on the VMI. If Ms. Boewe did make an error of one point in scoring this instrument, which she did not concede, it was not clinically significant because Student's weakness in visual-motor integration was already identified, his results would still be in the low average range, and the results would still be consistent with his scores in the 80s on Dr. Byrd's and on District's previous administration of the VMI. The difference in scoring would not affect clinical analysis or educational recommendations.

As discussed previously, while there were some scoring errors on District's part, these errors were not significant in terms of the assessors' recommendations or Student's eligibility for special education. In addition, Mother's conduct in this case may have contributed to the errors. Ms. Boewe testified credibly that the calculation errors may have resulted from the short time in which District had to complete the assessment, but that the errors did not invalidate the scores. Dr. Byrd conceded that he has made errors in calculating scores, and in fact he made several errors in recalculating District's scoring of the various tests.

52. Student also contends that the assessments are inappropriate because they do not contain sufficient relevant developmental information, academic information, or written language information to assist in determining Student's educational needs or in developing Student's IEP because District did not take into consideration the impact of Student's disability on his daily academic performance in the tenth grade. This argument lacks merit. It was clear from the testimony that District was well aware of Student's difficulties based on frequent, ongoing collaboration between Student, Mother, Ms. Hammer, Ms. Keller, Ms. Boewe, and Student's other teachers. Ms. Hammer and Ms. Keller worked closely with Student and were well aware of his disabilities and how those

disabilities affected his academic performance, and Student was receiving both services and accommodations to assist him. In addition, Student was earning average grades in his college preparatory and advanced placement courses, due largely to the support he was receiving. As discussed previously, dyslexia is not curable, and is something Student with which Student will always struggle, according to Dr. Byrd. District was well aware of Student's disabilities and his needs, and District gathered more than sufficient relevant developmental information, academic information, and written language information to assist in determining Student's educational needs and in developing his IEP.

Combined assessments

53. In sum, District conducted a thorough assessment of Student, including a reading, academic, health, and psychoeducational assessment. Ms. Boewe, based on her thorough knowledge of Student, ongoing conversations with Student, Mother, Ms. Hammer, Ms. Keller, other teachers, and based on her years of experience as a school psychologist, developed an assessment plan and selected instruments to assess Student in all areas of suspected disability. The District assessors used a variety of assessment tools and strategies, and gathered and reviewed relevant functional, developmental, and academic information regarding Student, including information from Mother, to determine whether Student was a child with a disability, and the requirements for his education program. Credible testimony from Ms. Keller, Ms. Hammer, and Ms. Boewe established that (1) each test was selected and administered to address an area of educational need and was appropriate for Student given his areas of weakness, (2) the District assessors used technically sound instruments that assessed the relative contribution of cognitive, behavioral, physical, and developmental factors, (3) the tests were selected and administered by the assessors so as not to be discriminatory based on race, culture, or gender, (4) the tests were administered in Student's native language and in a form most likely to yield accurate information on what Student knows and can do academically, developmentally, and functionally, (5) the tests were appropriately normed, (6) the

assessors used the most recent versions of the test, (7) the tests were used for purposes for which the assessments are valid and reliable, and (8) the tests were administered in accordance with instructions provided by the producers of the tests. In addition, as discussed above, District's assessors were trained and knowledgeable in the administration of the tests they administered, properly credentialed, and well-qualified to administer the tests. Ms. Boewe reviewed and approved the school nurse's assessment results and included them in her own report. The tests assessed Student in all areas of suspected disability all areas of suspected disability, including visual processing, processing speed, attention, reading (including fluency, decoding, and comprehension), writing, and academic fluency. District assessors prepared a written report for each assessment.

54. While it is clear that Student has academic struggles as a result of his disabilities, Dr. Byrd conceded that dyslexia cannot be cured, that Student will always struggle with dyslexia, and that, according to research, he will always have difficulty with reading comprehension. However, with the supports and services Student was receiving at Malibu High School based on his identified disabilities and unique needs, Student was passing his classes, which were all of the college preparatory level or above, except for his RSP and LRC classes. His ability to pass the college preparatory and advanced placement courses was having a positive affect on his self esteem. Dr. Byrd conceded that Student is getting double the normal time for tasks, which is what Dr. Byrd himself recommended; that Student is getting class notes for his visual-motor and processing speed needs; that Student is getting preferential seating in order to support his attention needs; that Student is provided help with spelling; that Student was receiving LRC support services for purposes of remediating reading and reading fluency; that Student has a reading goal and a math goal; and that Student is offered books on tape to help with reading comprehension.

Based on the foregoing, District's assessments were appropriate.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. District has the burden of proof in this case. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

2. A district is required to re-evaluate a child with a disability at least once every three years. (20 U.S.C. § 1414(a)(2)(ii); 34 C.F.R. § 300.536(b); Ed. Code, § 56381, subd. (b).) In conducting the evaluation, a District must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining” whether the child is a child with a disability, and in determining the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); see also Ed. Code, § 56320.) The District may not use any single assessment as the sole criterion for determining eligibility and must use “technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.” (20 U.S.C. § 1414(b)(2)(B), (b)(2)(C); see also, Ed. Code, § 56320.) A district is required to use assessments that provide relevant information that directly assists persons in determining the educational needs of the child. (20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.304(c)(7).)

3. A district is required to assess a child in all areas of suspected disability, including, if appropriate, health and development, vision, hearing, language, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

4. As part of a re-evaluation, the IEP team and other qualified professionals are required to review existing evaluations and information provided by the parent, current classroom-based assessments and observations, and observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1); Ed. Code, §§ 56320, subd. (h), 56381, subd. (g).) Based on this review, the district must identify what data is

needed to determine whether the student continues to qualify for special education and related services, present levels of performance and educational needs, and whether additions or modifications to the IEP are needed to meet annual goals and to enable the student participate in the general curriculum. (Ed. Code, § 56381, subd. (b)(2).)

5. A district is required to ensure that the assessments and other evaluation materials: 1) are selected and administered so as not to be discriminatory on a racial, cultural, or gender basis; 2) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; 3) use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors; 4) are used for purposes for which the assessments or measures are valid and reliable; 5) are administered by trained and knowledgeable personnel; and 6) are administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(2)(C) and (3); 34 C.F.R. § 300.304(b), (c); see also Ed. Code, § 56320.)

6. Assessors are required to prepare a written report of each assessment. A report must include: (1) whether the student needs special education and related services; (2) the basis for that determination; (3) relevant behavior noted during observation in an appropriate setting; (4) the relationship of that behavior to academic and social functioning; (5) educationally relevant health and development and medical findings; and (6) for students with learning disabilities, whether there is a discrepancy between achievement and ability requiring special education and related services. (Ed. Code, § 56327.)

7. The IDEA provide that under certain conditions a parent is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. §

1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

8. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) When a parent requests an IEE, and the district neither files its own due process complaint nor provides the IEE, the burden of proof is on the district to demonstrate that the parent’s privately obtained IEE did not meet agency criteria. (See 34 C.F.R. § 300.502(b)(2)(ii); *Schaeffer v. Weast, supra*, 126 S.Ct. at p. 534 [“When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute.”].)

DETERMINATION OF ISSUE

Were District’s December 2006 assessments of Student appropriate?

9. As set forth in Factual Findings 1 through 54, and Legal Conclusions 1 through 10, District established that it properly assessed Student in all areas of suspected disability, including visual processing, processing speed, attention, reading (including

fluency, decoding, and comprehension), writing, and academic fluency, prior to the December 11, 2006 IEP team meeting. District's assessors were knowledgeable regarding Student's areas of disability, and regarding the areas in which Student should be assessed. Ms. Boewe, Ms. Keller, and Ms. Hammer all knew Student well, and were familiar with his disability and educational needs. Ms. Boewe developed an assessment plan and selected proper instruments to assess Student in all areas of suspected disability. The District assessors used a variety of assessment tools and strategies, and gathered and reviewed relevant functional, developmental, and academic information regarding Student, including information from Mother, to determine whether Student was a child with a disability, and the contents of his education program. Each test was selected and administered to address an area of educational need and was appropriate for Student given his areas of weakness. The District assessors used technically sound instruments that assessed the relative contribution of cognitive, behavioral, physical, and developmental factors. The tests were selected and administered by the assessors so as not to be discriminatory based on race, culture, or gender. They were administered in Student's native language and in a form most likely to yield accurate information on what Student knows and can do academically, developmentally, and functionally. They were appropriately normed, and the assessors used the most recent versions of the test. The tests were used for purposes for which they are valid and reliable, and were administered in accordance with instructions provided by the producers of the tests. Ms. Boewe, Ms. Keller, and Ms. Hammer were trained and knowledgeable in the administration of the tests they administered, properly credentialed, and well qualified to administer the tests.

10. Student did not establish that there was an assessment that District should have, but did not conduct; that any District assessment was inappropriate; or that District failed to assess Student in any area of suspected disability.

ORDER

District's December 2006 assessments of Student were appropriate.

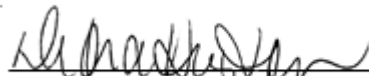
PREVAILING PARTY

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. District prevailed on the single issue in this case.

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).)

Dated: November 13, 2007


DEBRA R. HUSTON

Administrative Law Judge

Office of Administrative Hearings Special
Education Division