

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

VAL VERDE UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2008030801

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on May 21, 22, 23, 27, and 28, 2008, in Perris, California.

Student was represented by Danielle Augustin, Attorney at Law, of Augustin Egelsee, L.L.P. Student's mother (Mother) was present on all hearing days.

Val Verde Unified School District (District) was represented by Cynthia A. Yount, Attorney at Law, of Parker & Covert LLP. Vicki Butler, Director of Special Education for the District, was present on all hearing days.

On March 20, 2008, District filed its second amended Complaint, which is the operative pleading in this matter. On April 2, 2008, District requested that the hearing be continued, on the grounds that the District was closed for spring vacation during the dates OAH had set for mediation, and that District staff would not be available until the date OAH had set for the prehearing conference. Student did not oppose the continuance. On April 8, 2008, OAH continued the hearing, for good cause shown.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file and serve closing briefs by no later than 5:00 p.m. on July 7, 2008. District and Student each timely filed their closing

briefs on July 7, 2008. On that date, the record was closed and the matter was submitted.<sup>1</sup>

## ISSUE

Whether the District's Multidisciplinary Psychoeducational Evaluation, conducted during September and October 2007 is appropriate, such that Student is not entitled to an independent educational evaluation (IEE) at public expense?

## FINDINGS OF FACT

### GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a 12-year-old boy, who was born on April 4, 1996. He currently resides in the District, and, during the hearing, was attending the fourth grade at Sierra Vista Elementary School (Sierra Vista), his school of residence in the District. As of the last IEP to which Mother consented, Student is eligible for special education and related services under the category of OHI.

2. Student has been eligible for special education since pre-school. In approximately 1999, when Student was age three, he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). When he was approximately age four, Student was assessed by Murrieta Valley Unified School District (MVUSD), his district of residence at the time. MVUSD determined that Student was eligible for special education as a student with Emotional Disturbance (ED), and offered to place Student in a special day class (SDC) with speech and language services. Student remained enrolled

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<sup>1</sup> On July 9, 2008, District filed a reply to the Student's closing brief. District did not seek and was not granted permission to file a reply brief. The ALJ has not read the reply brief, and it has been given no consideration in arriving at this Decision.

at a private pre-school. He also attended kindergarten at a private school. Mother alleged that Student was abused there. In fall of 2002, when Student was six years old, Parents enrolled Student at Murrieta Elementary School (Murietta) in the MVUSD. At Mother's request, Student repeated first grade at Murrieta during the 2003-2004 school year. In early 2004, MVUSD changed Student's eligibility category to Other Health Impaired (OHI). Student continued to attend Murrieta through second grade in the 2004-2005 school year, and for part of third grade during the 2005-2006 school year. While at Murietta, Student was in a general education classroom. The services MVUSD provided to him varied, but they included a one-to-one aide, occupational therapy (OT), and speech therapy. Student's behavior while he attended Murrieta was troublesome, and he was suspended or otherwise disciplined numerous times between April 2005 through December 2005, when he was in the second and third grades at Murrieta.

3. In approximately December 2005, when Student was nine years old and in the third grade at Murrieta, David E. Libert, Ph.D., diagnosed Student with Pervasive Development Disorder, not otherwise specified (PDD-NOS). PDD-NOS is an autism spectrum disorder (ASD) but a diagnosis of PDD-NOS is a separate diagnosis from a diagnosis of autism. On January 4, 2006, parents took Student to the Center for Autism and Related Disorders, Inc. (C.A.R.D.) for an intake evaluation. C.A.R.D. is a non-public agency that primarily provides intensive therapy and behavioral services for children on the autism spectrum. The evaluation was conducted by Theresa Cardenas, M.A., a Senior Managing Supervisor at C.A.R.D., and Kari Scott, a C.A.R.D. Case Supervisor, both of whom signed a report of their findings and recommendations. The evaluation was based on observations of Student, parental interviews, and a records review.

4. In their report, Ms. Contreras and Ms. Scott recommended that Student receive 30 hours per week of the assistance of a shadow aide trained in Applied Behavior Analysis (ABA) in his school placement, and that his treatment program be

supervised by a qualified ABA consultant for 20 hours per month. Their recommendations also included reevaluations every three months to assess Student's program.

5. In early 2006, when Student was still in third grade, Student withdrew from Murrieta and attended Saint James School (St. James), a religious school, through early 2007, when Student was in the fourth grade. He attended summer school during summer 2006 at St. Jean, another religious school. Student was assisted by a C.A.R.D. aide in his classroom while attending St. James and St. Jean. Even though Student was attending St. James, MVUSD held an annual IEP meeting on March 31, 2006, and formulated a FAPE offer. The offer included behavioral support and a "sensory diet" containing sensory activities and strategies to assist in regulating Student's behavior.

6. In February 2007, when Student was 10 years old, he left the fourth grade at St. James, and enrolled at Sierra Vista Elementary School (Sierra Vista) in the District, which he has attended through the present. At Mother's request, he was enrolled in the third grade at Sierra Vista for the remainder of the 2006-2007 school year, instead of the fourth grade. District did not request nor obtain Student's records from MVUSD at the time he enrolled in Sierra Vista in the District. District did not request and receive those records until fall 2007, approximately eight months after Student enrolled in the District. While Student was in third grade at Sierra Vista, District determined that Student was eligible for special education under the category OHI.

7. Throughout his school career, Student has displayed a variety of troublesome behaviors, which has contributed to a variety of medical diagnoses. Student has been consistently diagnosed with ADHD since approximately 1999. He was diagnosed as Bi-Polar in approximately 2000 or 2001, when he was five years old. As was noted above, in approximately December 2005, Student's psychologist, Dr. Libert, diagnosed Student as having PDD-NOS. By January 2006, Student was no longer

considered Bi-Polar, but was diagnosed with Cyclothymic Disorder, a cyclical type of mood disorder that is less severe than Bi-Polar Disorder.

#### DISTRICT'S INITIAL ASSESSMENT OF STUDENT IN APRIL 2007

8. District first performed a psychoeducational assessment of Student in April 2007, shortly after he enrolled in the District. Michele Barrett, the District school psychologist, wrote a report of the assessment, which is dated April 17, 2007. The assessment team consisted of Ms. Barrett, a Resource Specialist (RSP), a general education teacher, a speech/language pathologist, the District Nurse, and Mother. Mother is an RSP in the District, and, has been for approximately 15 years, but she is not identified as an RSP in this assessment report.

9. The report states that the purpose of the assessment was to determine special education eligibility and the need for services. The evaluation consisted of a review of previous assessments and records, observations of Student, and parent interviews. Mother did not consent to formal testing.

10. Ms. Barrett noted Student's educational history and family history. She noted that Student was taking medication for ADHD, and that Mother reported Student had articulation issues and a history of language issues. In reviewing previous assessments, Ms. Barrett stated that previous psychoeducational evaluations were not available. She reviewed reports of Rachelle Keltner, an optometrist, who noted that Student's vision was less than optimal with respect to pursuits and saccades, accommodative facility and posture, and eye teaming. Ms. Barrett listed Student's scores on the Iowa Tests of Basic Skills (ITBS), an achievement test Student took while at St. James in October 2006. Ms. Barrett also listed Student's test scores on the Comprehensive Receptive and Expressive Vocabulary Test; the California Achievement Tests/5 (CAT/5): Form A-Level 12; and the Gray Oral Reading Test 3, all of which Student took at Sylvan Learning Center in July 2006.

11. Ms. Barrett reviewed and summarized an assessment report by Ms. Contreras of C.A.R.D., dated March 28, 2006. Ms. Barrett noted that, according to Ms. Contreras, Student continued to display maladaptive behaviors such as non-compliance, escape/avoidance, and infrequent aggression. Antecedents to these behaviors included transitions from work to more work, preferred activity delays, challenging assignments, and what appeared to be over-stimulation. Overall, he continued to improve and his socialization with peers had increased. Ms. Barrett also reviewed and summarized a report of Dr. Libert, Ph.D., Student's psychologist, dated January 25, 2006. Dr. Libert's report gave a diagnostic impression of PDD and Cyclothymic Disorder, noted that a diagnosis of autism was not in order, and noted that initially Student was diagnosed with Bi-Polar Disorder. Dr. Libert's report also noted that Student's mood had stabilized, and he had become more sociable and developed good peer relationships. Dr. Libert reported Student's continuing need for speech and language interventions, and that Student still had difficulty with transitions in activities, although he had improved in that area. Dr. Libert reported that Student became very anxious and agitated whenever he was made conspicuous. He could be successfully redirected and reprimanded if he was given sufficient space and time to process the information.

12. Ms. Barrett also reviewed and summarized the report of Carol J. Atkins, M.A., dated June 30, 2004. Ms. Atkins's report stated that Student presented with significant auditory processing difficulties, particularly in connected speech. Ms. Barrett summarized Ms. Atkins's report detailing Student's auditory deficiencies. Ms. Barrett noted that Ms. Atkins had diagnosed Student with an Auditory Processing Disorder with features of a Decoding and Auditory Association sub profiles.

13. Ms. Barrett reported on the "Current Assessments," which consisted of classroom observation, review of records, and interview. The report did not specify all records reviewed by the assessment team.

14. Ms. Barrett reported that Student was observed on several occasions and in several locations, but she did not specify who observed Student or where he was observed. She reported that he spontaneously initiated interactions with familiar and non-familiar adults, and participated in two-way turn taking conversations. He was interested in learning and appeared to be cooperative in learning groups and social situations. He was able to provide personal information and follow simple one-step directions. Ms. Barrett referred to a speech therapy report dated July 11, 2006, which stated that Student had a "moderate articulation disorder" characterized by misarticulation of the phoneme /r/ and cluster reduction of /s/ consonant clusters. His scores on the Clinical Evaluation of Language Fundamentals, 4th Edition (CELF-4) standardized assessment showed that his comprehension and use of spoken language were within age-appropriate limits, except for "mild" receptive and expressive semantic difficulties which may have been related to decreased reading skills.

15. Interviews and records revealed that Student's social/emotional functioning was a concern. Student had difficulties in attention, hyperactivity, poor eye contact, anxiety, and stubbornness. He was described as an overall friendly and caring person. In the prevocational area, a review of Student's file indicated he returned homework, worked independently, had legible but large handwriting, and had good attendance. Academically, classroom and District assessments reflected that Student fell below his expected level in the areas of language arts and mathematics.

16. Ms. Barrett concluded that Student was in need of special education support services. In so finding, she eliminated the effects of environmental, cultural or economic disadvantage. She specifically stated that a list of factors, including emotional disturbance, did not "appear to be significant with regard to [Student's] current psychoeducational diagnosis." She found that Student met the eligibility criteria for special education services under the category of OHI, and she included the definition of

OHI from the California Education Code. She recommended that the IEP team meet to discuss the results of the assessment to determine the most appropriate, least restrictive educational environment for Student. She also included approximately three pages of classroom strategies to help with Student's behaviors, auditory processing difficulties, handwriting, organization, and to help build Student's self-esteem.

#### AMENDED IEP OF SEPTEMBER 17, 2007

17. District convened an IEP meeting on April 17, 2007, but no party offered the IEP into evidence at hearing. Student was found eligible for special education and services under the eligibility category of OHI, based upon his medical diagnosis of ADHD. He was placed in a general education classroom, with RSP support and speech and language services. Mother was his RSP teacher and the case carrier.

18. On September 6, 2007, when Student was in the fourth grade at Sierra Vista, Student was involved in a "behavioral emergency." According to the Behavioral Emergency Report form completed by Student's fourth-grade teacher, Samantha Sayres, Student refused Ms. Sayres's request that he stop sitting on his desk and complete an assignment. After Student made his way to the floor, he began to grunt and flail. Ms. Sayres, fearful for his safety and that of others, bear hugged him and pulled him into the hallway. This event precipitated an addendum IEP team meeting, which was held on September 17, 2007.

19. The purpose of the September 17, 2007, IEP meeting was to amend the April 17, 2007, IEP, to include a revised Behavioral Support Plan (BSP). The attendees at the meeting included Ms. Sayres, Mother, Ms. Butler (the District's Director of Special Education), an administrator, a school psychologist, and Student's third grade teacher. The team noted Student's eligibility as OHI, and stated that he received RSP daily for 150 minutes, and speech services six times a year for 15 minutes each session. The team agreed upon Student's BSP, to address behaviors that might lead to disruption,



aggression, or disciplinary action. The team determined that a Functional Analysis Assessment would not be appropriate at that time, and that the school psychologist would provide consultation to Student's classroom teacher regarding social skills and other behavioral issues two sessions each month, for 20 minutes each session. The team also decided that the BSP would be reviewed at the next IEP meeting, after completion of a social-emotional assessment.

20. The IEP team noted Student's recent changes in his medication (Metadate and Lamictal) to treat his ADHD and mood. The team noted Mother's concerns about Student's anxiety in school, motor and facial tics, clearing of his throat, and tense body language. The team noted that, outside of the school setting, structure, routine and quiet were helpful. Loud noises and light could cause sensory issues, and Student only liked touching if he initiated it. Student's strengths and reinforcers included reading factual books, listening to audio books, building things, and arts and crafts. The team identified three "Behaviors of Concern." First, Student's anxiety was displayed by facial tics, throat clearing, and tensing and jerking of shoulders. Second, Student would not follow the teacher's directions, which led to escalating, disruptive, acting-out behaviors. Third, Student would shut down.

21. Over the course of two pages, the team listed the antecedents to these behaviors, the frequency, intensity, and duration of each behavior of concern, the reasons why the behavior occurred, the desired alternative behaviors, and the accommodations, supports, strategies, and interventions to be used to control the behaviors. The team agreed that daily progress reports regarding the BSP would be sent home. Mother agreed with the IEP; however, the IEP contains an unclear and unexplained notation in which Mother disagreed with where attachments would be sent.

## DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT OF SEPTEMBER-OCTOBER 2007

22. At the time of the September 17, 2007, IEP meeting, District was in the process of performing Student's triennial psychoeducational assessment. Philip Warren, a District psychologist, District autism consultant, and a Behavioral Intervention Case Manager (BICM), was the primary assessor for the triennial assessment. District selected Mr. Warren because Mother was concerned that Student was demonstrating autistic-like behaviors. Mr. Warren holds an M.A. in School Psychology from Azusa Pacific University, which he received in May 2003, and a Pupil Personnel Services credential. Mr. Warren's background includes work in the autism program at Temecula Valley Unified School District as a special day class teacher, during which he created and implemented an autism curriculum, and he has attended and presented many trainings regarding autistic students and methods of teaching them. He has been assessing children for approximately four years. For almost five years he has worked directly with children of an assortment of ages who had varying degrees of ASD. Mr. Warren was one of the authors of the Multidisciplinary Psychoeducational Report of the triennial assessment, which is dated October 29, 2007.

23. The other members of the assessment team listed in the report were January Paschall, the speech and language pathologist (SLP); Ms. Sayres, Student's general education teacher; Judy Helter, the Resource Specialist; and Mother. The assessment was conducted over seven days during September and October 2007. Ms. Paschall authored the October 29, 2007, triennial assessment report with Mr. Warren.

24. The team administered the following assessments:

Kaufman Assessment Battery for Children, 2nd Edition  
(KABC-II)

Beery-Buktenica Developmental Tests of Visual-Motor  
Integration, 5th Edition (VMI-5th);

Test of Auditory Perceptual Skills-Revised (TAPS-3)

Test of Visual-Perceptual Skills—3rd Edition (TVPS-3)

Woodcock-Johnson Tests of Achievement, 3rd Edition 2007  
Norms (WJ-III-NU)

Vineland Adaptive Behavior Scales—2d Edition (VABS II)  
(survey interview form and teacher rating form)

Childhood Autism Rating Scale (CARS)

Gilliam Autism Rating Scale, 2nd Edition. (GARS-2)

Autism Diagnostic Observation Scale (ADOS)

Behavior Assessment Systems for Children Parent Rating  
Scales, 2nd Edition. (BASC-2 PRS-C)

Behaviors Assessment Systems for Children, Teacher Rating  
Scales, 2nd Edition (BASC-2 TRS-C)

Goldman Fristoe Test of Articulation, 2nd Edition (GFTA-2)

Webber “R” Probes

Comprehensive Assessment of Spoken Language (CASL)

Test of Pragmatic Language (TOPL)

## Classroom Observation

## Review of Records

## Parent and Teacher Interviews

25. These assessment instruments were selected and administered so as not to be racially, culturally, or gender discriminatory, and they were administered in English, Student's native language. All of the assessments had been validated for the specific purpose for which they were used.

26. The report noted that Student was receiving RSP and speech and language services due to OHI and speech or language impairment. Mr. Warren also noted in the report that the assessment team had no direct access to Student's previous educational records. Mother had reported to the assessment team that these records had been sealed by the court. Therefore, Mr. Warren obtained background information dating from prior to Student's attendance in the District only from Mother and from independent assessments and assessors.

27. The report summarized Student's background information, as obtained from Mother and from the District's previous psychoeducational report dated April 17, 2007. The triennial assessment report described Student's educational history and family life, and noted that school attendance was not a concern. The report also noted that Student had recently been assessed by the Inland Regional Center (IRC), and Mother reported that Student had not met eligibility for regional center services, but Mother had not received the assessment results. Mr. Warren did not include in the report that Mother had disclosed that the IRC had administered the ADOS to Student as part of its recent assessment.

28. The report also summarized Student's health and development, based upon parent interview and a developmental history that had been conducted on

October 23, 2007. The report noted no complications with pregnancy and birth, and that Student had met most developmental milestones, but still had trouble dressing himself, still had trouble staying dry at night, and had on-going issues following directions. Student passed the vision and hearing screenings performed by the nurse on August 27, 2007. Student had been medically diagnosed with ADHD at age 3, and PDD-NOS, and Student's medications were Metadate and Lamictal. Mother reported that Student's behavior changed significantly from ages 2-3 years, as he became more hyper and resistant. The developmental history provided by Mother revealed that, at the time of the assessment, Student had sleep problems, was overactive, had facial tics, wet his bed at night, had speech difficulties, nightmares, inattentiveness, poor coordination, poor appetite, short attention span, and poor eye contact.

29. The report provided excerpts from three previous assessment reports that contained additional history, all of which had been given to Mr. Warren by Mother, and all of which had been summarized by Ms. Barrett in the District's previous psychoeducational assessment report dated April 17, 2007. These reports were: (1) Report of Carol Atkins, dated June 30, 2004; (2) Report of Teresa Contreras, dated March 28, 2006;<sup>2</sup> and (3) Dr. Libert's report dated January 25, 2006. Mother did not provide Mr. Warren the Initial Evaluation Report written by Theresa Contreras and Kari Scott of C.A.R.D., dated January 4, 2006.

30. As did Ms. Barrett, Mr. Warren set forth Student's scores on the ITBS which was administered to Student at St. James in October 2006, and the scores Student

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<sup>2</sup> The report erroneously states that the date of Ms. Contreras' report was March 28, 2007; at hearing Mr. Warren acknowledged that Ms. Contreras' report was dated March 28, 2006.

received on the assessments performed by Sylvan Learning Center on July 26, 2006.<sup>3</sup> Mr. Warren also reported Student's scores on the CAT-6, which the District administered on April 23, 2007.

31. Mr. Warren's assessment of Student occurred in the resource room and the "pod" at Sierra Vista. The "pod" is a hallway area outside of the resource room. Mr. Warren reported his observations during testing. He reported that Student was cooperative and friendly, but required frequent redirection to remain on task, and that several breaks were provided during each testing session to assist in keeping Student motivated and on task. Mr. Warren also reported that rapport was easily established and maintained throughout the testing sessions. Student had no difficult understanding and responding to verbal communication during the testing.

32. Mr. Warren reported his observations of Student during the school day. He observed Student on seven occasions in the general education classroom, RSP classroom, at lunch, at recess, and during physical education. Classroom observations were difficult, because Student was aware of Mr. Warren's presence and would either avoid Mr. Warren by going to Mother's classroom, or attempt to sit next to Mr. Warren or otherwise engage him. During the observations, Mr. Warren noted several situations in which Student did not attend to the task, ignored the teacher, left the classroom without permission, and suddenly visited his Mother's classroom, all of which Mr. Warren reported appeared to be "typical" for Student.

33. Mr. Warren also summarized his interview with Student's general education teacher, Ms. Sayres. Ms. Sayres reported that Student had many difficulties making friends and interacting socially with other students. He could be outgoing and friendly. Mr. Sayres reported that other students thought Student was immature. With

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<sup>3</sup> The report also misstates the date of the Sylvan assessment as July 26, 2007.

respect to classroom performance, Student was easily frustrated. He would stay on task well only if he liked the subject. He always completed homework but rarely completed assignments in class. He could not write a paragraph on his own, he had trouble sequencing sentences, and his handwriting was large and barely legible. He could not write in cursive. Ms. Sayres reported that math concepts were a strength, but Student did not participate in math because math frustrated him. Art and other creative projects were also a strength. Student struggled with reading, writing, vocabulary, social skills, following directions, and fine and gross motor skills. Student did not like to participate in reading and writing, and Ms. Sayres attributed his lack of skill in those areas to his failure to participate.

34. Mr. Warren summarized the series of interviews he conducted with Mother from September 14, 2007 through October 19, 2007. He included a brief chronology of Student's educational history since preschool, including the allegation that Student was physically abused at the private kindergarten he had attended. Mr. Warren's summary did not mention Student's behavioral difficulties and the related disciplinary actions that were imposed when Student attended Murrieta or thereafter, including the September 6, 2007, "behavioral emergency" in Mr. Sayres's classroom. Mr. Warren's summary also did not reference Student's receipt of OT services prior to enrolling in the District, even though Mother had advised him of this fact. Mr. Warren noted that Student attended Sierra Vista without a C.A.R.D. aide, and that Mother was his case carrier and RSP teacher. Mother expressed concerns to Mr. Warren regarding autistic-like behaviors, and the emotional impact of Student's attendance at the private kindergarten. Mother wanted Student's skills to improve so he could transfer to La Sierra Academy, a private school. Mr. Warren reported Mother's comments that Student loved school, and had friends his own age, but he had social difficulties with peers. Mr. Warren noted that Mother described no family problems that might affect Student's learning, and that

Student performed some household chores. Mr. Warren reported that Mother wanted Student to stay in the general education classroom and feel comfortable there, and not to walk out of the classroom. Mother expressed concern that Student's teacher called Mother when there were incidents involving Student. In his summary, Mr. Warren attributed this situation to Mother's multiple roles as Student's parent, case carrier, and RSP teacher.

35. The report summarized a brief interview Mr. Warren conducted by phone with Dr. Libert, Student's psychologist, on October 25, 2007. The report stated that Dr. Libert advised Mr. Warren that Dr. Libert had a long history with Student, that he primarily used emotional interventions with Student, and that Student had demonstrated much improvement. Dr. Libert stated that Student learned best when presented with information in different ways. Dr. Libert reported that Student was initially diagnosed with Bi-Polar Disorder, but the diagnosis was later changed to Cyclothymic Disorder, and that Student also met the diagnostic criteria for PDD-NOS. Dr. Libert told Mr. Warren that he wanted the ADOS administered to Student.

36. The report described Student's results on the 10 subtests of the KABC-II that comprise the Mental Processing Index (MPI). Mr. Warren reported that the KABC-II was a measure of the general cognitive ability for all children 3-18 years old. He also reported that the authors of the KABC-II recommended administration of the MPI to, among others, children with known or suspected language disorders or a child with known or suspected autism. He noted that the subtest Block Counting was substituted for the Rover subtest because the administration of the Rover subtest was interrupted by Student's peers. Student's total standard score on the MPI was 87, with a percentile rank of 19, with a confidence interval of plus or minus 6 at the 95 percent confidence interval. These scores reflected that Student's cognitive functioning fell within the lower range of average, where average was 85-115.



37. Judy Helter, a credentialed Resource Specialist employed by the District at the time of the assessment, administered the WJ-III-NU, to determine Student's academic functioning. At the time of the assessment she had been an educator for approximately 30 years. She had training in the administration of the WJ-III-NU, and had administered the Woodcock-Johnson assessment for approximately 19 years, from 10 to 20 times per year. Ms. Helter was trained and qualified to administer the WJ-III-NU to Student. The assessment report listed Student's standard scores and percentile rank on this instrument. The report noted that Student's standard score in math calculation skills was average. His scores in broad mathematics, math reasoning, and brief mathematics scores were low average. Student's broad reading, basic reading skills, brief reading, and written expression scores were in the low range. His standard score in reading comprehension was very low, compared to same-grade peers.

38. Mr. Warren administered the VMI-5 and reported Student's scores. His report described the primary purpose of the VMI-5 as the evaluation of a student's visual and fine motor skills, and their integration. He concluded that Student's standard score of 71 reflected that Student's ability to integrate visual acuity, visual perceptual skills, and fine motor ability fell within the low range. Student's standard score of 76 on the supplemental visual perceptual subtest also fell within the low range, and his standard score of 68 on the supplemental motor coordination subtest fell within the very low range.

39. Mr. Warren administered and reported Student's results on the TVPS-3, which the report stated evaluated Student's ability to interpret what he sees by measuring seven visual-perceptual skills. Student's scaled scores on the subtests ranged from 3 in the area of Visual Memory to 13 in the area of Visual Closure. Student's Overall Perception Quotient was a standard score of 86, which ranked in the 18th percentile. Mr. Warren's report concluded that Student's performance overall fell within the low

average range for visual processing. In the area of basic processing, Student's standard score of 80 fell within the low average range. His standard score of 70 in the area of sequencing fell within the low range. His standard score of 105 in the area of complex visual perceptual skills fell within the average range.

40. Mr. Warren administered and reported Student's scores on the TAPS-3, which the report stated measured Student's ability to perceive and process auditory stimuli. Student's scaled scores on the subtests ranged from scores of 4 in Phonological Segmentation and Sentence Memory, to 13 on Auditory Comprehension. On the Phonologic Index, Student obtained a standard score of 88. Student obtained a standard score of 90 on the Memory Index, and he obtained a standard score of 105 in Cohesion. His Auditory Index standard score was 93. Mr. Warren reported that Student's auditory perceptual skills were in the average range, with strengths in the area of cohesion, indicating Student's ability to process complex auditory information was strongly in the average range.

41. Mr. Warren administered the VABS-II to assess Student's personal and social skills, and he reported the scores. Mother was given the VABS-II Survey Interview Form, and Student's classroom teacher, Ms. Sayres, was given the VABS-II Teacher Interview Form. Scores below 70 are considered to be in the developmentally delayed range of ability. Mr. Warren's report stated that Mother scored Student as Low in the domains of Communication, Daily Living Skills, and Socialization. The standard scores Mother gave for each of these domains were below 70. Mother scored Student as Adequate on Motor Skills, and, based upon Mother's ratings, the Adaptive Behavior Composite score, which summarizes the Student's performance across all domains, was Low. The report stated that Ms. Sayres scored Student Low in all domains, for an Adaptive Behavior Composite score of Low. All of the scores Ms. Sayres gave were

below 70, except that the Motor Skills score was 70. Mr. Warren reported that Student's adaptive functioning fell within the developmentally delayed range.<sup>4</sup>

42. Mr. Warren administered the CARS, the GARS-2, the ADOS, the BASC-2, and the VABS-II maladaptive behavior index survey interview form to evaluate Student's social/emotional/behavioral functioning, and the assessment report described the results of these assessments.

43. The assessment report described the CARS as a 15-item behavioral rating scale to identify children with autism and distinguish them from developmentally disabled children without ASD. The CARS further distinguishes children with autism in the mild to moderate range from children with autism in the moderate to severe range. Mr. Warren reported that he completed the rating scale based on input from Student's mother and his own direct observation. The rating scale reflected a total CARS score of 25, which fell within the non-autistic range. A total score of at least 30 was required to categorize a child as being in the mild to moderate autism range.

44. The report describes the GARS-2 as a norm-referenced screening instrument to assess individuals aged 3 through 22 who have severe behavior problems that may be indicative of autism. It consists of three subscales, in the areas of Stereotyped Behaviors, Communication, and Social Interaction. Ms. Sayres, Student's classroom teacher, completed the Stereotyped Behaviors and Social Interaction subscales, and Ms. Paschall, the speech pathologist who was part of the assessment team and who performed the speech and language assessments that are described in the report, completed the Communication subscale. Mother completed the Parent

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<sup>4</sup> The Motor Skills subscale is applicable to children up to age seven. The score was not included in the Student's composite scores on the VABS-II. Mr. Warren did not include this information in the assessment report.

Interview form, which addressed Student's development in social interaction, language use, and symbolic or imaginative play from birth to 3 years of age.

45. Mr. Warren reported certain details of the results of the parent interview, but did not report any details of the subscales completed by Ms. Sayres and Ms. Paschall, except to report Student's standard scores. Mr. Warren reported that Mother stated that Student did not develop normally in terms of language or following direction. Mother advised Mr. Warren that Student did not cry when approached by unfamiliar people during his first year, and did not respond to his name being called or indicate when a parent or sibling cried or was distressed. Mother also advised Mr. Warren that Student did not engage in certain types of pretend play, such as pretending he was someone else, or pretending that an object was something else or a doll was a real person. Mr. Warren reported that on the Stereotyped Behaviors subscale, Student's standard score was a 5; on the Communication subscale, his score was 0; and on the Social Interaction subscale, Student's score was 10. This resulted in an autism index of 68, which correlated to an unlikely probability that Student had autism. An autism index of at least 70 was required to reach the "Possibly" autistic level. At hearing, Ms. Sayres testified that she would have scored Student higher than 0 on several of the items of the Communication subscale, had she been asked to score that subscale.

46. Mr. Warren administered the ADOS, which the assessment report stated is a semi-structured, standardized assessment of communication, social interaction, and play for individuals who are suspected of having ASD. It has four modules, and Mr. Warren administered Module 3, which is intended for children from the later preschool years up to age 16 who have fluent language skills. It consists of 14 activities in the areas of social, communicative, and language behaviors. Student was evaluated on all 14 activities.

47. Mr. Warren has administered the ADOS approximately 25-30 times throughout his career. He received training in administering the ADOS from the ADOS training video program and a school psychologist who had herself been directly trained in administering the ADOS by the publishers of the ADOS. Mother had advised Mr. Warren that the IRC had recently administered the ADOS to Student, but Mr. Warren did not know which of the four ADOS modules the IRC had administered, and he had not seen the IRC assessment report.

48. Mr. Warren reported the results of the ADOS. In the area of Communication, the assessment report stated that Student demonstrated limited flexibility with conversation skills, and he also demonstrated slightly unusual speech volume during the assessment. Student used gestures and spoke in complex sentences, shared information about himself, and expressed interest in Mr. Warren's ideas and experiences. In the area of Imagination, he demonstrated creative and imaginative play during structured and unstructured tasks.

49. In the area of Reciprocal Social Interaction, the report noted that Student demonstrated a limited or immature understanding of others' emotions. He demonstrated appropriate eye contact, shared enjoyment, facial expressions, and language production linked with nonverbal communication when Mr. Warren administered the ADOS.

50. Mr. Warren noted that Student demonstrated an unusual level of routinized activities during the assessment. He insisted that activities or toys which were to be used during break times be in clear view while he completed the assessment. Mr. Warren observed no hand, finger, or complex mannerisms, self injurious behaviors or excessive interest in specific topics or repetitive behaviors.

51. Based on Student's scores of 1 in the Communication domain, 3 in the Reciprocal Social Interactions domain, 0 in the Imagination/Creativity domain and 2 in

the Stereotyped Behaviors and Restricted Interests domains, Mr. Warren concluded that Student's performance on the ADOS did not indicate behaviors consistent with a diagnosis of Autistic Disorder or an ASD.

52. Mr. Warren also reported on Student's BASC-2 scores, based on rating scales completed by Mother and Ms. Sayres. The report stated that the BASC-2 was designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children, to aid in the development of treatment plans. Mr. Warren reported that Mother and Ms. Sayres both gave Student Clinically Significant ratings in the areas of hyperactivity, withdrawal, and the behavioral symptoms index. Ms. Sayres also reported Clinically Significant ratings in the areas of aggression, externalizing and internalizing problems, and learning problems. Scores that fall in the Clinically Significant range suggest a high level of maladjustment. The report did not mention a variety of other aspects of Student's BASC-2 scores. For example, the report omits that Mother and Ms. Sayres both rated Student in the Clinically Significant range in the areas of adaptability, functional communication, and adaptive skills. Further, the report does not comment upon the Clinically Significant ratings that Mother or Ms. Sayres gave Student in attention problems, activities of daily living, depression, school problems, atypicality, social skills, and study skills, and that Mother or Ms. Sayres gave Student At-Risk ratings in externalizing problems, atypicality, conduct problems, anxiety, and attention problems. The assessment report states that an At-Risk score may identify a significant problem that may not be severe enough to require formal treatment, or may identify a potential problem that needs careful monitoring.

53. Finally, Mr. Warren reported on the results of the Maladaptive Behavior Index on the VABS-II survey interview form which Mother completed. The survey revealed clinically significant maladaptive behaviors in the internalizing domain, and elevated maladaptive behaviors in the externalizing domain, resulting in a maladaptive

behavior index raw score of 28, which is a score at the Clinically Significant level. On this survey, Mother reported that Student was overly dependent, anxious, and nervous. He was impulsive, stubborn, and sullen. He had frequent accidents at night, and wore pull-ups. He was overly-familiar with strangers, and had frequent tics such as coughing when anxious or nervous. He had difficulty paying attention and was more active than others his age.

54. In the report, Mr. Warren summarized Student's social emotional status as demonstrated by the assessments, by noting that Student exhibited atypical behaviors when compared to typically developing students. He concluded that the records review and assessment data reflected that these behaviors did not appear to fit the profile of autistic-like behaviors. Mr. Warren testified that the autistic-like behaviors Student displayed were not displayed to a marked degree, severe enough, or consistent enough to meet the eligibility criteria of the Education Code for autistic-like behaviors.

55. Ms. Paschall evaluated Student's language functioning. Ms. Paschall has been a speech and language pathologist (SLP) since 2001, and she has served in that capacity in the District since fall 2003. She received her B.A. from Washington State University in speech and hearing sciences, and her M.S. from University of Redlands in Communicative Disorders. She holds a California SLP license and a certificate of Clinical Competence from the American Speech-Language-Hearing Association (ASHA).

56. Ms. Paschall conducted standardized assessments in the areas of phonology/articulation, receptive and expressive language, and social skills (pragmatics). She informally assessed the areas of oral peripheral, fluency, and voice. She was trained and qualified to administer these assessments to Student, which are further described below. Ms. Paschall had some familiarity with Student. She had met him when he first enrolled at Sierra Vista, and had provided consulting services to Student's classroom teacher starting in April 2007. Ms. Paschall would periodically check in with Student's

classroom teacher. Additionally, in spring 2007 Ms. Paschall had administered the state tests to Student, and he visited her therapy room approximately 5 times before the state tests to become acclimated to her and to the room.

57. The report summarized Ms. Paschall's interview with Mother. Mother occasionally observed that Student made articulation errors, but she was primarily concerned with Student's social skills. He acted inappropriately in school by putting his arm around his friends, which Student could not understand violated school policy. Mother reported that Student also exhibited difficulty with conflict resolution with his peers, and needed assistance from her in resolving conflicts. He would often walk away when he was unable to express his feelings. Student only began to make friends in January 2006. He could only handle interacting with one or two peers at a time, and he had difficulty transitioning between different groups of friends. He stayed in the RSP room at lunch and recess, where he was joined by two friends, because he could not tolerate the large group of students and the noise in the general recess and lunch settings.

58. The report also summarized Ms. Paschall's interview with Ms. Sayres. As did Mother, Ms. Sayres reported that she was mainly concerned with Student's social skills. Ms. Sayres disclosed that Student preferred to keep his distance from group settings, except for two boys. He sat somewhat apart from the class, and did not have an occupied desk next to him. When the class was walking in a line, Student walked a considerable distance behind the line. He was allowed to get his lunch first in the cafeteria because he was uncomfortable waiting in line. Ms. Sayres reported that Student did not work in small groups in class, but on his own or with one of his two friends. During free time, he did not attempt to interact with his classmates. He did not like to share. The other students did not interact with Student for fear of making him angry or uncomfortable. Student had directed other students away from his desk. He



had difficulty expressing his feeling when he was upset. Rather, he would “shut down” by turning away, avoiding eye contact, mumbling under his breath, and resisting communication attempts.

59. Ms. Paschall reported that Student acted appropriately and cooperatively throughout the testing portion of the speech and language evaluation, which was conducted on October 5, 9, 11, and 16, 2007, in a quiet environment that was free from distractions. However, Student often commented on the test stimuli and needed verbal prompts to redirect his attention to the next question. She reported that the assessments she performed were valid and accurate measures of Student’s current levels of speech and language functioning.

60. Ms. Paschall reported that Student’s scores on the CASL subtests of Antonyms, Grammatical Morphemes, Sentence Comprehension, Nonliteral Language, and Pragmatic Judgment, as well as on the Core Composite, were within the average range as compared to his same-age peers. The CASL tested Student’s processes of comprehension, expression, and retrieval in the categories of semantics, syntactic, supralinguistic, and pragmatic.

61. Ms. Paschall reported Student’s scores on the TOPL, another measure of Student’s pragmatic language skills. His quotient score of 97 (mean of 100) and percentile rank of 42 fell within the average range.

62. Ms. Paschall observed Student in a social setting, because of Mother’s and Ms. Sayres’s concerns regarding Student’s social skills. The observation occurred during recess, in the hallway outside of the RSP room, where Student played with two of his friends from class. Ms. Paschall observed that Student exhibited appropriate conversational discourse skills, such as initiating conversation, topic maintenance, commenting, showing, and appropriate eye-contact. However, during most of the observation, Student played on his own with boxes while the other boys played together

with rulers nearby. Both of the other boys would come over to Student when he wanted to show them something, but he never went to the other boys. He would only look towards them. Near the end of the observation, Student initiated play and asked the boys to play "army" with him. The boys agreed, but when Student immediately claimed as his own all of the boxes, an argument ensued. During the argument, Student mumbled under his breath and repeatedly said that the boys were annoying him. Recess ended, and Student was visibly upset. He sat down at a table with his head in his hands. He was asked why the boys were annoying him, and he stated they were playing with the rulers and not with him. He told Mother what had happened, and Mother brought all of the boys together. With Mother's verbal coaching, Student and the boys resolved the situation.

63. Based upon this observation, and Mother's and Ms. Sayres's reports to her, Ms. Paschall concluded that Student had weaknesses in three of the six core subcomponents of pragmatic language tested by the TOPL. Specifically, the three areas of Student's weakness were physical setting, audience, and purpose. With respect to physical setting, Ms. Paschall considered Mother's report that Student would yell at Mother across a store and not wait until they were together to converse. He would also speak loudly to Mother when they were in close proximity in a quiet environment. With respect to audience, Ms. Paschall noted that Student exhibited difficulty in a variety of conversational areas, such as relating to peers and adults, socializing in groups, considering other people's perspectives, expressing his moods, and conversational turn-taking. She gave examples of Student's conduct in each of these areas. With respect to purpose, Ms. Paschall considered that Student appeared to have difficulty expressing his emotions and intent, especially when he was upset, including difficulty with apologizing.

64. Ms. Paschall also evaluated Student in the areas of phonology/articulation. She administered the GFTA-2 to evaluate his phonology skills (how words are combined

to convey meaning), specifically within the area of articulation. He obtained a standard score of 102, at the 21st percentile, which was within the average range as compared to same age peers. Ms. Paschall explained that Student produced several errors that were not reflected in the raw scores, inconsistently substituting certain sounds for others. Ms. Paschall reported that these errors were not developmentally appropriate, but she did not consider these errors significant because they did not significantly impede upon the intelligibility of his speech. Because of these inconsistent errors, Ms. Paschall reported that she administered the Webber "R" probes, a non-standardized measure, to further evaluate his production of prevocalic and vocalic "r" sounds. Student's scores were within acceptable ranges, although he appeared to have more difficulty with vocalic /r/ sounds than prevocalic /r/ sounds. As with the GFTA-2, Ms. Paschall reported that the errors were inconsistent, which indicated that he was acquiring mastery of those sounds. Therefore, she reported that they were not a significant concern, as they did not severely impact the intelligibility of his speech.

65. Ms. Paschall conducted an informal oral peripheral examination which revealed that Student's oral mechanisms for the proper production of speech were intact and appropriate. She reported that Student exhibited fluent speech throughout the evaluation. The pitch, intensity, and quality of Student's voice appear to be appropriate for his age, size, and sex.

66. At the end of the report, Mr. Warren summarized his findings, noting again that home and classroom behavioral information was difficult to define due to Mother serving multiple roles as parent, case carrier, and RSP teacher. He also noted again the lack of access to special education/academic history since, as reported by Mother, the file was sealed by the court. He concluded that strengths in the area of independent/adaptive functions were difficult to determine due to the overlapping of home and educational boundaries. He reiterated that Student demonstrated atypical

behaviors, but they did not appear to fit the profile of autistic-like behaviors. He concluded that based on the information gathered through interview, outside data, and current assessment, Student demonstrated behaviors consistent with eligibility criteria as a student with an emotional disturbance (ED). He listed the criteria for eligibility under the category of ED as set forth in the California Code of Regulations, title 5, section 3030(i). He found that three of the eligibility characteristics were applicable to Student:

- (A) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. Mr. Warren reported that Student had difficulty with the social interaction required to develop lasting relationships with peers.
- (B) Inappropriate types of behavior or feelings under normal circumstances. Mr. Warren reported that Student consistently demonstrated high anxiety behaviors in which he was unable to cope with typical, routine classroom expectations and interactions.
- (C) A tendency to develop physical symptoms or fears with personal or school problems. Mr. Warren reported that Student coughed during all classroom observations and testing sessions, which Student attributed to "stress," and not illness.

67. Mr. Warren considered and rejected the two other ED characteristics as not applicable to Student. Mr. Warren did not find that Student exhibited an inability to learn, and Student did not display a severe level of depression or unhappiness.

68. At hearing, Mr. Warren testified that some of the behaviors Student displayed were consistent with ASD, as well as ED, ADHD, and other disorders. Mr. Warren explained that he considered Student's social behaviors to be more consistent with ED than with ASD, partly because Student had the ability to understand social

situations, but his emotional disturbance prevented him from dealing with them appropriately in the real world.

69. Mr. Warren also concluded that Student continued to meet eligibility criteria under OHI, and continued to be eligible for speech and language services to address his pragmatic language needs. Mr. Warren specifically referred to the California regulations regarding both OHI and the SLI categories. He did not refer to the California regulations or to any other source regarding the criteria for eligibility for special education as a student with autism or autistic-like behaviors, nor did he include those criteria in his report.

70. Mr. Warren's report included a variety of recommendations to assist Student in controlling his behaviors and enhance his coping strategies, problem-solving skills, and social skills. Mr. Warren's recommendations did not include psychological counseling or a referral for mental health services.

71. Mr. Warren also summarized Ms. Paschall's findings. He noted that, based upon Ms. Paschall's observations and parent and teacher report, Student's pragmatic language skills were impaired in the areas of audience and purpose. He failed to state that Ms. Paschall had also specifically found Student's pragmatic language skills were impaired in the area of physical setting.

72. While the assessment was pending, Vicki Butler, the District's Director of Special Education, learned that the District had not made any effort to obtain Student's previous records from MVUSD, because Mother had reported they were "sealed." Ms. Butler instructed her staff to attempt to obtain the records. District requested the records on or about October 11, 2007. District received the records from MVUSD in or about November 2007, after Mr. Warren had completed and distributed the triennial assessment report dated October 29, 2007, but prior to the IEP meeting of January 9, 2008.

## IEP MEETING OF JANUARY 9, 2008

73. On January 9, 2008, District convened a triennial IEP meeting to discuss the results of the triennial assessment. Mother had waived the statutory 60-day time period for holding the IEP meeting after the assessment. Mother, Student's father, Ms. Sayres (Student's general education teacher), Jan Marshall (Sierra Vista's principal), Ms. Butler (District Director of Special Education), Mr. Warren, Chris Miller (a District school psychologist), Dr. Libert (Student's psychologist), Lori Marshall (a District SLP), and Student's uncle attended the meeting. Ms. Helter, who had administered the WJ-III-NU assessment, and Ms. Paschall were not present at the meeting.

74. The team discussed Student's present levels of performance, and set annual goals in the areas of reading, writing, math, communication development, social emotional/behavioral, and vocational to enable Student to progress in the general curriculum. The team noted that Student had a BSP.<sup>5</sup>

75. The team listed accommodations for Student for participation in statewide and District-wide assessments, and recommended classroom accommodations. The team considered a range of placements, and concluded that the least restrictive environment was general education with RSP consultation/collaboration and related services. The team determined that the school psychologist, RSP teacher, class teacher, and SLP would consult twice a month for 30 minutes each time; RSP collaboration and consultation would occur five days a week for 150 minutes a day; speech and language consulting services would be provided six times a year, for 15 minutes each time; and observation and facilitation of Student's social skills with peers by an SLP would be

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<sup>5</sup> The IEP stated that the BSP was attached to the IEP form, but it was not attached to either of the two copies of the IEP that were admitted as exhibits at hearing.

provided 20 times a year, for 15 minutes each time. Student would spend 100 percent of his time in the general education environment.

76. The team recommended that an OT assessment be performed. The team did not find Student eligible for mental health services, for transportation, or for extended school year services (ESY). The IEP provided that parents would be informed of Student's progress six times a year.

77. The IEP reflects that the team discussed Mother's roles as parent and case carrier for Student, and that Mother and the principal asserted that Mother could handle both roles in a professional manner. The team discussed the triennial multidisciplinary psychoeducational report. Mr. Warren stated that the assessment results did not indicate eligibility under autistic-like behaviors, but that Student met eligibility criteria as a student with ED, as well as OHI due to ADHD, and SLI. Mother disagreed with the report, stating that Student "wasn't himself" during the assessment. She felt that the transitions of starting the new school year, scheduling changes, and testing interfered with the results. She disagreed with the ED eligibility conclusion of the report, and felt that the report would be a problem if it stayed in Student's file. Parents requested that District shred Student's records that it had obtained from MVUSD. Student's father and uncle also disagreed with an ED eligibility classification. The IEP team recorded Dr. Libert's comments that the primary issue was Student's PDD-NOS, and that difficulty in processing environmental stimuli triggered emotional responses. Dr. Libert discussed his disagreement with the ED eligibility classification, and stated he would submit a letter to the District to clarify his position. The letter was to be attached to the IEP.<sup>6</sup> Mother

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<sup>6</sup> Dr. Libert wrote a letter to the District, dated February 14, 2008, to further explain his position. District did not receive the letter promptly after February 14, 2008, but the evidence was unclear as to the date the District received the letter. Mr. Warren did not have knowledge of the letter until shortly before the due process hearing. The

expressed that Student was successful in school the previous year and that he was doing well during the current school year. Ms. Sayres stated that Student had difficulty adjusting to the new classroom at the beginning of the year. The team compromised on the eligibility category, and determined that multiple disabilities would be the primary disability, with SLI as the secondary disability. Ms. Sayres had to leave the meeting before it concluded, but she passed a note to Ms. Butler that was quoted in the meeting notes: "[Student] should be listed as multiple disorders because ED and OHI are insufficient to represent his behavior and disability." The IEP noted parents' belief that Student was autistic-like with ADHD with speech and language issues, and his delays in social skills, transition issues, and sensory issues were related to the autistic-like disability. Parents requested an IEE, and District stated that it required time to consider the request and would respond in writing. Parents did not consent to the IEP.

78. At the IEP meeting, District presented an assessment plan to Mother, dated January 9, 2008, seeking her consent to an OT evaluation. Mother did not sign the form and did not consent to the OT assessment.

79. On January 28, 2008, after the IEP meeting, Mr. Warren wrote a two-page addendum to the multidisciplinary psychoeducational assessment report of October 29, 2007, to reflect his review of the additional records that had been produced by MVUSD. He listed the items from MVUSD that he had reviewed, which included the C.A.R.D.

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letter was admitted into evidence at hearing, but it was not attached to either of the two copies of the January 9, 2008, IEP that were admitted into evidence at hearing. At hearing, Dr. Libert clarified his opinion that Student is not emotionally disturbed. Rather, Student, because of his ASD, has difficulty processing information and environmental stimuli. When the information and stimuli reach a certain level, Student becomes overwhelmed and will act out emotionally.



Initial Evaluation Report by Ms. Contreras and Ms. Scott, dated January 4, 2006. Mr. Warren determined that the information received from MVUSD supported the assessment findings outlined in the District's October 29, 2007, triennial Multidisciplinary Psychoeducational Report. District did not convene an IEP meeting to discuss the addendum to the assessment report.

#### STUDENT'S CRITICISMS OF THE DISTRICT'S ASSESSMENT

80. At hearing, Dr. Libert criticized District's triennial Multidisciplinary Psychoeducational Report. Dr. Libert received his B.A. in Psychology from California State University, Fullerton, and his M.S. in Counseling Psychology from the same institution. He received his Ph.D. in Psychology from the University of California, Irvine, and received a Post-Doctorate Certificate in Neuropsychology from the Fielding Graduate University in Santa Barbara. He has been a licensed California Marriage, Family, and Child Counselor since 1981, a licensed California clinical psychologist since 1993, and he holds a California full life teaching credential in Psychology. He has taught psychology at the community college level and is an Adjunct Professor at the California School of Professional Psychology. Since 1993 he has had a private practice in clinical psychology and neuropsychology. He specializes in children, and, as part of his practice, he has a program for social skills training for children and adults on the autism spectrum. Student is not a participant in Dr. Libert's social skills program. Dr. Libert's practice is not limited to children with ASD, and he provides assessment, evaluation, and treatment of children with a variety of mental disorders, including emotional disturbance, depression, bi-polar, and anxiety. He has been treating Student since 2001.

81. Dr. Libert has training in administering diagnostic and standardized assessments. He criticized Mr. Warren for only surveying Mother regarding background information from birth to age three on the GARS-2, for several related reasons. He testified that this background information is not part of the score, and often a child's

true difficulties in social functioning are not clinically observed until the child is in third or fourth grade, well above the age-range of the background portion of the survey. Therefore when, as here, Mother's input was limited to information from birth to three years, one may not receive a complete picture of the child's behaviors. Further, a parent should rate the child on the GARS-2 survey, because otherwise the examiner would miss information about the child's daily behaviors within the family, which is a large component of the child's behavioral status. The GARS-2 was designed to capture Student's behaviors in a range of activities, and therefore Mother's input would be important

82. Dr. Libert also criticized Mr. Warren for rating Student on the CARS, because of Mr. Warren's limited experience with Student. Dr. Libert testified that the CARS raters should have observed the child in a range of settings, to obtain an accurate picture of how they handle situations. Dr. Libert also felt that Mr. Warren's overall conclusion that Student did not display autistic behaviors on the CARS was inconsistent with Mother's report of Student as displaying a few symptoms of autism.

83. Dr. Libert was also concerned with respect to whether Mr. Warren had sufficient training to administer the ADOS, and because it was administered twice to Student within two to three months' time. He cited the American Psychological Association Standards of Ethics as reflecting a concern with the practice effects of administering the same assessment twice within a short period of time and that, if it is done, the assessment report should contain an annotation that the repeat of the assessment may affect the interpretation of the results. Mr. Warren made no such notation in the assessment report.

84. Dr. Libert was also concerned that Mr. Warren did not have Student's previous records to review as part of the assessment. He stated that, since Student has

had many interventions, the assessor should have a complete picture of Student's history to properly evaluate Student's present status.

85. Dr. Libert testified that Student's behaviors and sensory and pragmatic language issues that were mentioned in the assessment report and reported on the ratings scales, as well as Student's scores on the VABS-II and the BASC-2, were consistent with a student with ASD. He also noted that many of those behaviors and issues are also shared with other diagnoses, such as a primary psychiatric disorder that is described by the eligibility category of ED. Therefore, one must look for characteristics that differentiate the diagnoses. In his opinion, Student can be differentiated from a child with ED, because, unlike an ED child, Student is not symptomatic in every environment. Rather, he is responsive to the specific environment, and the environment can be structured so as to meet his needs. Dr. Libert testified that the environment in which the District assessed Student was the type of environment that would have met Student's needs, which could account for the failure of several of the assessment instruments to reflect Student's autistic-like behaviors. Therefore, to assess for ASD, Dr. Libert recommended that assessors not rely only on standardized tests, but also on observation. Dr. Libert believed that an ASD child's autistic-like behaviors would be more likely to appear if one observed the child in a typical environment, such as a classroom with its variety of competing stimuli, for several days.

86. Dr. Libert was an articulate and thoughtful witness. His training and credentials, his knowledge of Student, and his knowledge of his field combined to make him a credible witness.

87. Bahareh M. Talei, Psy.D., also criticized the District's assessment at hearing. Dr. Talei received her B.A. in Psychology in 1998 from California State University, Long Beach, her M.A. in Clinical Psychology in 2001 from Pepperdine University, and her Psy.D. in Clinical Psychology in 2005 from Pepperdine University. Since 2007, she has

been the Director of Assessments at C.A.R.D. Her duties include training and supervising assessment staff and assessing and diagnosing children on the autism spectrum. From 2005-2007, she was employed as a Senior Assessor at C.A.R.D. As part of her master's and doctorate program, she took several year-long courses in administering, scoring, and interpreting a variety of assessments. As a student at the doctoral level, she worked with the HELP Group through the U.C.L.A. Neuropsychology Program and conducted neuropsychological batteries primarily on children and adolescents who were on the autism spectrum. After her doctoral program, she spent one year full-time at the HELP Group assessing children and adolescents who were on the autism spectrum.

88. Dr. Talei and Brian Swanson, a doctoral level student at C.A.R.D., assessed Student on January 24, 2008, at Mother's request. This assessment, which took place over the course of approximately four and one-half hours during one day, consisted of nine instruments, two of which, the CARS and the VABS-II, were the same as those the District used in assessing Student. Dr. Talei's assessment also included the TOPL-2, a more recent and more difficult version of the TOPL than had been used by Ms. Paschall. Dr. Talei criticized Ms. Paschall for administering the TOPL to Student, rather than the TOPL-2. There was no evidence that the TOPL-2 was in existence at the time Ms. Paschall assessed Student.

89. After completing the assessments, Dr. Talei concluded that Student exhibited a variety of impairments and behaviors that fell within the diagnosis of autistic disorder as set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

90. Dr. Talei agreed with Dr. Libert that the District's assessment inappropriately failed to include Mother as a respondent on the GARS-2 rating scale. Dr. Talei testified that it was important to obtain information regarding how Student acted in various settings. She also felt that it was unethical and grossly negligent to split the

rating scales on the same form between two respondents, such that Ms. Sayres did not fill out all of the rating scales. She also criticized Mr. Warren for administering the ADOS to Student when it was the second time he had been administered the ADOS in 12 months. She testified that the ADOS should not be administered twice within a year. She further stated that the ADOS should probably not be given even after a 12-month period, because the results could be skewed by the practice effect that could result from recent previous exposure to the test. Dr. Talei also questioned whether Mr. Warren was sufficiently trained to administer the ADOS, since he had only been trained in the administration of the ADOS by another employee of the District, and not by certified instructors or the test developers at the University of Michigan. Further, she questioned whether Mr. Warren had sufficient experience with children on the autism spectrum to properly administer the ADOS.

91. Dr. Talei also criticized Mr. Warren's administration of the Motor Skills section of the VABS-II. It is designed to be administered to children up to age 7. In her opinion, if it is administered to older children, it should not be included in the overall score, and the examiner should note these facts in the report. Mr. Warren did not include the Motor Skills score in the Student's overall VABS-II score, however.

92. Dr. Talei's criticisms of the District's assessment are not entirely accurate. First, the GARS-2 protocols permit splitting the rating scales between two respondents. Second, the ADOS protocols do not necessarily require Mr. Warren to have been trained by certified instructors or by the test developers from the University of Michigan. The ADOS Training Videos Guidebook (Guidebook) states that the training video program can be used as an alternative to the in-person Clinical Training Course offered by Western Psychological Services (the ADOS publisher) and the test authors. The Guidebook further states that, if the ADOS is not used for diagnostic purposes, but rather to evaluate individuals and provide information for designing intervention or

educational programs, school psychologists who have training and experience in the use of individually administered test batteries, plus background and experience providing professional services to individuals with ASD, are qualified to administer the ADOS. Mr. Warren is a credentialed school psychologist, and the evidence demonstrated that he had the background, training, and experience prescribed by the Guidebook.

93. The ADOS Manual (Manual) states that extensive practice in administering the ADOS is required to use the ADOS appropriately. There was no evidence that Mr. Warren's experience in administering the ADOS approximately 20-30 times prior to administering it to Student was insufficient to meet this requirement. Further, Dr. Talei provided no basis for her categorical opinion that the ADOS cannot be administered twice in a 12-month period, an opinion that Dr. Libert did not express. Mr. Warren offered a contrary opinion, testifying that his research on the administration of the ADOS revealed that the ADOS protocols do not prohibit the administration of the ADOS twice within a 12-month period, because the test is so structured that the practice effect is not applicable. The lack of foundation for certain of Dr. Talei's opinions, and the inaccurate facts upon which she based certain of her other opinions, diminished the credibility of Dr. Talei's testimony regarding flaws in the District's assessment.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. As the petitioning party, District has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-58 [126 S.Ct. 528].)

### ISSUE: WAS DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT APPROPRIATE?

2. District contends that the comprehensive Multidisciplinary Psychoeducational Evaluation it conducted during September and October 2007 met all of the requirements of the Individuals with Disabilities Education Act (IDEA) and of the

California Education Code, and was appropriate. Student contends that this assessment was inappropriate, since Student's behaviors are rooted in his ASD, and are not due to ED, as stated in the District's assessment. Student contends that the District's assessment was inappropriate and the results were inaccurate, in that the District had not obtained Student's previous school records prior to the assessment; the District did not administer the CARS, ADOS, and GARS-2 assessment instruments appropriately; Mr. Warren did not have proper training to administer the ADOS; the ultimate conclusions reached by Mr. Warren were incorrect and ignored the autistic-like behaviors Student displayed; and District did not assess Student in all areas of known or suspected disabilities, specifically in the area of OT.

#### ELIGIBILITY CRITERIA FOR ED AND AUTISM/AUTISTIC-LIKE BEHAVIORS

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

4. A child meets eligibility criteria for ED if the child exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

- (a) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations;

- (d) A general pervasive mood of unhappiness or depression;
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8(c)(4)(i) (2006); Cal. Code Regs., tit. 5, § 3030, subd. (i).)

Neither the IDEA nor its regulations, nor the Education Code nor its regulations, define “to a marked degree” or “a long period of time.” With respect to eligibility under subdivision (c), the focus is on the student’s ability to control the behavior and to act pursuant to socially acceptable norms. (Off. of Special Education Programs, interpretative letter (August 11, 1989), 213 IDELR 247.)

5. The student does not meet special educational eligibility criteria as ED if the student is socially maladjusted, unless the student has ED. (34 C.F.R. §300.8(c)(4)(ii) (2006); Ed. Code, § 56026, subd. (e).)

6. California law specifies a greater range of behaviors than does the IDEA regarding the eligibility criteria for special education for children with ASD. The IDEA designates the disability category as “autism,” and defines “autism” as a developmental disability significantly affecting verbal and nonverbal communication and social interactions, generally evidenced before age three, that adversely affects a student’s educational performance. The IDEA regulations state that other characteristics associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. If such characteristics appear after age 3, the child could also be identified as having autism. Autism does not apply if the child’s educational performance is adversely affected primarily because of ED. (34 C.F.R. § 300.8(c)(1)(i)-(c)(1)(iii) (2006).) In comparison, under California law, the eligibility category is designated as “autistic-like behaviors,” and a student is eligible for special



education if his educational performance is adversely affected due to any combination of one or more such behaviors, which include, but are not limited to, the following:

- (1) An inability to use oral language for appropriate communication;
- (2) A history of extreme withdrawal or inappropriately relating to people and continued impairment in social interaction from infancy through early childhood;
- (3) An obsession to maintain sameness;
- (4) Extreme preoccupation with objects or inappropriate use of objects or both;
- (5) Extreme resistance to controls;
- (6) Display of peculiar motoric mannerisms and motility patterns;
- (7) Self-stimulating, ritualistic behavior.

(Cal. Code Regs., tit. 5, § 3030, subd. (g).)

#### Assessments

7. An assessment of a student who is receiving special education and related services must occur at least once every three years unless the parent and the school district agree that such a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) The same basic requirements as for an initial assessment apply to re-assessments such as the three-year (triennial) assessment. (20 U.S.C. § 1414(a)(2); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (e).) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414(b)(2) & (3); Ed. Code, § 56320, subds. (e) & (f).) The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306 (2006).) As part of a reevaluation, the IEP team and other qualified professionals must review

existing evaluation data on the child, including teacher and related service-providers' observations. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305 (2006); Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the school district must identify any additional information that is needed by the IEP team to determine the present level of academic achievement and related developmental needs of the student, and to decide whether modifications or additions to the child's special education program are needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The school 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).) The duty to obtain such information is facilitated by statutory and regulatory provisions requiring a district to request a special education student's records from a previous district in which the child was enrolled, and requiring the previous district to provide the records within five working days. (Ed. Code, § 56325, subds. (a)(1), (b)(2); Cal. Code Regs., tit. 5, § 3024, subd. (a).)

8. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2),(3); Ed. Code, § 56320, subds. (a), (b).)

9. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).) The personnel who assess the student shall prepare a written report of the results of each assessment. (Ed. Code, § 56327.) An IEP meeting to review the results of the assessment must be held within 60 days, with certain exceptions for vacation days and other circumstances, from the receipt of the parent's written consent to the assessment. Parent may agree, in writing, to an extension of the 60-day period. (Ed. Code, §§ 56043, subd. (f)(1), 56344, subd. (a).)

10. A parent is entitled to obtain an IEE of a child. (20 U.S.C. §1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i) (2006).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must, "without unnecessary delay,"<sup>7</sup> either initiate a

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<sup>7</sup> In this regard, Mother's verbal request for an IEE is reflected in the January 9, 2008, IEP. At an unspecified time after January 9, 2008, but prior to March 3, 2008, District sent Mother prior written notice of its refusal to provide an IEE at public expense. On March 3, 2008, District, in an attempt to avoid due process, sent Mother an e-mail asking whether Mother was truly requesting an IEE, and whether Mother would sign the IEP. Mother responded by e-mail the same day, stating that she had requested an IEE at the IEP meeting, her request was denied, and she would request

due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. § 300.502(b)(4) (2006); Ed. Code, § 56329, subd. (c).)

### Analysis

11. In certain respects, District's Multidisciplinary Psychoeducational Evaluation complied with the IDEA and the Education Code. District used a variety of assessments instruments, which were validated for the purposes for which they were used. The assessments were conducted in English, which is Student's native language, and the District did not rely on only one assessment instrument.

12. Additionally, several of Student's criticisms of the assessment are not meritorious. Student's criticisms of Mr. Warren's administration of and interpretation of the CARS, of his qualifications to administer the ADOS, and of his administration of the ADOS, are not persuasive. With respect to the CARS, Dr. Libert criticized Mr. Warren for appointing himself as a rater on the CARS, because he had not observed Student in the range of settings required. There was no evidence, however, that Dr. Libert's opinion as to CARS raters was supported by the CARS protocols, or that the CARS protocols excluded Mr. Warren as a rater. He also criticized Mr. Warren's analysis of the CARS results that Student did not display autistic behaviors on the CARS, because Mother had reported Student as displaying a few symptoms of autism. While Mr. Warren's conclusion was not congruent with Mother's ratings, Mr. Warren properly added his and Mother's ratings, for a score of 25. This score, according to the CARS scale, fell within

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reimbursement for an IEE she had obtained. Since no party has raised the issue of whether the District "unduly delayed" in filing this action, this issue will not be addressed in this Decision.

the non-autistic range. Overall, there is insufficient evidence to conclude that District did not properly administer the CARS.

13. With respect to the ADOS, the evidence demonstrated that Mr. Warren was qualified to administer the ADOS. Dr. Libert was concerned about the impact of a practice effect if the ADOS had been administered within the previous 12 months, and, in his opinion, Mr. Warren should have included an annotation in the report regarding the potential impact of a practice effect on the ADOS scores. Mother's comments to Mr. Warren were the only evidence that the ADOS was previously administered to Student, and there was no evidence that the IRC had administered the same module of the ADOS to Student that Mr. Warren had administered. The evidence reflected that the ADOS is so structured that examiners need not be concerned about a practice effect, and there was no evidence that Student's results on the ADOS were influenced by a practice effect. Therefore, there is insufficient evidence that Mr. Warren was required to provide the annotation, or that the results of the ADOS were compromised by a practice effect.

14. Dr. Talei criticized Mr. Warren's administration of the motor skills section of the VABS-II, but there was no evidence that this subtest was administered improperly. Dr. Talei also criticized Ms. Paschall for administering the TOPL rather than the newer version of the test, the TOPL-2. There was no evidence, however, that the TOPL-2 was available when Ms. Paschall administered the TOPL to Student. Further, although Student's scores on the TOPL were within normal ranges, Ms. Paschall did not rely solely upon those scores. She was careful to report that her observation of Student, and her interviews with Ms. Sayres and Mother, reflected that Student had deficiencies in three areas of pragmatic language. Consequently, Dr. Talei's criticisms are not persuasive. The speech and language assessments which Ms. Paschall administered as part of the District's Multidisciplinary Psychoeducational Evaluation were appropriate.

15. However, for the reasons set forth below, the psychoeducational portion of District's assessment was not appropriate, and the District did not assess Student in all areas of need.

16. First, as is shown by Factual Findings 1 through 84, and Legal Conclusions 1, 7, and 9, District improperly conducted the assessment without having the benefit of all of Student's records. District should have obtained Student's records from MVUSD when Student enrolled in the District. District should also have obtained them in time to be reviewed during the triennial assessment at issue here, to fulfill the IDEA and Education Code requirements that assessors must review existing evaluation data on the student. Instead, District did not attempt to obtain the records until the assessment had commenced, did not receive them until the assessment was completed, and did not report on them until after the January 9, 2008, IEP meeting. It is unfortunate that, at the time of the assessment, District relied on Mother's representation that the records were sealed by the court, and did not pursue obtaining the records. This representation does not excuse the District's conduct in making no effort to obtain the records at the time Student enrolled, or in attempting to verify Mother's representation that the records were sealed.

17. Even beyond the District's statutory and regulatory obligations to obtain the records, as Dr. Libert testified, the records were required to obtain a full picture of a child with as extensive a history as Student. A review of the records, and Mother's explanation of the materials therein, prior to the assessment, could have influenced the analysis of the entire psychoeducational assessment results. Mr. Warren's review of the records after the psychoeducational assessment was completed, and the assessment was discussed by the IEP team, is not a sufficient substitute to having the records in hand during the assessment process. The records may have presented additional areas of inquiry for the assessors, and, as Dr. Libert noted, the records were required to serve

as context for the information obtained through the assessment process so that the assessment would provide an accurate evaluation of Student's present status.

18. Second, as is shown by Factual Findings 1 through 85, and Legal Conclusions 1, 3, and 6 through 10, District did not assess in all suspected areas of need, in that District failed to perform an OT assessment to assess Student's well-known sensory integration and related issues, including his motor issues. With respect to motor issues, the report noted Student's low scores on the VMI. Ms. Sayres reported Student's inability to write in cursive, his large and barely legible handwriting, and difficulties with fine and gross motor skills. With respect to sensory issues, Student's sensitivity to noise, touching, and crowds were reported to Mr. Warren and, to a more limited extent, to Ms. Paschall, by Mother and/or Ms. Sayres. These sensitivities are commonly associated with children who are on the autism spectrum, and unusual reactions to sensory experiences is one of the few autistic-related characteristics that is specifically referred to in the regulations interpreting the IDEA. Additionally, Mother had informed Mr. Warren that Student had previously received OT. Under these circumstances, District was on notice that an OT assessment was required to assess Student in all areas of disability, and should have conducted a thorough OT assessment as part of the multidisciplinary psychoeducational assessment. Yet, at hearing, District presented no reason why it failed to include an OT assessment as part of the triennial assessment. The District's offer of an OT assessment after the triennial assessment had been completed and reviewed is not sufficient to cure this defect, since one of the reasons for the multidisciplinary psychoeducational assessment was to evaluate Student's autistic-like behaviors. An OT assessment would have been highly relevant to this inquiry, and might have impacted the analysis of the entire psychoeducational assessment results.

19. Mother's refusal to sign the OT assessment plan proposed by the District at the January 9, 2008, IEP meeting does not alter this analysis. In many circumstances,

the failure of a parent to consent to an assessment bars the parent from obtaining an IEE, since the law relevant to that situation contemplates that the parent's request for an IEE is based upon the parent's disagreement with an assessment that has already been performed. In this case, however, the Student's right to an IEE is grounded upon the District's failure to assess in all areas of suspected disability by failing to perform an OT assessment. From a public policy standpoint, it would not promote the goal of encouraging school districts to assess in all areas of suspected disability if, after a school district conducted an incomplete assessment, the district could avoid any consequences of its violation of the law simply by presenting an assessment plan to the parents and offering to conduct the necessary assessment. Such a situation would also force parents to agree to an assessment by a District that has already conducted a flawed assessment, and wait to request an IEE until after the District has conducted another assessment. This scenario deprives Student of a remedy for the District's failure to assess in all areas of suspected disability. This is particularly inequitable when, as here, the need for an OT assessment was apparent, and would have been more apparent had District fulfilled its obligation to obtain and review Student's educational records as part of the assessment. Further, District offered no explanation for its failure to conduct an OT assessment. Under these circumstances, equitable principles support Student's right to an IEE.

20. Third, as is demonstrated by Factual Findings 1 through 85, and Legal Conclusions 1 and 3 through 10, Mr. Warren improperly failed to administer the GARS-2 assessment in a manner consistent with the requirements set forth in the GARS-2 Examiner's Manual (Examiner's Manual). The Examiner's Manual requires that, although different people can be selected as raters on different portions of the test, all raters must know the student well. The Examiner's Manual states that appropriate raters are a classroom teacher, parent, "or other caregiver who has had regular, sustained contact with the individual for at least 2 weeks." (Gilliam, Gilliam Autism Rating Scale, Second



Edition, Examiner's Manual (2006) pp. 15-16.) The Examiner's Manual also states that an SLP can complete the Communications Subscale. (*Id.* at p. 16.) However, the Examiner's Manual does not exempt the SLP from the requirement that the rater must know the student well and must have had regular, sustained contact with the individual for at least two weeks. Ms. Sayres, Student's classroom teacher who rated Student on the Stereotyped Behaviors and Social Interaction subscales, met the Examiner's Manual criteria, in that she knew the Student well and had regular, sustained contact with Student for at least two weeks. Ms. Paschall, the SLP who rated Student on the Communications subscale, did not meet these criteria. Her experience with Student was limited and sporadic. Moreover, the choice of Ms. Paschall as a rater had a demonstrable impact on the results of the assessment, as Ms. Paschall rated Student 0 in all categories of the Communications subscale. Ms. Sayres, however, had rated Student in the autistic range in the two subscales of the GARS-2 in which she participated, and, on the numerical strength of Ms. Sayres's ratings alone, Student came within two points of an autism index score of "Possibly." Further, Ms. Sayres would not have given Student all zeroes on the Communication subscale, had she been requested to rate him on that subscale, but would have given him higher ratings on certain items. Therefore, had Mr. Warren selected a proper rater for the Communication subscale, it is highly likely that Student's total GARS-2 score would have been different.

21. Fourth, Mr. Warren's report did not fully analyze the ratings Student received on the BASC from Mother and Ms. Sayres. (Factual Findings 1 through 7, and 22 through 85; Legal Conclusions 1 and 3 through 10.) He cursorily commented upon several areas in which both Mother and Ms. Sayres rated Student's behavior in the "Clinically Significant" range, but the report contains no analysis of the significance of these ratings, nor did Mr. Warren comment upon all of the areas in which both Mother and Ms. Sayres so rated Student. Further, Mr. Warren did not specifically note that in

some areas either Mother or Ms. Sayres rated Student as “At-Risk,” and that in many areas either Mother or Ms. Sayres rated Student’s behavior as “Clinically Significant.” For example, the report does not specifically acknowledge that Ms. Sayres rated Student as “Clinically Significant” in Social Skills, and that both Mother and Ms. Sayres rated Student as “Clinically Significant” in Functional Communication. Dr. Libert testified that the ratings Ms. Sayres gave Student on the BASC, in particular, were consistent with a child who has ASD.

22. Fifth, the report’s analysis and conclusions display several other errors. For example, Mr. Warren considered Student eligible for ED on the ground of an inability to build or maintain satisfactory relationships with peers *and* teachers. The report only reflects that Student had difficulties in peer relationships, not in relationships with teachers. (Factual Findings 1 and 22 through 71 and 79; Legal Conclusions 1 and 3 through 5.) Additionally, Mr. Warren applied an incorrect standard for finding eligibility under the category of autistic-like behaviors. Mr. Warren testified that Student was not eligible under the category of autistic-like behaviors because Student did not demonstrate the autistic-like behaviors “to a marked degree.” This is not an element of the eligibility category for autistic-like behaviors; it is an element of the ED eligibility category. (Legal Conclusions 4 through 6.) Further, as is demonstrated by Factual Findings 55 through 65, and 71, and Legal Conclusion 9, the assessment report did not accurately summarize Ms. Paschall’s findings regarding Student’s weaknesses in pragmatic speech. The report stated that Ms. Paschall found that Student had weaknesses in two areas of pragmatics: audience and purpose. Yet, Ms. Paschall concluded that Student also had a weakness in the area of physical setting. These errors call into question the accuracy of the analysis and conclusions of the assessment report.<sup>8</sup>

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<sup>8</sup> The error in accurately summarizing Ms. Paschall’s findings does not implicate the appropriateness of the speech and language assessment she conducted. As is

23. Some of these errors are more significant than others. The number of errors, however, must also be taken into account, and the number of errors in this case increases the overall significance of the errors. Accurate assessment is important in all cases so that the student's unique needs are identified, and so that an IEP that addresses those unique needs can be formulated. Accurate assessment is particularly important in this case because, as Dr. Libert testified, this case presents issues relating to differential diagnoses. Student demonstrated various behaviors which can be consistent with ED, or consistent with ASD, and Student's undisputed ADHD may also affect his behavior. Under these circumstances, when there are differential diagnoses which might explain Student's conduct, the accuracy and reliability of the assessment scores, and the rigor of their analysis, are particularly important. The fewer the flaws in the assessment, the greater the likelihood that the assessment results and their analysis are accurate, and that Student's unique needs are met.

Based upon the foregoing, the District did not meet its burden of demonstrating that the psychoeducational assessment portion of the Multidisciplinary Psychoeducational Evaluation was appropriate and that District evaluated Student in all areas of need.

## ORDER

1. District's claim for relief is denied.
2. Student is entitled to a psychoeducational IEE and an OT IEE at public expense.

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discussed elsewhere in this Decision, Ms. Paschall's speech and language assessment was appropriate.

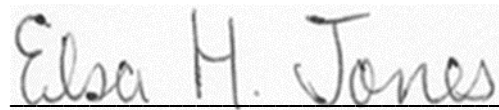
## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on all issues that were heard and decided in this case.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: July 28, 2008

A handwritten signature in cursive script that reads "Elsa H. Jones". The signature is written in dark ink on a light-colored background.

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings