

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TUSTIN UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2008120809

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Irvine, California, on April 20-22, 2009.

Jennifer C. Brown, Attorney at Law, represented Irvine Unified School District (District). Lori Stillings, Assistant Superintendent, Student Services, attended the hearing on all days.

Student was represented by his Mother and Father. The hearing was translated into Farsi for Mother.

The District's Request for Due Process Hearing was filed on December 24, 2008. Joint requests for continuance were granted for good cause on January 15, 2009 and March 13, 2009. The record was closed and the matter was submitted at the close of hearing on April 22, 2008.

ISSUES

1. Was the District's May 8, 2008 triennial assessment properly conducted, such that the District has no duty to fund an Independent Educational Evaluation (IEE)?
2. May the District exit Student from special education without parental consent because he is no longer eligible?

FACTUAL FINDINGS

1. Student is a nine-year-old boy, who, at all relevant times, lived within the boundaries of the District. Student's Mother and Father speak Farsi and English in the home. Student understands some Farsi and can speak a few words of it, but his primary language is English.

2. Student was first found eligible for special education under the category of language and speech disorder in 2002, when he was three years old. At the time, Student was delayed in using speech. Standardized assessments demonstrated that he was below the fourth percentile in expressive and receptive language. Student was provided with speech and language therapy twice a week for 30 minutes, and by 2004, his individualized education program (IEP) reflected that he was meeting his goals in this area.

3. In January of 2005, resource specialist program (RSP) services were added to Student's IEP. The RSP services were delivered on a "pull-out" basis to help with counting and letter sounds.

4. Student was assessed by the District in May of 2005, when he was in kindergarten. Student was assessed in the areas of academics, cognitive ability, perceptual/motor development, language and speech, social/emotional/behavioral development, and health. Student's teacher had observed that he had difficulty in the areas of written language and reading, specifically with sounding out words and writing out his thoughts on paper.

5. Kathryn Kilgore (Kilgore) assessed Student's speech and language in May of 2005. Kilgore was a licensed speech and language pathologist with credentials to provide speech and language therapy in schools. Her training and education made her qualified to administer assessments and make recommendations regarding special education eligibility and speech and language therapy. On standardized tests, Student

scored in the fifth percentile in semantics (vocabulary), the first percentile or less in syntax (grammar), and was in the eighth percentile in articulation. Student's articulation errors related to the sounds for "r," "th," and "z." Student was adequate for his age in speech pragmatics (use of appropriate communication). Based on the above, Student met the eligibility criteria for special education under the category of language and speech disorder. Based on Kilgore's recommendation, Student continued to receive speech and language therapy twice a week for 30 minutes a session. Student had met his IEP goals in speech and language from his previous IEP and new speech and language goals were developed. When Kilgore provided speech and language therapy to Student, he was always motivated and made consistent and steady progress.

6. School psychologist Bradley Rush (Rush), also assessed Student in May of 2005. Rush possessed a B.A. in psychology and an M.A. in educational psychology, as well as the pupil personnel services credential required for employment as a school psychologist. Rush had experience as a school psychologist, reading instructor, and counselor, and performed 20 to 40 assessments a year. Rush's training, credentials and experience made him qualified to administer psychoeducational assessments in schools and make IEP team recommendations.

7. For the 2005 assessment, Rush performed a structured behavioral observation of Student in the kindergarten classroom, which showed that Student was engaged and on-task. Student showed high average abilities when tested in the area of visual-motor integration. On the Test of Auditory-Perceptual Skills, revised (TAPS-R), Student scored in the second percentile, suggesting an auditory processing deficit. Auditory processing deficits manifest as a reduction in receptive language skills. Rush gave Student the Universal Nonverbal Intelligence Test (UNIT), in light of Student's history of language delay and Student's background of coming from a family that spoke Farsi in the home. On the UNIT, Student obtained an overall full scale intelligence

quotient score of 103, in the average range. On the Woodcock-Johnson III – Test of Academic Achievement (WJ-III), Student scored in the average range in reading and math, the high average range in written expression, but was in the low average range in oral expression and the low range in the area of listening comprehension (sixth percentile). Based on the above scores, Rush concluded that Student exhibited a severe discrepancy between his cognitive ability and academic achievement in the area of listening comprehension, such that Student met the criteria for special education in the category of specific learning disability (SLD).

8. During first grade (2005-2006), Student made progress in all areas. Student met all of his speech and language goals and his articulation had improved to where only the “r” sound was giving him trouble. Student continued to receive speech and language therapy twice a week. Student made progress in other areas as well, including meeting his reading goal. Although he made progress, Student did not meet his sentence writing goal, or his following directions goals. Student’s IEP was amended to reduce the amount of RSP service he received to two hours per week based on his overall performance in a general education classroom.

9. During second grade (2006-2007), Student met all of his speech and language and RSP goals. Student was at grade level in reading and math as reflected by his classroom grades and scores of “proficient” on state standards tests. At Mother’s request, Student was re-administered the WJ-III in January of 2007. The 2007 WJ-III showed that Student had overall average achievement with some academic skills in the superior range. However, Student scored in the low average range in oral expression and very low in listening comprehension. Based on Student’s demonstrated academic progress, Student’s RSP services in his IEP were reduced to ninety minutes per week.

10. Student was in third grade during the 2007-2008 school year. On March 4, 2008, Father consented to a triennial assessment plan that provided for assessments in

the following areas: academics; intellectual development, language and communication and health and vision. The assessment plan described that Student would be assessed using a combination of observation, work samples, standardized tests, interviews and record review.

11. On March 10, 2008, Mother and Father sent a letter to the District stating that they wanted Student to be assessed on videotape by District personnel who did not work with him. The letter did not contain any language that could be read as a revocation of consent to the assessment plan. Consistent with an interpretation that the letter was not a revocation of consent, but a request for assessment conditions, the District responded by email on March 13, 2008, denying the request for other assessment personnel and for videotaping. No evidence was presented that Mother and Father did anything that could be considered a revocation of consent for the assessment after the District's March 13, 2008 response.

12. School psychologist Rush, speech therapist Kilgore, RSP teacher Brenda Nur (Nur), and a school nurse assessed Student on April 2, 8, 22, 29, 2008 and May 1, 2008. An assessment report dated May 6, 2008, summarized the assessment results and made recommendations for Student. The uncontroverted and credible testimony of District personnel showed that all standardized tests given to Student were appropriate, were administered according to the test instructions, were administered by qualified personnel and were not biased. Student was given a variety of assessment instruments and the assessment also included observation, record review, parent input and teacher input. The health assessment of Student showed that Student did not have vision or hearing problems. Father reported as social emotional concerns that Student did not have enough friends and was emotionally sensitive in some areas. Father reported that Student's home and school behavior was good.

13. The May 6, 2008 assessments revealed that Student had a weakness in one area of auditory processing. Auditory processing refers to a child's ability to make sense of information the child hears. Student was given the Test of Auditory-Perceptual Skills, Third Edition (TAPS-3) by school psychologist Rush. Student scored in the average range with a standard score of 94 in phonological skills (discriminating parts of words and blending sounds) and a standard score of 93 in memory. Student scored in the low range in auditory cohesion (using inferences, deduction and abstraction), with a standard score of 74. Student's overall standard score on the TAPS was 89, in the low average range. The assessment report made the following recommendations for Student, all of which were either being done, or could be done, in the general education classroom without special education: 1) establishing a specific time for Student to do homework without distraction; 2) accompanying reading assignments with related vocabulary practice; 3) previewing Student's independent reading assignments by having Student first follow along while being read to; 4) giving directions in a variety of ways, such as visually and verbally; 5) breaking down multiple step directions; 6) presenting information to Student in visual or written form if he did not understand; 6) creating opportunities for collaborative work; and, 7) maintaining communication with Student's parents.

14. The May 6, 2008 assessments did not reveal a severe discrepancy between Student's cognitive ability and academic performance. Specifically, Student was given the UNIT cognitive test, which was properly selected in light of Student's history of living in a household where Farsi was spoken. On the UNIT, Student had a full scale intelligence quotient score of 110, in the high average range, with no deficits in any of the subtest areas. Student was given the WJ-III to measure academic achievement. Student achieved an average standard score of 108 in Broad Reading and an above

average score of 124 in Broad Math. Student's lowest standard score on the WJ-III subtests was an average score of 95 in the area of reading comprehension.

15. The May 6, 2008 assessments did not reveal that Student had any difficulty with attention in the classroom. There was no evidence that at the time of the assessment Mother and Father provided any information to District about Student having attention problems. Moreover, school psychologist Bush performed a structured behavior observation during reading instruction that showed Student to be on task more than a comparison peer.

16. The May 6, 2008 assessments included speech and language assessments by speech therapist Kilgore, who administered the Comprehensive Assessment of Spoken Language (CASL), the Expressive Vocabulary Test, Second Edition (EVT 2) and informal observations. Student's suspected areas of disability were in the areas of syntax, articulation and pragmatics. In the area of semantics (word meaning and word relationship), Student's average scores on the EVT 2 and the antonyms and sentence completion subtests of the CASL showed that Student had no deficits. In the area of syntax/morphology (word order in sentences), Student's scores on the CASL showed that he was only weak in the area of paragraph comprehension, where he scored a standard score of 70 (second percentile). Student's high standard scores of 96 in syntax construction and 107 in grammatical morphemes showed that the low score in paragraph comprehension was a reflection of Student's auditory processing deficit and not evidence of a deficit in syntax/morphology. Student's articulation was assessed using the Goldman-Fristoe Test of Articulation 2, on which Student did not produce any articulation errors. However, Kilgore noted from observation and a screening test that Student was behind by approximately one year in the production of the "r" sound, with accuracy in spontaneous speech of 60 percent. In speech pragmatics (the appropriate use of communication in context), the CASL and observation of Student interacting with

peers showed that Student had no deficits. Student had no deficits in voice quality, pitch, volume, and resonance and no deficits in speech fluency.

17. A properly noticed IEP team meeting was held on May 6, 2008. Mother and Father attended, participated in the meeting, and signed a form indicating they had received notice of their procedural safeguards and all assessment reports. During his third grade year (2007-2008), Student had either met his IEP goals and/or timely met all benchmarks on his goals in his operative IEP. The May 2008 assessment results were also reviewed. District members of the IEP team concluded that Student no longer qualified for special education under the SLD category because Student did not demonstrate a severe discrepancy between cognitive ability and academic achievement. The IEP team's recommendation was based on the fact that Student achieved scores of "proficient" on state academic testing, achieved average classroom grades in academic subjects, and had shown improvement from past years. District members of the IEP team also concluded that Student was no longer eligible for special education under the category of language and speech disorder because his sole deficit, in the production of the "r" sound had no impact on Student's academics and the District's general education program included an articulation clinic to address deficits like Student's. Although Student's listening comprehension deficit was noted, the IEP team concluded that Student was still achieving appropriately academically. Student's deficit in this area would also continue to be addressed through the listening skills "Earobic" program that was used in general education.

18. The May 6, 2008 IEP team also considered information from Mother and Father that Student had been assessed by Marc A. Lerner, M.D. (Dr. Lerner), on January 7, 2008. Neither Dr. Lerner, nor anyone else, testified at hearing about this assessment. The May 6, 2008 IEP team did not receive a complete copy of Dr. Lerner's report at the meeting. Dr. Lerner's report reflected that Student was examined because of parent

concerns about Student's development in learning. The SNAP 4 ratings scale administered by Dr. Lerner revealed that inattention and hyperactive and impulsive behavior were not a concern. Dr. Lerner's impression was that Student had an "uncommon pattern of communication" in oral language and a mild articulation concern. Dr. Lerner recommended continued communication therapy. He also recommended, apparently based on private test results obtained by parents but not provided to the District, that Student might have difficulties in logic and reasoning and executive functioning for which Student could consult with another doctor. Dr. Lerner did not render any specific diagnosis and did not recommend medication.

19. Mother and Father did not consent to the May 6, 2008 IEP. Student started fourth grade in September of 2008. A subsequent IEP team meeting was held on October 2, 2008 to discuss the lack of parent consent to exit Student from special education and Student's progress in the fourth grade. Parents reported that Student had been nervous one time during the new school year about not understanding his homework. Parents believed Student benefited from special education and were concerned that Student would fall behind if not in special education. Student's teacher reported that he was near the top of his class in reading fluency, was overall on grade level, and was not struggling with academic work.

20. Mother believed that Student required special education because he had trouble pronouncing the "r" sound and at home Student was asking for help with his homework. According to Mother, at home Student would state that he did not understand the homework or that it was taught while he was in RSP. Mother did not believe Student had sufficient reading and writing skills, and that he had difficulty doing more than one thing at a time. Mother believed that Dr. Lerner had diagnosed a short-term memory deficit, however, nothing in Dr. Lerner's report reflected this. Mother believed that all of Student's report cards were inaccurate and that the grades were

higher than Student's actual abilities. According to Mother, Student's performance on homework showed that he is not ready to exit special education. Mother and Father had not visited Student's classrooms during the 2007-2008 and 2008-2009 school years at any time while instruction was taking place.

21. A review of Student's report cards from kindergarten in the 2004-2005 school year, through the beginning of fourth grade in the fall of 2008, showed that at all times Student was at or near grade level standards and always made academic progress. There was no evidence supporting Mother's belief that Student's grades were in any way inaccurate or inflated. Similarly, Student had been enrolled as a limited English proficiency (LEP) pupil because Farsi was spoken in the home. Testing administered to Student as part of his LEP instruction showed that from kindergarten through the time of hearing, Student's English improved to the point where he was no longer considered an LEP pupil. A limited sample of Student's homework from the third and fourth grade showed that sometimes Student made errors on his homework and got grades of "C." However, the homework samples demonstrated that Student had strength in reading comprehension.

22. Nur was Student's RSP teacher from January of 2005, when he was in kindergarten, through the time of hearing. Nur described RSP services as additional instruction provided to special education students whose educational placements were in general education. Nur was also Student's "case carrier," meaning that she coordinated assessments, IEP meetings and communication with Student's parents about special education. Nur had an M.A. in education, was state credentialed, and had 14 years of teaching experience. Nur described Student as a courteous boy who was serious about learning. Student could be a bit of a perfectionist. RSP time with Student was spent working on the goals in Student's IEP. Student did not require RSP time to re-teach classroom concepts. During the time Nur worked with him, Student had made

progress in all areas and as of the date of hearing was on grade level. Student had asked Nur why he continued to need to come to RSP. Overall, based on her tracking of Student's progress, Nur believed that Student had all of the skills necessary to be placed in general education and that removal from the general education environment for RSP services was not helping Student.

23. Patti Howsley (Howsley) taught Student in her third grade class during the 2007-2008 school year. Howsley was considered to be a "master classroom teacher" based on her decades of experience, her state teaching credentials, and M.A. degree in curriculum and instruction. Howsley described Student as a polite student who did what was asked of him. Although Student did not have a lot of friends, he participated in class and group class work. Student had no behavioral issues and responded to redirection. Student had some tendency toward perfectionism and had some anxiety about whether he was missing anything by leaving class for RSP. Howsley did not perceive Student to have any noticeable speech deficit that interfered with his performance in the classroom. To the contrary, Student performed adequately on assignments that involved public reading or speaking. Student's reading comprehension level was high enough that unlike other children in the classroom, Student did not require additional support in this area. Overall, Howsley believed that Student derived more benefit from being in the classroom than from receiving RSP services outside of the classroom.

24. Lisa Galluci (Galluci) taught Student in her fourth grade class from September of 2008 through the time of hearing. Galluci had an M.A. in classroom instruction, state teaching credentials and five years of teaching experience. Galluci described Student as conscientious, hard working, and generally well-liked. As an example, Galluci recalled that during an assignment that required reading aloud, Student's classmates were supportive when he needed to work on producing an "r" sound. Student demonstrated understanding of the classwork and homework

assignments. Galluci described how general education teaching methodology included the use of sound signals, oral and written directions, repetition to check for understanding, visual aides, breaking assignments into smaller parts, and working with peers in small groups. Student did not require any more support than what was provided to all general education students. Student's fourth grade weekly progress reports from the fall of 2008 through the time of hearing showed that he generally performed well in class. More often than not Student was recognized for good behavior, work habits and effort. Between September of 2008 and the time of hearing, Student received only eight "Making Better Choices" slips (a note to parents), for not bringing homework or workbooks to class. Only one of the slips was for being disruptive in class.

25. At some time prior to hearing, Mother and Father provided fourth grade teacher Galluci with a February 9, 2009 letter from Alta Neuro-Imaging. A person listed as Stephen A. Ferrari, Ph.D., "certified neurofeedback provider" and Director of Alta Neuro-Imaging, stated in the letter that Student "screened positive with a high degree of the combined form of ADHD" and appeared to be a good candidate for "neurofeedback" treatment. The letter also requested "understanding of this problem" and "extra patience with" Student while he completed his treatment. No evidence was presented at hearing regarding Ferrari's qualifications to render a diagnosis of ADHD, how Student was "screened," or what "neurofeedback" treatment was. On its face, the letter did not make any educational recommendation. In light of the above, the Ferrari letter did not prove Student had ADHD, but at most showed that the District had notice that ADHD might be a concern.

26. In response to the Ferrari letter, the District assessed Student on March 10, 24, 2009 and April 2, 2009, for eligibility for services under Section 504 of the Rehabilitation Act of 1973. The assessment included review of school records and medical records and information provided by parents, classroom observation, parent

input, teacher input and the Behavior Assessment System for Children – Student Observation System (BASC-SOS). In addition, the following behavior rating scales were administered to parents and teachers: 1) Behavior Assessment System for Children, Second Edition, Parent Rating Scale; 2) Conners' Parent Rating Scale, Revised, Long Version; 3) Behavior Assessment System for Children, Second Edition, Teacher Rating Scale; and 4) Conners' Teacher Rating Scale, Revised, Long Version. Student's parents rated him as mildly atypical in attention and hyperactivity and markedly atypical on oppositional and social problems subscales. Consistent with the testimony of RSP teacher Nur and teacher Galluci, none of the ratings scales completed by school personnel indicated that Student had behaviors consistent with ADHD or any other behavioral concern.

LEGAL CONCLUSIONS

1. As the petitioning party, the District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. District contends that the May 8, 2008 triennial assessment of Student was properly conducted, such that it does not have a duty to provide Student with an IEE at public expense. Student disagrees, contending that parents had withdrawn their consent for the assessment. The District further contends that the results of the May 8, 2008 triennial assessment, when considered with teacher reports of Student's classroom performance, demonstrate that Student is no longer eligible for special education under the categories of specific learning disability (SLD) or language and speech disorder. Specifically, Student no longer demonstrates the severe discrepancy between academic achievement and cognitive ability that is required for SLD eligibility, and although Student is still working on pronouncing "r" sounds, he does not require special education for language and speech issues. Student disagrees, contending that his performance on homework assignments and his grades, when considered with a

weakness in auditory processing and letters from doctors, demonstrate that Student should be eligible for special education. Both issues will be analyzed together because resolving the eligibility question requires analysis of whether Student was properly assessed. As discussed below, the District met its burden of demonstrating by a preponderance of the evidence that Student was properly assessed and is no longer eligible for special education.

3. Before a child may be found ineligible for special education, the local educational agency must conduct an assessment of the child, in all suspected areas of disability. The IEP team or other qualified professionals must review existing data regarding the child and determine, with input from the parents, what additional data are needed to determine questions regarding whether a child is a child with a disability, the present levels of academic performance and developmental needs of the child, whether the child needs or continues to need special education and related services, or whether modifications to the IEP are required to enable the child to meet annual goals. (20 U.S.C. §§ 1414(c); 34 C.F.R. § 300.305(e); Ed. Code, § 56381, subds. (b), (c) & (h).) Parental consent must be obtained for special education evaluations. (20 U.S.C. §§ 1414(c)(3); Ed. Code, § 56381, subd. (f).) An "assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the

relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

5. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

6. A student may be entitled to an IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)¹; Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

7. Upon completion of the assessment, the determination of whether the child is a child with a disability must be made by a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose

¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

8. A student is eligible for special education if he or she is a "child with a disability" such as a specific learning disability or language and speech disorder, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b); 5 C.C.R. § 3030, subd. (g).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401(a)(29); 5 C.C.R. § 3001, subd. (ac).) "Related services" (referred to as designated instruction and services or DIS in California) are defined as transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a); 5 C.C.R. § 3001, subd. (z).) A child is not considered a "child with a disability" for purposes of the IDEA if it is determined that the child only needs a "related service" and not special education. (34 C.F.R. § 300.8(a)(2)(i).)

9. "A student is eligible for special education under the category of language and speech disorder when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services." (Ed. Code, § 56333.) The difficulty understanding or using spoken language must result from any of the following: 1) Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention; 2) Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; 3) Fluency difficulties which result in an abnormal flow of verbal expression to such a

degree that these difficulties adversely affect communication between the pupil and listener; 4) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be below the seventh percentile for his or her chronological age or development level on standardized tests; 5) Hearing loss which results in a language or speech disorder and significantly affects educational performance. (*Ibid*; Cal. Code Regs., tit. 5, § 3030, subd. (c).)

10. A student is eligible for special education under the category of "specific learning disability" if: 1) the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and; 2) based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement tests" has a severe discrepancy between intellectual ability and achievement. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).) If standardized tests do not reveal a severe discrepancy between intellectual ability and achievement, the IEP team may still find that a severe discrepancy exists as a result of a disorder in a basic psychological process based on: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the pupil's present teacher; 4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; 5) consideration of the pupil's age, particularly for young children; and 6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).) "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) "Specific learning disability" does

not include "learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).)

11. In *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, 1110, the court found that a child may have a qualifying disability, yet not be found eligible for special education, because the student's needs can be met with modification of the general education classroom. In *Hood*, the due process hearing officer and the reviewing court looked to the child's above-average success in the classroom as shown by the child's grades and the testimony of teachers as evidence that the child's needs could be met in a general education classroom without specialized education and related services. (*Ibid.*)

12. A local education agency may request a due process hearing when there is a disagreement about a proposal to change the special education eligibility of a child. (See Ed. Code, § 56501, subds. (a)(1) & (a)(2).) In general, IEP team decisions are reviewed using the "snapshot" rule, meaning that the actions of the District cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Here, however, the "snapshot" rule does not apply to limit consideration of Student's current eligibility to what was known at the May of 2008 and October of 2008 IEP team meetings because the District's due process hearing request framed the issue in terms of Student's present eligibility. (See *Dublin Unified School District v. Student*, OAH Case No. 2006060896, fn. 1 (determining that a district's due process hearing request controlled what the relevant time period was for purposes of determining eligibility).)

13. As an initial matter, the May 6, 2008 assessments were properly conducted. All District personnel involved were qualified to conduct the assessments. Student was assessed using a variety of assessment instruments, ranging from standardized tests to observation, in order to determine his unique needs. The assessment instruments were appropriate given Student's history of speech and language delay and upbringing in a home where more than one language was spoken. The assessment was not racially, sexually, or culturally biased, was given in Student's primary language of English, and the assessments were valid for the purpose for which they were used. Mother and Father were provided with a comprehensive report that explained all of the assessments, the results, and which included recommendations for Student's education. The report was discussed at a properly noticed IEP team meeting in which parents participated. Mother and Father's March 10, 2008 letter to the District was not a withdrawal of permission for the assessments, but instead was an attempt to add conditions to the assessments after parents had given permission. No evidence was presented that Mother and Father actually requested that the District pay for an IEE at public expense following the May 6, 2008 assessment report, however, the question of special education eligibility still requires a finding as to whether Student was properly assessed. Here, the District demonstrated by a preponderance of the evidence that the May 6, 2008 psychoeducational assessment was properly conducted. (Factual Findings 1, 5, 6, 10-17; Legal Conclusions 1, 3-6.)

14. As to eligibility, the District met its burden of demonstrating by a preponderance of the evidence that as of the date of hearing, Student was no longer eligible for special education. First, as to eligibility under the category of speech and language disorder, the District established that the only unique need that Student had in this area was the sometimes imperfect production of the "r" sound. This mild articulation deficit was not impacting Student's education, as demonstrated by testimony from

Galluci, Student's grades, and results on standardized tests. More importantly, Student did not require specialized instruction or the related service of speech therapy because the District established that its general education program included a speech articulation clinic to address mild issues like Student's. Similarly, although the assessments established that Student had an auditory processing deficit, the evidence demonstrated that as a result thereof Student did not require specialized instruction. In particular, Student's classroom performance was in the average range and he showed strength in reading and reading comprehension. Accommodations such as repeating instructions or providing instructions visually or in writing, could be implemented in the general education environment without modification of the general education program. Moreover, the District's general education program included listening skills instruction via the "Earobics" program. In light of the above, Student is no longer eligible for special education on the basis of a speech and language disorder. (Factual Findings 1-26; Legal Conclusions 1, 3, 7-9, 11, 12.)

15. Similarly, the evidence showed that Student no longer meets the eligibility requirement for special education under the category of SLD. Student did not have a condition affecting his attention. The observations of Student in class, the behavior inventory assessments, and the undisputable testimony of his classroom teachers showed that Student did not demonstrate a lack of attention or hyperactivity in class. Student does have a weakness in one area of auditory processing. However, Student's academic performance was not significantly impacted by this weakness. Properly administered standardized tests of cognitive ability and academic achievement did not reveal a severe discrepancy between Student's cognitive ability and his academic performance. Even if the totality of the evidence about Student is considered, nothing about Student's academic performance demonstrated a severe discrepancy between cognitive ability and academic performance. Instead, the evidence showed that Student

made tremendous progress in special education to the point that Student can now be educated in general education without modification and without related services. Thus, Student is not eligible for special education under the SLD category at this time. (Factual Findings 1-26; Legal Conclusions 1, 3, 7, 8, 10-12.)

16. In conclusion, Mother and Father are understandably concerned about maximizing Student's academic potential, particularly in light of his history of language delay. However, Student is not eligible for special education at this time and may be exited from special education without parental permission.

ORDER

1. The District's May 6, 2008 psychoeducational assessment of Student was proper.

2. As of the date of this Order, Student is no longer eligible for special education.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

DATED: May 11, 2009

_____/s/_____

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings