

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

OAH CASE NO. 2009020326

v.

LANCASTER SCHOOL DISTRICT.

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DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Lancaster, California on June 15-17, 2009, June 23, 2009, August 12-13, 2009, and August 24-25, 2009.

Student was represented by Mark Woodsmall, attorney at law. Student's Mother and Stepfather (Parents) attended each day of the hearing.

Lancaster School District (District), was represented by Kathleen LaMay, attorney at law. District Director of Special Education Benay Loftus attended each day of hearing.

Student filed a Request for Due Process Hearing on February 11, 2009. A joint request for continuance was granted on March 25, 2009 for good cause. The record was closed on the final day of hearing on August 25, 2009.

ISSUES

1. Has the District failed to timely, adequately and appropriately assess Student in all areas of suspected disability?

2. Has the District denied the Student a free appropriate public education (FAPE) by committing procedural violations of IDEA, which impeded parents' rights to meaningful participation in the IEP process and/or caused a loss of educational benefit?

3. Did the March 14, 2008 IEP offer Student a FAPE?

## REMEDIES REQUESTED

As remedies, Student seeks a placement in the general education setting with minimal pull-out, a one-to-one aide, a behavioral assessment, an independent speech and language assessment, an independent behavior assessment, an independent occupational therapy assessment, an independent auditory processing assessment, an independent adaptive physical education assessment, a recreational therapy assessment, an independent psychoeducational assessment, a change in Student's special education eligibility category from mental retardation to Autistic-like behaviors and a new IEP.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is a nine-year-old girl diagnosed with Seizure Disorder, Attention Deficit Hyperactive Disorder (ADHD) and Autism. Student began having seizures at approximately one year of age. Student is medicated with Depakote for seizures (5 capsules per day). She also takes a half a tablet of clonidine and one capsule of Dexedrine daily for ADHD. She was diagnosed with ADHD at the age of three. Student received occupational therapy (OT) and speech and language therapy in home as well as early intervention services from the age of 14 months through January of 2003.

2. Student attended kindergarten in the Westside Union School District for the 2005-2006 school year. She was homeschooled for first grade in the 2006-2007 school year in coordination with Covenant Christian School.

## 2007-2008 SCHOOL YEAR

3. Student first moved to the District around August of 2007. She enrolled in Westwind Elementary School on August 17, 2007, a few weeks after the school year had commenced.<sup>1</sup> Student was initially placed in a second grade general education classroom based upon her age and the report card information that was provided to District from Parent reflecting Student's satisfactory progress and completion of first grade curriculum. At hearing, Mother acknowledged that in hindsight the home school report card did not accurately reflect Student's performance.

4. Student was not able to keep up with the curriculum in second grade and was moved to a general education first grade class taught by Donna Hansen (Hansen) in September of 2007.<sup>2</sup> This was considered a retention in first grade. At that time, Student was referred to the Student Study Team (SST), a general education intervention program utilizing the response to intervention model (RTI). RTI is most often used when learning disabilities are suspected, but is also used by District as a first step when students are experiencing any academic difficulties. The District's RTI model consists of levels 1, 2, 3a and 3b. At the 3a level, students have completed 12 weeks of intervention. At the 3b level, students have been referred for special education assessment.

5. Within the first few weeks, Hansen observed that Student was not progressing at the expected rate and was not grasping new materials. On September 18, 2007, Hansen completed the SST request form. In the SST request form, Hansen noted

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<sup>1</sup> Westwind was on a year round calendar during the 2006-2007 and 2007-2008 school year.

<sup>2</sup> Hansen is a general education teacher with no special education training or expertise.

that Student did not have age appropriate fine and gross motor skills. She observed that Student did not cut, trace or color within the lines. She also noted that Student did not have appropriate self-control or behavior in the classroom or on the playground.

Hansen noted that Student did not know her vowel sounds, making it difficult for her to decode words and read. Hansen opined that Student was behind in her work because of her inability to follow directions.

6. In preparation for the SST team meeting, Parent completed a questionnaire and returned it to the school on September 13, 2007. In the form, Mother noted that Student had a seizure disorder for which she was taking Depakote. She also noted that Student had ADHD, was unable to focus, easily distracted, had a short attention span, was frustrated, had low self-esteem and worried about failure. She noted that Student was under the care of a pediatric neurologist and had experienced difficulty in school due to medical issues.

7. The SST team met on September 24, 2007, for a level 1 meeting. The SST team addressed only the academic concerns raised by Hansen and not the fine motor or behavioral issues. The SST team devised strategies and modifications which included the teacher talking slower and having Student acknowledge she understood assignments. The SST team also determined that a student helper from the high school Regional Occupational Program (ROP) would help student in a small group setting. Finally, Parents and Student would continue working on vowels, consonants, blending, decoding, reading and word problems at home. Mother helped in the classroom on some days and helped with Student individually in the classroom at times. According to Hansen, Student was initially responsive to Mother's one-to-one assistance. However, as time progressed, the assistance did not help Student keep up with the curriculum as the material became more difficult.

8. The SST team met again on October 25, 2007 as a level 2 team, in response to Parent's request for an IEP.<sup>3</sup> At the meeting, Hansen reported that Student had made progress in reading, but had difficulty expressing ideas in her written work. Hansen also reported that Student did not make any progress in writing. The SST notes indicate that the team discussed Student's behavior and determined that Student needed additional positive behavior support. The SST team also determined that behaviors such as profanity were to be ignored and replacement behaviors were to be encouraged. Student's homework was to be reduced and she was to be given opportunities for leadership. The SST team notes indicated that the team deferred a decision about assessment for four more weeks in order to see Student's response to the interventions.

9. District documented multiple discipline incidents in September, October and November of 2007 for using profanity in class and on the playground and using her middle finger at other students. Mother observed Student in the classroom and on the playground. She was distressed to find that Student was always by herself and that others did not want to play with her. She was concerned about Student's safety. She saw that Student's pursuit of friendships had affected her self-esteem and resulted in injuries. Megan Messer, the playground duty aide, considered Student to be a "clinger" during the 2007-2008 school year. Student wanted to remain with the adults and did not interact well with the other children. She was bullied by some of the boys. District's response to Mother's concern was to discipline the bullies, conduct an anti-bullying workshop and offer to segregate Student in her own small circle on the playground.

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<sup>3</sup> The evidence presented at hearing did not establish the exact date of Mother's request for an IEP. The evidence also did not establish whether her request was written or verbal.

Mother was appalled by this suggestion because she considered it to be punishing Student for being a victim of bullying. Vice Principal Samuel Youm (Youm) instructed the playground staff to "keep an eye" on Student. Youm observed recess and playground activities himself to the extent his schedule permitted him to do so.

10. School was not in session from November 22, 2007 through January 7, 2008. During the break from school, Parents had Student assessed for Autism by Kaiser Permanente psychologist Donald P. Gallo (Gallo). Gallo received a Bachelor of Arts degree in Psychology in 1993 from California State University at Northridge, a Master of Arts degree in Developmental Psychology from Teacher's College, Columbia University, and a Master of Arts and Doctorate of Philosophy in Clinical Child Psychology from the California School of Professional Psychology. Gallo is the lead psychologist for the Autism Spectrum Disorders screening service at Kaiser Permanente in Reseda. He develops and implements the assessment program for individuals of all ages to assess for Autism Spectrum Disorders and has conducted approximately 1400 assessments. He also provides individual, group and family therapy for children and adolescents both in private practice and for Kaiser. Gallo diagnosed Student with Autism and ADHD.

11. Gallo diagnosed Student with difficulties in the areas of social interactions, communication and stereotyped patterns of behavior and interests. Gallo conducted an extensive interview with Mother and a clinical observation of Student over the course of three hours. He found behavioral issues, difficulty with pragmatics, echoing, flapping, lecturing others and food issues. He also found Student inattentive and impulsive, consistent with a previous medical diagnosis of ADHD. He based his assessment and diagnosis on reports, observation, history, medical records and his experience as a clinical psychologist. Carufel testified that Gallo's report did not provide sufficient information to establish eligibility for special education or to develop goals, services or placement for an IEP. However, Gallo did opine in his report that placement in an Autism

class would be appropriate for Student. Mother advised District of Gallo's diagnosis and later provided a copy of Gallo's report and diagnosis of Autism to District on January 16, 2008.

12. On January 14, 2008, Student was referred for a full assessment to determine if she met eligibility for special education services as a student with Autism or other health impairment due to Seizure Disorder and ADHD. Referral for assessment elevates the SST team to level 3. An assessment plan was provided to Mother on January 14, 2008. Parent signed the assessment plan on January 16, 2008 and returned it to the District. The assessment plan provided for assessment by the special education teacher, school psychologist, school nurse, general education teacher and adapted physical education teacher. The assessment plan called for assessment in the areas of preacademic/academic achievement, hearing and vision screening, cognitive development, social adaptive behavior, communication development, and psychomotor development. In addition to direct assessment of Student, the assessors were to conduct a file review.

13. Testing began on January 25, 2008 when Resource Specialist Program (RSP) teacher Stacy Rudy administered the Woodcock Johnson III Tests of Achievement (WJIII) to Student. According to the WJIII scores, Student's oral expressive skills were in the average range, her academic skills and listening skills were in the low range, her fluency with academic tasks and her ability to apply academic skills were in the very low range. Student received a broad reading standard score of 74, a broad math score of 69 and a broad written language score of 84 on the WJ III.

14. School psychologist Amie Carufel (Carufel) conducted a psychoeducational assessment of Student as part of a multi-disciplinary assessment. Caraufel conducted the assessment in English on February 28, 2008, March 3, 2008, March 4, 2008, March 6,

2008 and March 7, 2008. Carufel observed Student in the classroom, on the playground and during testing.

15. Carufel utilized the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), The Developmental Test of Visual Motor Integration (DTVMI), Test of Auditory Perceptual Skills-III (TAPS-III), Motor-Free Visual Perception Test-3rd Edition (MVPT-3), Kinetic Family Drawing and Draw-A-Person (DAP), the Childhood Autism Rating Scale (CARS), Gilliam Autism Rating Survey-Second edition (GARS-2), Behavior Assessment for Children (BASC-2), and the Vineland Behavior Scales Parent and Teacher rating forms (Vineland) to assess Student.

16. Student received a full scale intelligence quotient score (FSIQ) of 60 on the WISC-IV which is in the extremely low range. Student scored in the borderline range on the verbal comprehension index and the processing speed index. She scored in the extremely low range on the measures of perceptual reasoning and working memory. Student received a standard score of 75 on the DTVMI demonstrating skills at the 5 to 6 year old level. Student received a standard score of 76 on the TAPS-III indicating auditory processing skills consistent with her cognitive abilities.

17. Carufel administered the Gilliam Autism Rating Scale (GARS) which is an Autism screening tool utilizing rating scales completed by parents and teachers to evaluate whether Student exhibited autistic-like behaviors. The teacher rating scale did not show indication of autistic behaviors. The Parent scale showed indications in the range of non-autistic to mildly-moderately autistic. The CARS is another observational rating instrument for children suspected of having Autism Spectrum Disorder that was used to assess Student. The CARS contains 15 items that are rated through observation of the child by parents, teachers and assessors, and a cut-off score of the items is suggested for diagnosis within the autistic Spectrum. The CARS completed by Mother indicated a possibility of Autism. The teacher rating scales scored Student in the non-



autistic range. The teacher noted that Student was very active, stared off in to space or at someone, often failed to respond when her name was called, and overall demonstrated less fear when compared to peers. The teacher also indicated that Student demonstrated frequent movement when seated in class and moved slower than peers to line up for recess or sit during group activities. The teacher rating scales did not reveal any autistic-like behaviors in the classroom. The teacher also indicated that Student was inconsistent in listening and hearing.

18. School psychologist Victoria Gluck (Gluck), in consultation with supervising school psychologist Teresa Ede (Ede) and Carufel, administered the Autism Diagnostic Observation Schedule (ADOS) to further assess Student and gather information about possible signs and symptoms of Autism. Gluck and Ede were certified to administer the ADOS, Carufel was not. Carufel sat in on the administration of the ADOS by Gluck and took notes. Ede and Gluck determined that Module 2 of the ADOS should be utilized with Student because they believed it was more likely to elicit more responses from Student than Module 3 which required more language.

19. During the District's ADOS administration, Student gazed and vocalized to express interest in materials and used an open handed reach for material of high level interest. Student was able to point and gaze at appropriate items. During components of the assessment, Student described pictures, pointed to a particular picture, asked questions, waited for a response and continued to describe a picture or answer questions about pictures. District's administration of the ADOS reflected that Student did not meet the quantitative cut-off criteria for Autism or Autism Spectrum Disorder in the areas of communication, social interaction or the combined communication and social interaction section according to the scoring algorithm.

20. Student's expert Susan Bassett (Bassett), a licensed clinical social worker, employed by Kaiser Permanente and certified in the use of the ADOS, testified that the

use of Module 2 for Student was inappropriate because of the higher level of language ability that Student possessed and was therefore more likely to result in an inaccurate picture of Student. According to Bassett, the ADOS has four different modules. Module 1 is used for persons with no language skills, module 2 is used for persons with limited language, module 3 is for persons who have some language skills and module 4 is for adult level language skills. Bassett opined that use of too low of a module might result in a false negative score for Autism. Bassett opined that the use of Module 2 when a person could use five or six sentences was inappropriate and would skew the outcome of the ADOS. According to Bassett, the Module 3 should be used when a student can articulate five or more sentences. The evidence did not establish that in this instance the administration of Module 2 of the ADOS was improper. Instead, the testimony of Ede and Bassett established that the administering professional must use professional judgment to determine which module is best suited for an examinee such as Student and in some cases such as this one, either Module 2 or Module 3 would be appropriate.

21. Carufel evaluated Student's adaptive behavioral skills through observation, the Vineland and BASC-2. Carufel observed that Student was able to state the days of the week and the months of the year, but was not able to tell time. According to responses, Student was assertive in getting her needs met and asking to play games of interest. Results of the Vineland teacher rating forms completed by Hansen indicated that Student demonstrated communication, daily living, and socialization skills within the low range. Results of the BASC-2 teacher form indicated scores within the at-risk range in the areas of adaptive skills. Results of the BASC-2 completed by Parent and teacher indicated clinically significant results in the area of depression. Among the contributing answers were scores of always on "is easily upset, nobody likes me and I don't have any friends." Results of the BASC-2, adaptive skills composite could not be scored because Parents did not complete the entire scale due to confusion about the

instructions. Standardized scores were not available for the Parents' Vineland rating scale because it was not completely filled out by Parents. Nevertheless, Carufel was able to ascertain some qualitative information about Student's adaptive skills from the portions of the scales that were completed by Parents.<sup>4</sup> Carufel ascertained that Student was able to put the correct shoes on her feet, was toilet trained during the day and night, fastened snaps, helped with simple household chores and demonstrated an understanding of the function of money. Carufel opined that the Vineland and BASC-2 rating scales and observation demonstrated low adaptive skills commensurate with Student's cognitive skills.

22. Carufel reviewed the California Department of Education criterion for special education services under the category of autistic-like behaviors. She found that Student had communication skills commensurate with her cognitive functioning and the ability to apply language and communication skills in many settings and contexts. She also found that although Student had difficulty making and maintaining new friends, she was aware of people in the environment and was seeking out interactions with others. Carufel's review of Student's history revealed that as young child, her communication and reciprocal social interactions were appropriate. Carufel observed Student in several environments, initiating social interaction and responding to interaction from others. Carufel noted that Student used objects in an appropriate manner and had not been observed to chew or suck on toys, clothes or herself at school. Carufel also found that Student did not have difficulty following the classroom or school routine and appropriately responded when others attempted to direct and control her movements

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<sup>4</sup> Carufel offered to obtain the information orally or by telephone, but Parents did not believe that it would be appropriate for Carufel to assist them with the answers so they declined her offer.

or behavior. Carufel found no evidence of peculiar motor mannerisms or motility patterns. Although hand flapping had been observed at home, none had been observed at school. Similarly, no self-stimulating or ritualistic behaviors were described or reported at school. Accordingly, Carufel concluded that Student was not eligible for special education under the category of Autism or autistic-like behaviors.

23. Carufel concluded that Student's adaptive and academic functioning were commensurate with her cognitive abilities, which were in the low range. She opined that Student's seizures were under control with medication and that Mother reported Student had not had seizures for a few months. Carufel opined that the Seizure Disorder did not affect Student's vitality, alertness or stamina within the educational setting. Carufel's assessment revealed that Student had hyperactive and distracted behaviors even while on medication. Nevertheless, Carufel opined that Student's ADHD did not affect her vitality, alertness or stamina within the educational setting and did not meet the eligibility criterion for other health impairment or Autism.

24. Carufel opined that Student was eligible for special education under the category of mental retardation based upon the combination of low cognitive ability and low adaptive skills. Carufel recommended a small group learning environment such as an SDC for learning handicapped Students and promotion of Student to the appropriate grade level according to her age to provide her access to her same aged peers.

25. Student's gross motor skills and object control were evaluated by adapted physical education (APE) specialist Renee Bielling (Bielling). Bielling received her Bachelor of Arts Degree in Kinesiology from California State University at Northridge (CSUN), a Master's Degree from Azusa Pacific University and a specialist certification from California Polytechnic University in Pomona. Bielling had nine years of experience as an APE specialist, eight years of experience as a general education science teacher and held a clear credential. Bielling administered the object control and gross motor

skills sections of the Curriculum, Assessment, Resources, and Evaluation –Revised (CARE-R) to Student. The CARE-R is a criterion referred test developed by the Los Angeles County Office of Education to measure age ranges for acquired motor skills. According to Bielling, Student demonstrated skills within, at, and above the age appropriate range. She was able to jump up and down, and to throw and catch a ball. She had emerging jump rope, overhand throwing and dribbling skills. Bielling noted that Student has slight difficulty in performing skills she was unfamiliar with, but with direction and a model she was able to show immediate improvement. Bielling opined that Student was able to perform both gross motor skills and object control skills within age-appropriate ranges and did not require APE. Bielling also administered ten items of the Visual Perceptual Motor battery of the CARE-R and did not observe Student to have any difficulties with visual motor perception. The assessment administered by Bielling dealt only with object control, gross motor skills and cursorily with visual motor perception. The assessment was conducted in the cafeteria, no observation or assessment was conducted on the playground. Bielling reasoned that physical education classes are sometimes held in the cafeteria, thus the cafeteria was representative of a natural setting. Bielling acknowledged that her assessment was not designed to reveal any fine motor deficiencies or sensory integration issues.

26. Student passed District's hearing and vision screening conducted by the school nurse.

27. Parents did not grant District permission to review medical records. Accordingly, District did not have access to a complete medical history for assessment. Parents did not want to provide the District with a blanket release for medical records because of privacy concerns. Parents provided a copy of Gallo's report and Mother provided an oral medical history to Carufel.

## MARCH 14, 2008 IEP MEETING

28. An IEP team meeting was held on March 14, 2008. Mother credibly testified that Parents requested that District provide copies of the assessment reports in advance of the IEP meeting so they could review them and prepare for the meeting.<sup>5</sup> District provided a draft of the multi-disciplinary assessment report on March 13, 2008.

29. The March 14, 2008 IEP team members were Parents, Student's maternal grandmother, Student's advocate Emily Iland (Advocate), Principal Linda Edmond (Edmond), RSP teacher Rudy, school psychologist Carufel, general education teacher Hansen, APE teacher Bielling, School psychologist Angela Mercer and Assistant Principal Youm. A speech and language pathologist was briefly present at the meeting.

30. Edmond provided Parents with the California Department of Education publication entitled Procedural Safeguards at the beginning of the meeting. The Procedural Safeguards provide information of the availability of Independent Educational Evaluations (IEEs).

31. The IEP team discussed the assessments conducted by Carufel, Gluck, Rudy and Bielling. Parents expressed concern that District did not conduct a speech and language assessment although Parent had requested one during the assessment process and Carufel had agreed that one would be provided. Parents had not returned the signed speech and language assessment plan and therefore District was not able to conduct such an assessment before the IEP meeting. Carufel opined that Student's speech and language skills were commensurate with her cognitive ability. Parents expressed concern that an occupational therapy assessment was not conducted to evaluate Student's sensory integration and fine motor needs. Carufel opined that

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<sup>5</sup> The evidence did not establish the date of the request or whether the request was oral or written.

Student did not have sensory integration issues. Instead, she opined that Student was frustrated with instruction which was too advanced for her cognitive level and acted out due to the frustration.

32. Parents advised the team that Student had been diagnosed with Autism by Gallo. Gallo's report was referenced in the multi-disciplinary assessment report prepared by Carufel and considered by Carufel in her analysis, but Gallo's report was not provided to all members of the IEP team for review.

33. The IEP notes indicated that Student used profanity and had active behaviors consistent with frustration due to her low cognitive ability. Youm testified that Student had shown improvement with positive behavior support. Student was not offered a behavior support plan or a behavior assessment by the IEP team because the IEP team believed Student's behavior had improved and was not serious enough to warrant assessment.

34. Based upon input from the IEP team, Parents, grandmother, advocate, District team members and the assessment results, present levels of performance (PLOPS) were developed for Student and Student's areas of need were identified. The IEP team identified areas of need in social/emotional skills, adaptive skills, functional academics, pre-academics/academics-reading (reading), pre-academics/ academics-math (math), language/communication, health and medical, pre-academics/academics-writing(writing) and psychological processing as set forth in the IEP.

35. The team developed the following measurable goals for the year:

- (a) In adaptive development, Student will match clocks to identified time on an analog clock as measured by observation and work samples maintaining 4 out of 5 trials 80% of the time and implemented by the special education teacher and staff.

- (b) In social/emotional skills, Student will use appropriate language (ex. "I" statements) to tell a peer why she is angry as measured by observation and discipline records maintaining 4 out of 5 trials 80% of the time and implemented by the special education teacher and staff.
- (c) In functional academics, given core curriculum materials, Student will complete a task in a timely manner as measured by observation and work samples maintaining 4 out of 5 trials 70% of the time and implemented by the special education teacher.
- (d) In functional academics, given core materials, Student will stay on task for a period of time to be determined by the teacher at increased intervals as measured by observation and work samples maintaining 4 out of 5 trials 70% of the time and implemented by the special education teacher.
- (e) In reading, given core curriculum materials, Student will respond to who, what, when, where, and how questions as measured by observation and work samples maintaining 4 out of 5 trials 80% of the time and implemented by the special education teacher.
- (f) In math, given core curriculum materials, Student will memorize addition facts (sums to 20) and corresponding subtraction facts as measured by observation and work samples maintaining 4 out of 5 trials 80% of the time and implemented by the special education teacher.
- (g) In writing, given a written/verbal prompt, Student will write in complete sentences as measured by observation and work samples maintaining 4 out of 5 trials 80% of the time and implemented by the special education teacher.
- (h) In psychological processing, when presented with material at her instructional level Student will complete work in class with a 70% accuracy with two



prompts 4/5 trials for a period of 6 weeks as measured by teacher observation and work samples.

36. The District IEP team members offered Student special education eligibility under the category of Mental Retardation. The IEP team rejected both autistic like behaviors and OHI eligibility categories based upon Carufel's recommendations.

37. The offer of placement was a special day class for learning handicapped children (SDC-LH). The SDC-LH class has a low student to adult ratio and offers a modified curriculum in a self-contained classroom. The offer contemplated participation in a general education setting for 16 percent of the day to include lunch, recess, physical education and school assemblies. There were three SDC-LH classes which the District members of the team might have offered to Student. An SDC-LH class at Nancy Corey elementary was mentioned in the IEP meeting. Student was to use regular district core curriculum and have use of manipulatives. The IEP provided for extra time and rephrasing of directions on tests and quizzes, consideration of effort and work in grading, and the posting of assignments and routines for organizational purposes. As instructional strategies, the IEP listed a multi-sensory approach, use of mnemonics, modified content and restating of information. The IEP also contained accommodations and modifications for state and district testing including: simplification or clarification of test directions, on task reminders, verbal encouragement, tests in a small group, question or items read aloud and student/audio presentation (except reading test), and extra time within a testing day. An individual health care plan was also developed to address Student's Seizure Disorder.

38. Parents did not agree with the eligibility category of Mental Retardation and noted that on the IEP. Parents asserted that Student was eligible for special education based upon her Autism and or OHI. Parents checked the boxes indicating that they did not agree to eligibility or to placement and services. Parents always believed

Student was eligible for special education, but disagreed with the selection of Mental Retardation as the category of eligibility.

39. Parents did not agree to the SDC-LH placement, instead Parents wanted Student to remain in the general education classroom with a one-to-one aide also called a special circumstances instructional aide (SCIA) for safety reasons and academics. In an effort to obtain services for Student, Parent and their advocate offered that Parents would temporarily agree to the eligibility category of mental retardation, if Student was given a one-to-one aide and remained in the general education classroom pending resolution of the dispute. District refused and continued to offer Student an SDC-LH placement. District personnel insisted that a SCIA assessment would be required to determine whether or not Student would be provided with an aide and offered to provide a SCIA assessment. District uses a rubric or checklist to evaluate whether a student requires a SCIA. The assessment is conducted by the school psychologist. Parents did not provide consent to the SCIA assessment.

40. District IEP team members believed that Student needed a different curriculum and that she required specific instruction for more than 50 percent of the day. When specific instruction is needed for more than 50 percent of the day, District does not provide the instruction in a resource specialist program (RSP). The IEP notes indicate that in evaluating the placement options, District team members considered previous interventions utilized including cooperative grouping, peer/cross-age tutoring, modification of assignments, monitoring by a student study team, individual assistance from a teacher or other adult, change of classroom, preferential seating and grade retention before recommending an SDC placement. District team members did not consider a one-to-one aide or SCIA for Student because they did not see an assessed need for such service and believed that Student's needs would be met without an aide

in the SDC-LH class. Carufel also opined that a one-to-one aide would be more restrictive and stigmatizing than an SDC-LH classroom.

41. On March 18, 2008, Parents wrote to Loftus in her then role as Coordinator of Student Services and requested her assistance. They advised Loftus that "we were not able to come to agreement in the IEP meeting on the issues of category of eligibility, adequacy and accuracy of assessment, needs and goals, and placement" and requested that she provide "assistance to resolve the outstanding issues." Parents attached a copy of a March 14, 2008 parental addendum to IEP.

42. On March 24, 2008, Parents provided Loftus with the original signed copies of the March 14, 2008 IEP addendum and a March 19, 2008 Parental Addendum to the Multi-disciplinary Assessment Draft Report. Parents requested that a speech and language assessment be conducted to examine the impact of her language difficulties on Student's academics and that a spontaneous language sample be taken in the context of a peer to peer interaction to evaluate pragmatics and social problem solving skills. Parents also requested a social skills assessment,<sup>6</sup> a recreational skills assessment, a sensory integration and occupational therapy assessment, and an auditory processing assessment. Parents asserted that poor language skills were a component of Autism and should have been evaluated before discounting Autism as an eligibility category. Parents also asserted that pragmatics and social skills were also seen as problems in every day activities and were not specifically evaluated. Parents also raised concern about Student's safety and her injuries.

43. The addendums indicated that Parents disagreed with the APE assessment. Parents asserted that Student's physical education skills were underdeveloped and that

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<sup>6</sup> During the SST process, District offered Student social skills training. Parents declined the service.

the assessment was not sufficiently comprehensive. Parents disagreed with various aspects of the psychoeducational assessment and multi-disciplinary assessment report prepared by Carufel. Parents disagreed with the eligibility category of mental retardation, the denial of Autism as a category of eligibility, the administration of the ADOS, and various statements included in the report concerning parental cooperation and health history as well as Carufel's analysis. Parents requested that Carufel's report be amended in numerous instances.

44. On May 20, 2008, District special education director Janis Rivera (Rivera) sent Parents a letter in response to the March 18, 2008 letter. The letter stated that District would agree to provide assessments in speech and language, recreational therapy, occupation therapy, pragmatics, auditory processing and a SCIA assessment. The bottom of the letter indicated that an assessment plan was enclosed. District did not maintain a copy of the assessment plan that it asserts was sent with the letter and admits that Rivera's record keeping was not consistent as she had been in and out of the office on medical leave for much of the 2007-2008 academic year until her retirement. In her absence, various members of the staff including Loftus, filled in to fulfill her duties. Rivera did not testify at the hearing.

45. The letter went on to acknowledge that some of the requested changes would be made to the multi-disciplinary report, but other requested changes would not be made. Rivera indicated that an emergency SCIA was denied because there was no assessment that indicated a one-to-one aide would assist Student in benefiting from her educational program. Rivera asserted that a specific assessment was required to add a one-to-one aide as a related service to Student's educational program. Rivera offered to have a SCIA assessment conducted. Rivera denied Parents' request for an additional APE assessment because she asserted the assessment was sufficient and accurately reflected

Student's gross and fine motor skills. Rivera also rejected Parents' request for counseling because Carufel had led the whole class in a workshop on bullying.

46. Mother received the letter, but did not recall seeing the assessment plan enclosure. At about the time the letter arrived, Student's 17-year-old brother died unexpectedly. Mother was in a state of shock and grief for many weeks and not focused on following up on the assessment plan. The District did not inquire further about the assessment plan.

47. As the 2007-2008 school year progressed, Student was the subject of bullying and physical abuse on the playground by male students on multiple occasions as documented in school records. Student was injured several times including an incident wherein she was hit in the head with a clipboard by another student sustaining a bruise and permanent discoloration on her face from the incident. In May of 2008, Student suffered an unspecified sexual assault in the girls' bathroom by another female student who had accompanied her to the bathroom. The Department of Child Protective Services was notified of the incident.

48. In the 2008-2009 school year, Student attended a general education second grade class taught by Abigail Farag (Farag). Due to her age and previous retention in first grade, a second retention in first grade was not an option available pursuant to the District's retention policy. Hansen credibly testified that she would have recommended retention had the District policy permitted another retention.

49. Farag received a Bachelor of Arts degree in Liberal Arts and a Master of Arts degree in Education and Counseling from Biola University. District considered her to be one of their best second grade teachers and placed Student in her class for the 2008-2009 school year. Farag had taken some courses dealing with special education issues as part of her educational program and continuing education. Farag appeared very knowledgeable, caring and sincere in her testimony. Farag testified that Student's

strengths were in Music and Physical Education. Math was very difficult for Student despite considerable effort by Student. Farag noted that Student was not able to complete multiple step math problems. Farag observed that Student had problems with spacial issues such as copying material from the white board. In Farag's class, Student also struggled with Math, Science, Social Studies and Language Arts. To the extent time permitted, Farag gave Student extra attention and extra repetitions of instruction. Farag opined that although Student was two years older than most of her classmates, she struggled academically and socially. She estimated that at least one hour per day was spent dealing with Student's social adjustment issues.

50. Farag opined that a general education classroom was an inappropriate placement for Student. She did not feel that she could adequately meet Student's needs. The level of modification to curriculum that was needed for Student and the number of repetitions needed made it impossible for the teacher to provide instruction to the rest of the class and at the level that Student needed. Farag opined that an SDC class providing a small group, a para-educator, and a lot of repetition would be more appropriate for Student. Farag was generally familiar with manifestations of Autism Spectrum Disorder and did not see such indications in Student.

51. Farag worked with Vice Principal Soum on playground and social issues. She spent considerable time working with the students in Student's classroom to have them help Student on the playground, including a program in which classmates coached Student and gave Student stickers for taking turns and using appropriate behavior. Student's classmates reported to Farag when Student did not follow playground rules and what they had done to help her. According to Farag and the notes in her behavioral log, Student seemed to respond to her classmates' assistance and was included in games and play. In essence, Student's playground behavior and inclusion became a class project for Farag's class.

52. Farag estimated that at the end of the 2008-2009 school year, Student was academically at the kindergarten to mid-year first grade level in her skills. She saw Student make some progress socially based upon the extensive work Farag did with the entire class. Farag did not think Student was able to self-advocate at an appropriate level. Although Student made some personal progress in Farag's class, she never performed at grade level and seemed to fall farther behind as the curriculum became more difficult.

53. Playground aide Megan Messer saw a dramatic improvement in Student from 2007-2008 school year to 2008-2009 school year. In 2007-2008, Student did not appear to have any friends and was given time outs on the bench numerous times for cursing at others and using her middle finger at other students. In 2008-2009, she had a few friends and no longer cursed or used her middle finger.

#### ADDITIONAL OUTSIDE ASSESSMENTS

54. At Gallo's request, Bassett administered the Autism Diagnostic Interview Revised (ADI-R) based upon an interview with Mother and grandmother and observations Gallo made about Student. The ADI-R is scored on a diagnostic algorithm. According to Bassett, the ADI-R placed Student solidly within the autistic range. Bassett's report was not provided to the IEP team.

55. On April 22, 2008, April 30, 2008 and June 10, 2008, Regional Center psychologist Heike Ballmaier (Ballmaier) conducted an assessment of Student and observation at Westwinds School. Parents did not give Ballmaier permission to share or exchange information with the District. Parents wanted an objective second opinion of Student's abilities. Parents did not provide the District with copies of Ballmaier's reports until after the Due Process Complaint was filed in this case.

56. Ballmaier evaluated Student using the Wechsler Intelligence Scale for Children-Fourth edition (WISC-IV), Wechsler Abbreviated Scale of Intelligence (WAIS),

Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), Wide Range Achievement Test-Revision Four (WRAT4), Adaptive Behavior Assessment System, Second Edition (ABAS-II) Parent Form, Gilliam Autism Rating Scale, Second Edition (GARS-2), Autism Diagnostic Observation Schedule Generic (ADOS-G)-Module 3, Child Symptom Inventory 4-Parent Checklist, clinical interview and a records review.

57. In April of 2008 Ballmaier observed that Student had borderline cognitive ability with an FSIQ of 73. District psychologist Ede asserted that Ballmaier's administration of the WISC-IV again so close to the District's administration of the same instrument may have been effected by the "practice effect" or the act of learning portions of the test and improving performance by multiple administrations and familiarity resulting in a slightly elevated FSIQ. Ballmaier saw evidence of Student's ADHD in the administration of the assessment instruments and in her office, but not when she observed Student in an academic setting. She noted that Student had deficits in visual motor integration and coordination as demonstrated on her administration of the VMI. She also noted that Student had limited expressive language skills. After observing Student at school, Ballmaier ruled out autistic disorder. She noted that Student was a friendly and social child who maintained good eye contact, showed compassion, showed a great deal of interest in and shared enjoyment with her peers, and responded well to the teacher during classroom activities. Ballmaier observed that Student appeared to be an easy target for teasing by her peers, but not because of autistic-like characteristics she might be exhibiting, but rather because her peers might be aware of her cognitive and academic delays and she might be trying too hard to be liked by her peers. According to Ballmaier, Student did not demonstrate any qualitative impairment with verbal or nonverbal communication, repetitive or stereotyped patterns of behavior or interest.



58. Ballmaier opined that Student had borderline cognitive ability and would fall further behind as time went on if she remained in a general education classroom without additional assistance. Ballmaier also suggested that an SDC class be considered for academic, social and safety reasons. Ballmaier concluded that Student would benefit from learning how to assert herself so that she does not become a target for teasing and victimization by her peers.

59. Student filed a Due Process hearing request on February 11, 2009. On March 17, 2009, Loftus again offered additional assessments including a speech and language assessment, auditory processing assessment, occupational therapy assessment and special circumstances aide (SCIA) assessment. Parents did not grant permission for the assessments.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. On the first day of hearing, Student filed a Motion seeking to reallocate the burden of proof in this proceeding to District. The Motion was denied. As the petitioning party, Student has the burden of proof on all issues. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### ISSUE 1: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO TIMELY, ADEQUATELY AND APPROPRIATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY?

2. Student contends that District failed its statutory child-find obligations by not immediately assessing Student for special education. Student asserts that Parents requested an assessment of Student at the beginning of the 2007-2008 school year and that instead of assessing Student or holding an IEP meeting, District held a Student Study Team meeting and unnecessarily delayed the assessment until January of 2008.

Student further contends that once District did assess Student, the assessment was insufficient in that it failed to assess Student in all areas of suspected disability including behavior, speech and language, occupational therapy and auditory processing. Finally, Student contends that the APE assessment and the psycho-educational assessment that were conducted by District were inappropriate. Student contends that the District's administration of the WISC was inappropriate because a speech and language assessment had not been conducted to determine whether Student had any speech and language deficits which might affect her performance on the WISC. Student contends that the APE assessment inappropriately relied solely on the observations of the assessor.

3. District contends that it fulfilled its child-find responsibilities and responded appropriately with general education interventions through the Student Study team process. District also contends that as a member of the SST team, Parent was in agreement with the SST team decision to postpone an assessment and IEP meeting until interventions including retention had been attempted for 12 weeks. District contends that its assessments were appropriate and sufficiently comprehensive to determine Student's unique needs. District further contends that it offered to conduct the additional assessments requested by Parents in the areas of occupational therapy, recreational therapy, SCIA, auditory processing, recreational therapy, pragmatics and speech and language, but Parents never provided consent to the assessment plans offered.

4. A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§

56171, 56301, subds. (a) and (b).) A child must be assessed by a school district in all areas related to the suspected disability. No single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320. subd. (f).) A district is also responsible for the planning of an instructional program to meet the assessed needs. (Ed. Code, § 56301.) These duties are often described as a district's "child find" obligations. "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

5. A student's parent or the responsible public educational agency may request an initial evaluation to determine whether a child is eligible for special education and related services on the basis of a qualifying disability. (20 U.S.C. 1414(a)(1)(B); 34 C.F.R. § 300.301.)

6. A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, §

56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).)

7. For purposes of evaluating a child for special education eligibility, the District must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. §1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A school district is also required to ensure that the assessment is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly lined to the disability category. (34 C.F.R. § 300.304(c)(6).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. 300.303(a); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

8. 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); Ed. Code, §§ 56320, subds. (a) & (b).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse 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).) Tests must be selected and administered to ensure that tests administered to a pupil with impaired sensory, manual or speaking skills produces test results that accurately reflect what the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, §56320, subd. (d).)

9. An assessment plan is to be prepared within 15 days of the initial referral or request for assessment. (20 U.S.C. §1414(a)(C)(I); Ed. Code § 56321, subd.(a).) In order to assess or reassess a student, a school district must provide proper notice to the student and his/her parents. (20 U.S.C. §1414(b)(1); (Ed. Code, § 56381, subds. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. §1414(b)(1); (Ed. Code, § 56321, subds. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide notice that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).)

10. Student's contention that District failed in its child-find duties when it unnecessarily delayed assessment fails. The evidence established that Student was referred for a full assessment on January 14, 2008. The question to be resolved then is whether District violated its child find duty from August 17, 2007, the date school began, through January 13, 2008.

11. Upon indication that Student was having academic difficulties, District immediately took action and placed Student in the SST process. The RTI process implemented by the SST team included periodic evaluations and meeting about Student's progress. District's SST process, a resource of the regular education program, was a first step in the process. Student asserts that Parents requested an assessment at the beginning of the school year and that District unduly delayed the assessment. While parents are entitled to request an assessment to determine if their child is a child with a disability for special education purposes, there was no evidence of when Parents requested that Student be assessed for special education. However, notations in the October 25, 2007 SST meeting notes indicate that the SST team discussed Parent's request for an IEP and after discussion decided to postpone assessment for four weeks until Student had completed 12 weeks of RTI. The four additional weeks of RTI placed Student at the off-track break which ran from November 22, 2007 through January 7, 2008. When Student returned from her off-track break in January 2008, Mother presented the school psychologist with a copy of Gallo's report diagnosing Autism and the District initiated the assessment process. Student did not present sufficient evidence regarding what Parents requested, when the request was made nor what role Parents played in the SST team decision to delay assessments for the four additional weeks. Further, the District took action when the Student's academic difficulties became apparent. Thus, the evidence is not sufficient to support a finding that District failed in

its child-find obligation or that it delayed conducting an assessment requested by Parents. (Factual Findings 1-27 and Legal Conclusions 1-11.)

12. Student's contention that District's psycho-educational assessment was improper fails. The evidence showed that the psycho-educational assessment conducted by the District was proper. District conducted a comprehensive psycho-educational assessment as part of its multidisciplinary assessment. A team of school psychologists including Carufel, Ede and Gluck consulted and were involved in the psycho-educational assessment. District utilized various measures including observation, file review, standardized testing and rating scales to evaluate Student. The measures included tests of cognitive functioning, auditory processing skills, visual motor integration, Autism Spectrum Disorder, and adaptive and behavioral functioning. All measures were administered by qualified school psychologists Carufel and Gluck. Gluck administered the ADOS with Carufel as an observer. Gluck had received special training to administer and score the ADOS. The Multi-disciplinary assessment also included academic achievement testing in all academic areas by RSP teacher Rudy, a vision and hearing screening by the school nurse and an APE assessment by APE specialist Bielling. Student failed to meet her burden of showing that the District's psycho-educational assessment was improper. (Factual Findings 1-27 and Legal Conclusions 1-12.)

13. Student's contention that District 's APE assessment was improper fails. District conducted an APE assessment which focused on object control and gross motor skills. APE specialist Bielling acknowledged that her assessment did not address fine motor or sensory integration issues. Bielling observed Student and used the CARE-R, a standardized measure to ascertain the level of her gross motor skills and object control skills. Bielling was qualified to perform the assessment, used an appropriate measure and obtained results indicating that Student was at or above age appropriate levels in her skills. Bielling's analysis was consistent with teacher comments that physical

education was a strength for Student. The evidence did not establish any deficiency in the APE assessment or any unidentified APE needs. (Factual Findings 1-27 and Legal Conclusions 1-13.)

14. Student's contention that District failed to assess Student in all areas of suspected disability because a speech and language assessment was necessary was not supported by the evidence. Student did not offer any evidence to support her contention that Student's performance on the WISC was effected by a speech or language deficit or that Student had needs in the area of speech and language that were not identified by District's assessment. Carufel found no indications of speech difficulties and Student's performance on the WJIII and the WISC demonstrated expressive and receptive language skills commensurate with her cognitive ability. Similarly, Student's contention that an auditory processing assessment was necessary is not supported by the evidence. Carufel administered the TAPS III, an auditory processing evaluation tool, and Student scored commensurate with her cognitive ability and consistent with the low processing scores indicated on the WISC. District identified Student's needs in this area and further auditory processing assessment was not needed to identify Student's unique needs. (Factual Findings 1-27 and Legal Conclusions 1-14.)

15. Student's contention that a separate behavioral assessment was warranted was not supported by the evidence. Student demonstrated behaviors including profanity and making a middle finger gesture at her peers on the playground. District personnel and the IEP team acknowledged that Student had some behavioral incidents including profanity and using her middle finger and identified her needs in the area of behavior. At the time of the assessment, District had implemented positive behavior supports, general education interventions and added more supervision to the playground during unstructured time when Student's behavioral challenges were most evident. Furthermore, the multi-disciplinary assessment evaluated behavior through



assessment, observation and rating scales. District IEP team members believed that as a result of the positive behavior supports, Student's behaviors were improving at the time of the March 14, 2008 IEP team meeting and did not believe that Student's behaviors were serious enough to warrant a behavior assessment. Student failed to demonstrate that Student had unidentified behavioral needs. (Factual Findings 1-27 and Legal Conclusions 1-15.)

16. Student's contention that an occupational therapy assessment to evaluate fine motor skills and sensory integration skills was necessary has merit. The issue then is whether District denied Student a FAPE from January 2008, when District's assessment plan did not include an OT assessment in these areas, through March 14, 2008, the date of the IEP team meeting. As early as September of 2007, Hansen, a general education teacher, with no occupational therapy or special education training, noticed that Student had indications of fine motor weaknesses including inability to draw or cut within the lines in the initial September 18, 2007 SST referral. At that time, she also noted that Student had difficulty paying attention, staying in her seat, and listening to instructions. Hansen's identification of fine motor weaknesses and potential sensory issues, together with Gallo's diagnosis of Autism and Mother's reports of sensory needs and fine motor difficulties were sufficient to put District assessors on notice to suspect unique needs in the occupational therapy area of fine motor skills and sensory issues and District failed to assess in those areas. A procedural violation of IDEA only denies FAPE, however, if it impedes the parents' rights to participate in the IEP process or deprives the student of an educational benefit. In this case, there was no evidence that Student's need for occupational therapy was more than anecdotal. Student did not introduce any evidence that established an actual need for occupational therapy. Furthermore, even assuming an actual need existed, the deprivation of benefit was de minimus in that it would have amounted to failure to provide occupational services during the two month period of

time between the March 14, 2008 IEP and the May 20, 2008 letter wherein the occupational therapy assessment was offered. Accordingly, the violation did not rise to the level of a denial of educational benefit and, did not, therefore, result in a denial of FAPE. (Factual Findings 1-27 and Legal Conclusions 1-16, 20.)

**ISSUE 2: DID THE DISTRICT DENY STUDENT A FAPE BY COMMITTING PROCEDURAL VIOLATIONS OF IDEA, WHICH IMPEDED PARENTS' RIGHTS TO MEANINGFUL PARTICIPATION IN THE IEP PROCESS AND/OR CAUSED A LOSS OF EDUCATIONAL BENEFIT?**

17. Student contends that District denied Student a FAPE by failing to explain Student's rights with respect to an IEE and failing to fund an IEE upon request. Student also contends that District impeded parental involvement in the IEP process by failing to consider the reports of outside assessors.

18. District contends that Student was provided with a copy of the Procedural Safeguards developed by the California Department of Education which addresses availability of IEEs. District also contends that it was not required to provide a publicly funded IEE to Student. District contends that Gallo's report was considered by school psychologist Carufel in her assessment of Student and that the IEP team was apprised of the report and its contents. The report of Bassett and the two reports prepared by Ballmaier did not exist at the time of the IEP meeting and therefore could not have been considered by the IEP team. District further asserts that Ballmaier was instructed not to provide any information to District and therefore, it was impossible for District to consider any assessments conducted by Ballmaier.

19. Under IDEA and companion state law, students with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and

that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Ed. Code, §§, 56001, 56040, subd. (a).)

20. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); *see also M. L., et. al., v. Federal Way* (9th Cir. 2004) 394 F.3d 634, 653.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, § 56500.4.) 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 concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

21. If the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation: (1) must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and (2) may be presented by any party as evidence at a hearing on a due process complaint regarding the child. (34 C.F.R. § 300.502(c); Ed. Code, §§ 56341.1, subd. (b)(1), 56381, subd. (b).)

22. When a parent disagrees with an assessment by the educational agency, the parent has the right to an IEE from independent qualified specialist at public expense unless the educational agency is able to demonstrate at a due process hearing

that its assessment was appropriate. (Ed. Code, §§ 56329, subds. (b) & (c), 56506, subd. (c); 34 C.F.R. § 300.502.)

23. Student's contention that she was denied a FAPE when District did not advise Parents of their rights with respect to an IEE is not supported by the evidence. First, Parents were given copies of the Procedural Safeguards at the March 14, 2008 IEP meeting. The Procedural Safeguards set forth rights with respect to IEEs at public expense. Furthermore, Student is only entitled to an IEE at public expense when the District's assessment is inappropriate. In this instance, the ALJ has determined that District's assessments which were challenged by Student were appropriate. Accordingly, there is no right to an IEE at public expense and no resulting denial of FAPE or deprivation of educational benefit to Student. (Factual Findings 1-59 and Legal Conclusions 1-13.)

24. Student's contention that she was denied a FAPE when District failed to consider outside assessments is also without merit. The assessments prepared by Bassett and Ballmaier had not been conducted at the time of the March 14, 2008 IEP. Parents did not give Ballmaier consent to share her report or information with District. With respect to Gallo's report, District considered the diagnosis of Autism and results of Gallo's report. District also considered his suggestion that Student be placed in an Autism class. Carufel summarized Gallo's report in her assessment report which was provided to the IEP team. Although each member of the IEP team was not provided with a copy of the report and did not have the same opportunity as Carufel to conduct an in depth review of the report, the District members of the IEP team relied upon Carufel's expertise to evaluate the report. The Gallo report in and of itself was not sufficient to determine eligibility for special education, design an IEP or determine placement. Parents had not provided any medical records or consent to access medical records, so District was limited to what was provided in the Gallo report. Gallo's assessment results

were considered as part of an overall discussion and consideration of Student's eligibility, needs and placement. The law does not require District to follow the recommendations or diagnosis of an outside assessor; instead it merely requires that the IEP team consider the assessment results. District met its obligation which was to consider the outside assessment results. (Factual Findings 1-59 and Legal Conclusions 1-24.)

### ISSUE 3: DID THE DISTRICT OFFER STUDENT A FAPE IN THE MARCH 14, 2008 IEP?

25. Student contends that the March 14, 2008 IEP failed to state accurate levels of performance and measurable goals because the IEP team relied upon inadequate and deficient assessments to determine present levels of performance and goals and failed to have measurable annual goals in place at the beginning of the 2008-2009 school year. Student also contends that District failed to provide appropriate supportive and related services by not providing Student with a positive behavior plan, speech and language therapy, occupational therapy for fine motor skills and sensory issues, adapted physical education, counseling services and a one-to-one aide. Student further contends that District's offered placement of an SDC-LH class was not the least restrictive environment and therefore not an appropriate placement for Student. Finally, Student contends that District did not provide a safe environment for Student based upon her disability.

26. District contends that its assessments were adequate and appropriate and that accurate levels of performance and measurable goals were derived from the information developed at the IEP team meeting and from the assessment data. District contends that Student did not need any additional supportive services when appropriately placed in the SDC-LH class. District also contends that the placement offered in the SDC-LH class was a safe and appropriate environment for Student based upon her unique needs. Finally, District contends that after trying various interventions

and strategies and with the benefit of assessment data, it became clear that Student needed a modified curriculum, more repetitions, and a smaller class environment for all of her academics and that an SDC-LH class was the least restrictive environment to deliver such a program based upon Student's unique needs.

27. As set forth above, under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are 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).) In California, related services are called designated instruction and services, which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

28. IDEA and state law require that, in order to provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207 [73 L.Ed. 2d 690] (*Rowley*).) The Supreme Court in *Rowley* held that the basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Rowley, supra*, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational

benefit" upon the child. (*Id.* at pp. 200, 203-204.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).)

29. An IEP shall be in effect for each disabled child qualified for special education at the beginning of each school year. (20 U.S.C. § 1414 (d)(2).)

30. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)<sup>7</sup> An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F. 2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*) To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the district actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

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<sup>7</sup> Although *Adams* involved an Individual Family Services Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212) and district courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salelm-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

31. The IDEA charges the school with developing an appropriate education not with determining a program label with which to describe multiple disabilities. (*Heather v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

32. An educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP in any one or a combination of public, private, home and hospital, or residential settings. The IEP team shall document its rationale for placement in other than the school and classroom in which the pupil would otherwise attend if the pupil were not handicapped. The documentation shall indicate why the pupil's handicap prevents his or her needs from being met in a less restrictive environment even with the nature or severity of the disability is such that education in general education regular classes with the use of supplementary aids and services. (Cal. Code Regs., tit. 5, § 3042.)

33. Federal and state law require school districts to provide a program in the least restrictive environment (LRE) to each special education student. (Ed. Code, §§ 56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the student had on the



teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with ADHD and Tourette's syndrome].)

34. The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

35. Student's contention that the March 14, 2008 IEP failed to state accurate levels of performance and measurable goals is without merit. As determined in Issue 1 above, District's challenged assessment were appropriate. To the extent additional assessments were offered by District in May 2008, Parents did not provide consent for the assessments and District was not free to conduct further assessment without parental consent. Furthermore, such after-acquired assessments would not be relevant as to whether appropriate PLOPS and goals were developed. Accordingly, based upon the information that the IEP team had at its meeting on March 14, 2008, it developed PLOPS and measurable goals based upon Student's identified and assessed needs.

36. Similarly, Student's contention that she was denied a FAPE because annual measurable goals were not in place at the beginning of the 2008-2009 school year is meritless because of the finding above that District developed proper PLOPS and goals at the March 14, 2008 IEP team meeting. Parents did not consent to the IEP, special education eligibility or the provision of special education placement and services. Parents can disagree with an IEP and file a due process complaint challenging that IEP and/or FAPE, as they have done in this instance; however, parents cannot then raise an argument that District failed to have in place proper PLOPS and goals for the next school year when those have been found sufficient.

37. The evidence did not support Student's contention that District failed to provide appropriate supportive and related services by not providing Student with a positive behavior plan, speech and language therapy, occupational therapy for fine motor skills and sensory issues, adapted physical education, counseling services and a one-to-one aide. Instead, the evidence demonstrated that Student was assessed in all areas of suspected disabilities except occupational therapy, and that the challenged APE and psycho-educational assessments were appropriate. Student bears the burden of proof in this matter. Student did not establish that student needed related services in adapted physical education, counseling, occupational therapy, or a one-to-one aide to receive a benefit from her educational program. (Factual Findings 1-59 and Legal Conclusions 1-37.) Regarding occupational therapy, the evidence was merely anecdotal. Student did not offer expert testimony to identify or explain occupational therapy needs that she contends were not met and the testimony of Hansen, Mother and Gallo, while sufficient to establish that District should have been on notice that occupational therapy was an area of suspected disability for assessment purposes, was not sufficient to meet the burden of proof to establish the existence of an actual unmet need in the area of occupational therapy. Accordingly, there was insufficient evidence to support a finding

that Student was denied a FAPE when the March 14, 2008 IEP did not offer occupational therapy. (Factual Findings 1-59 and Legal Conclusions 1-37.)

38. Student's contention that the District's offered placement of an SDC-LH class was not the least restrictive environment and is therefore not an appropriate placement for Student is without merit. To determine whether a special education student could be satisfactorily educated in a regular education environment, one must evaluate and balance the educational benefits of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student had on the teacher and children in the regular class; and the costs of mainstreaming the student. Here, the evidence shows that Student was receiving minimal to no academic benefit from the general education classroom.

39. Student was retained in first grade due to her inability to keep up with the second grade curriculum. Although two years older than most students, Student was not able to keep up with the first grade curriculum when she was returned to a first grade classroom and made only minimal personal progress in first grade after retention. Hansen did not believe Student was progressing in the general education curriculum despite her extra efforts to assist her. Hansen opined that Student was not appropriately placed in a general education classroom and needed an SDC class with a modified curriculum with extra repetitions to make progress in the curriculum. Although not available to the IEP team at the time of the FAPE offer, the Ballmaier report provided by Student also supports the need for a more specialized setting for Student based upon her limited cognitive abilities. At the time of the IEP, Student was not receiving any social benefit from participating in the general education classroom, she was also harmed when taken advantage of by others and bullied on the playground. She also experienced frustration and low self-esteem when not able to achieve at the same level

and rate as others in the class. Student was not receiving any social benefit and minimal, if any, academic benefit from placement in the general education classroom.

40. Finally, regarding the effect on the teacher and children in the regular class, Student required on average an hour of teacher attention each day to handle her social adjustment issues. Hansen was required to spend time scheduled for academic curriculum attending to Student and rendering one-to-one assistance to Student at the expense of the other Students for extended periods of time.

41. The SST team tried several interventions including retention, small groups, additional assistance and modification of homework assignments prior to assessment. The interventions did not result in any improvement in Student's access to the curriculum. Assessment results and teacher reports indicated weaknesses in all academic areas requiring special education services for all academic areas. Parents contend that Student should be provided with a one-to-one aide in the general education classroom. While a one-to-one aide might be of assistance with behavior challenges and staying on task, the aide will not address the underlying issue that Student needed a modified curriculum. The SDC-LH will provide Student with a small class, additional repetitions of material, and some same-aged peers for social and non-academic benefit. District's assessments support the need for an SDC class. Further, while not a part of the IEP team snapshot of information, the subsequently offered assessment by Ballmaier supports an SDC placement based upon Student's delays, inability to keep up with the general education curriculum and need for extra repetition and practice. Placement in the SDC-LH will not require an invasive one-to-one adult aide shadowing Student and will provide Student with an academic and social benefit. The proposed placement provides for Student to participate in general education physical education and other aspects of the general education school community for 16 percent of her day and is the LRE for Student. (Factual Findings 1-59 and Legal Conclusions 1-41.)

42. Student's contention that District failed to provide a safe environment for Student based upon her disabilities also fails. On March 14, 2008, District offered Student an appropriate placement in a self-contained SDC-LH classroom with a low student-to-adult ratio tailored to her unique needs. Parents did not accept the placement because they sought a different placement for Student with a one-to-one aide and disputed the mental retardation eligibility category. There was no evidence that the SDC-LH class offered by District presented any safety issues to Student. (Factual Findings 1-59 and Legal Conclusions 1-42.)

43. In sum, the District offered Student a FAPE in the March 14, 2008 IEP with measurable goals, accurate PLOPS, and an appropriate placement in the least restrictive environment with consideration of Student's safety needs. Student failed to meet her burden of demonstrating that she was denied a FAPE. (Factual Findings 1-59 and Legal Conclusions 1-43.)

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. 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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: September 17, 2009

                    /s/                    

GLYNDA B. GOMEZ

Administrative Law Judge

Office of Administrative Hearings