

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2016050852

DECISION

District filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings, State of California, on May 18, 2016, naming Parents on behalf of Student. OAH continued this matter on June 2, 2016 at the request of the parties.

Administrative Law Judge Vernon Bogy heard this matter in Van Nuys, California, on August 22 and 23, 2016.

Donald Erwin, Attorney at Law, represented Los Angeles Unified School District. Anahit Sunanian, Due Process Specialist, attended the hearing on behalf of District.

Student's Father and Mother attended the hearing on August 22, 2016. Student's Mother attended the hearing on August 23, 2016.

At the hearing, a continuance was granted for District and Student to file written closing arguments, and the record remained open until September 1, 2016. Upon timely submission of written closing arguments, the record was closed and the matter was submitted for decision on September 1, 2016.

ISSUES¹

1. Is District's April 5, 2016 psychoeducational evaluation appropriate such that District is not obligated to fund an independent psychoeducational evaluation requested by Parents on April 13, 2016?
2. May District exit Student from special education based on its determination at Student's April 6, 2016 Individualized Education Program team meeting that Student was no longer eligible as developmentally delayed and did not meet eligibility criteria for autism or specific learning disability?

SUMMARY OF DECISION

This decision holds that District's April 5, 2016 psychoeducational assessment met all legal requirements, and accordingly, Student is not entitled to an independent educational evaluation at public expense.

The decision further holds that District properly exited Student from special education based on its determination at Student's April 6, 2016 IEP team meeting that Student was no longer eligible as developmentally delayed and did not meet eligibility criteria for autism or specific learning disability.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was a six-year-old boy who at all relevant times resided with his Parents within District's geographical boundaries. Student was eligible for special

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

education and related services under the category of developmental delay.

2. During the 2015-2016 school year, Student attended kindergarten at the Granada Elementary Community Charter School in a general education program. He received special education services from a resource specialist program to address goals in language arts and behavior.

3. In December 2012 Student was referred for initial evaluation by Parents and the North Los Angeles County Regional Center. Student was assessed by the regional center due a delay in receptive and expressive language. The regional center gave a diagnosis of autism.

4. District conducted Student's initial IEP team meeting in September 2013, and he was found eligible for special education placement and services under the category of developmental delay.² Student was found not eligible under the categories of autism or speech and language impairment.

5. District conducted a language and speech assessment in March 2015. The assessor found that Student did not demonstrate a need for language and speech support.

APRIL 5, 2016 PSYCHOEDUCATIONAL ASSESSMENT REPORT

6. As Student aged out of Developmental Delay eligibility, the District held a triennial assessment in April 2016. As part of that assessment, District conducted a psychoeducational evaluation. The suspected disabilities addressed in the assessment were specific learning disability and autism.

7. Yulya Ippolitova, District's school psychologist, performed the

² California Code of Regulation, title 5, section 3031, was amended effective July 1, 2014, to remove this eligibility category for children three and older for special education eligibility.

psychoeducational assessment. Ms. Ippolitova received a bachelor of arts degree in psychology from the University of California, Berkeley in 2003, and a master of science degree in counseling with a specialization in school psychology in 2010 from California State University, Northridge. She had a clear pupil personnel services credential in school psychology, which qualified her to work as a school psychologist in the state of California.

8. Ms. Ippolitova has worked for District as a school psychologist since 2010. During her tenure at District, she has conducted more than 200 psychoeducational assessments, and has attended approximately 250 Individualized Education Program team meetings. She was knowledgeable about, and trained in, administering standardized assessment instruments at issue here. She was qualified to administer the psychoeducational assessment based on her education, training, credential and experience.

9. Ms. Ippolitova issued the psychoeducational assessment report of Student on April 5, 2016. She assessed Student through a review of Student's educational records; direct observation in the classroom and on the playground; interviews with Student's special education and general education teachers and Father; assessments prepared by Student's special education resource specialist Leslie Weinstein Joseph and general education teacher Laura Park; and standardized testing.

10. For the psychoeducational assessment, Ms. Ippolitova employed the following tools: the Bracken Basic Concept Scale, Third Edition; the Motor-Free Visual Perception Test, Third Edition; the Beery Buktenica Developmental Test of Visual Motor Integration, Sixth Edition; the Comprehensive Test of Phonological Processing, Second Edition; the Behavioral Assessment System for Children, Second Edition; the Disruptive Behavior Rating Scale; and the Autism Spectrum Rating Scales.

11. The materials and procedures used for the psychoeducational assessment

were not racially, culturally, or sexually discriminatory in selection or administration. All instruments were administered in English, which was Student's primary language. All instruments were reliable and widely accepted assessment tools. All instruments were administered and interpreted consistent with the publisher's protocols and yielded valid results. Ms. Ippolitova did not rely on any single measure, tool, or score in making her recommendation for eligibility or services.

Student Observation

12. On February 9, 2016, Ms. Ippolitova observed Student both in the classroom and on the playground, and interviewed him. Student was appropriately dressed and groomed, made appropriate eye contact and initiated and sustained conversation. He approached the interview without any evidence of fear, anxiety or withdrawal, and showed a good sense of humor and understanding of non-literal sayings.³ He put forth a good effort during the interview and during the assessment, showed appropriate activity level for his age during the assessment process, and while occasionally distracted, was easily redirected to the task at hand.

13. When observed in the classroom, Student interacted and initiated conversation with peers. Student sang along with his peers and actively participated during the singing of various songs. He participated in spelling and arithmetic practices. When called on by his teacher to share a school project with his peers, Student stood in the front of the class, told the teacher and his peers about his project, and smiled as he responded to questions from the teacher and his peers about his project. Student also was attentive as his peers presented their own projects to the class.

14. When observed on the playground during a recess period, Student

³ For example, Student understood and smiled at Ms. Ippolitova's comment to him that he was "on fire" because he was working so well.

interacted with peers, participated in pretend play with peers, initiated play with a peer, and appropriately utilized the play structure, including sliding down the slide with a peer, and using a climbing wall. He demonstrated appropriate peer interactions at all times during the observation.

Cognitive Assessment

15. The Bracken Basic Concept Scale, Third Edition, was used by Ms. Ippolitova to assess Student's conceptual knowledge and measure his comprehension and acquisition of basic concepts and receptive language skills. Student's scores ranged from average to high average to superior for his age range on this assessment.

16. Ms. Ippolitova also tested Student using the School Readiness and Receptive School Readiness Composites, which are designed to provide information regarding overall conceptual development as assessed receptively. Student was able to identify a variety of colors, numbers, letters and shapes, and performed in the average range in that regard. He performed in the high average range in direction/position, social awareness, texture/material, quantity and time/sequence concepts.

Reading Assessment

17. Ms. Ippolitova also assessed Student using the Comprehensive Test of Phonological Processing, Second Edition, which is a measure of phonological and auditory processing that is strongly related to mastering reading and written language. Student scored in the high average range on the phonological awareness component, and in the average range in the phonological memory composite. He scored in the low average range in the rapid symbolic naming composite, and well below average in the rapid non-symbolic naming composite.

Visual Perceptual and Motor Function Assessment

18. Ms. Ippolitova utilized the Motor-Free Visual Perception Test, Third Edition, to measure Student's visual perceptual skills. That test measures visual perception by examining the ability to discriminate between forms, remember forms, spatial relations, form constancy, sequential memory, figure-ground and closure. Student demonstrated high average facilities in visual perceptual skills.

19. Student was also tested using the Beery-Buktenica Developmental Test of Visual-Motor Integration, which is designed to assess visual and motor skills and provide information regarding the underlying visual motor integration processing necessary to support handwriting function. Student showed average skills in this area.

Academic Assessment by Student's General Education Teacher

20. As part of her assessment, Ms. Ippolitova reviewed the standard academic assessment prepared by Student's general education teacher, Laura Park. Ms. Park earned a bachelor of arts degree 1996 from California State University at Northridge. She received her teaching credential in 1999 from California State University at Northridge. She had been employed by District since 1993, initially as a teaching assistant, and beginning in 1997 as a full-time teacher. She has taught kindergarten for 17 years at Granada Hills Charter School.

21. Ms. Park was Student's general education kindergarten teacher during the 2015-2016 school year. Based on her observation of Student, Ms. Park reported Student to be proficient in all academic areas, given consistent effort, and found Student to have average skills in reading, math and written language. Ms. Park reviewed Student's performance on the Dynamic Indicators of Basic Early Literacy Skills test, and determined that Student demonstrated benchmark reading fluency skills.

Language Function Assessment

22. Ms. Ippolitova reviewed Student's language and speech assessment report, which was completed by J. Hernandez, District's speech language pathologist in March 2015. While the assessor reported concerns with Student's speech and language needs, in terms of articulation skills and development, he performed in the average range, and his speech intelligibility was judged at approximately 100 percent. Student's voice and oral fluency appeared functional to access his curriculum, and Student showed average language and expressive and pragmatic skills. He participated in group discussions. Father, however, reported that Student showed challenges in communicating at home, had immature articulation skills, and performed best when following single step directions.

Social Emotional Assessment

23. Ms. Ippolitova assessed Student's social emotional needs by interviewing him on February 17, 2016. She also interviewed Ms. Park and Father.

24. During her interview with Student, he was able to describe his father's and mother's jobs. He told Ms. Ippolitova that he enjoyed playing with Play-Doh, doing projects, going to Disneyland, reading books and pretending to be a mailman. He identified several school friends and reported several activities that he would like to accomplish. He was able to tell Ms. Ippolitova what he wanted to be when he grows up (a nurse, like his father).

25. Ms. Park reported that Student showed an appropriate attitude towards school rules and figures of authority, behaved appropriately in the classroom, and got along well with other students in class. Ms. Park described him as well-motivated in the classroom, showing appropriate attention in the classroom and transitioning between various classroom activities. She noted that Student tends to be talkative, requiring redirection to remain on task.

26. Father participated in a telephone interview with Ms. Ippolitova, and reported that Student was a “different person” at home. He described Student as kind, polite and friendly, but having a short attention span, appearing sad or unhappy, and exhibiting disobedient and inattentive behavior. Father told Ms. Ippolitova that Student was quiet and withdrawn, keeps to himself and is nonverbal unless spoken to. He reported that Student was disruptive in the classroom, hit other students and was socially awkward. Accordingly to Father, Student was unduly fascinated by certain things such as hair and clouds, cried for hours, and was not independent. Father related to Ms. Ippolitova that Student told stories which seemed believable but were untrue, and sought attention, whether positive or negative.

27. As part of this assessment, Ms. Ippolitova administered a Behavior Assessment System for Children, Second Edition, which included teacher, parent and self-reports. This assessment is a comprehensive set of rating scales and forms designed to evaluate various aspects of a child’s social, emotional, behavior, and personality of children and adolescents. This assessment was completed by Student’s general education teacher, Ms. Park, as well as by Father.

28. Student’s scores in this assessment indicated that Student was at-risk in the Internalizing Problems composite of the assessment, based on an at-risk rating in the anxiety and somatization scales. Ms. Park reported that Student often worried about his parents, sometimes fell down, and was easily annoyed by others.

29. Father’s rating scales under the Behavior Assessment System for Children reflected many more emotional and behavioral concerns at home, including at-risk ratings on anxiety, depression and somatization scales. Father’s ratings indicated that Student was withdrawn and had attention problems at home, acted confused and did strange things, had a short attention span and was easily distracted, and had trouble making new friends. Father reported that Student was easily annoyed by others, often

slept with Parents, often fell down, had toileting accidents and sometimes wet his bed, and sometimes bullied other children.

30. Ms. Ippolitova reviewed the Disruptive Behavior Rating Scale Assessment, which was completed by both Ms. Park and Father. The Disruptive Behavior Rating Scale Assessment is a screening measure which is designed to identify symptoms of attention deficit hyperactivity disorder, oppositional defiant disorder, and conduct disorder in children and adolescents.

31. Ms. Park's report did not perceive Student as presenting any significant behaviors indicative of inattention, hyperactivity or oppositional defiant disorder while at school.

32. Father's report perceived Student as presenting significant behaviors indicative of inattention in the home setting. Father indicated Student often fidgeted, showed signs of restlessness, and often interrupted others. Father identified Student as presenting significant behaviors indicative of oppositional defiant disorder, often blaming others for his own mistakes or misbehavior, being easily annoyed by others and acting spitefully and vindictively. He also reported that Student showed behaviors indicative of conduct disorder, including lying to others to obtain favors, initiating physical fights, bullying, threatening and intimidating others, and being cruel to animals.

33. Ms. Ippolitova administered the Autism Spectrum Rating Scales, which utilize inventories completed by Ms. Park and Father to measure behaviors associated with autism spectrum disorders.

34. Ms. Park's responses showed no scale elevations indicative of autism spectrum disorder. Ms. Park reported that Student used verbal and non-verbal communication for social contact, did not engage in unusual behaviors, related well to other children and adults, showed appropriate emotional responses to people in social situations, used language appropriately, did not engage in stereotypical behavior and

tolerated changes in routine well, reacted appropriately to sensory stimulation and did not display problems with attention or motor and impulse control.

35. Father's responses, in contrast, indicated numerous behaviors and features characteristic of autism spectrum disorders. Father reported that Student had difficulty using appropriate verbal and non-verbal communication for social contact, had difficulty relating to other children, and often chose to play alone. Father's responses reflected that Student had difficulty relating to adults, and had difficulty demonstrating appropriate emotional responses in social situations. Father reported that Student showed little emotion, did not understand the feelings of others, and did not notice social cues. Student was reported to use language in an atypical manner, frequently asked questions which were off-topic, used language that was immature for his age, and often spoke in an odd manner, reversing pronouns and repeating certain words out of context.

District's Resource Specialist Assessment Report

36. Ms. Ippolitova reviewed the March 10, 2016 assessment report of Ms. Weinstein Joseph, Student's special education resource specialist.

37. Ms. Weinstein Joseph holds a bachelor of arts degree in social sciences from State University New York at Buffalo, with a teaching credential. She received her master of arts degree in special education from New York University. She also holds a resource specialist teaching certificate. Ms. Weinstein Joseph has been employed by District for 37 years, first as a special day class teacher for students with learning and intellectual disabilities including autism, and then for 24 years as a resource specialist teacher working with students with significant educational needs resulting from learning and developmental disabilities, including autism.

38. During the 2015-2016 school year, Ms. Weinstein Joseph worked directly with Student when he attended kindergarten at Granada Elementary Community Charter

School, both individually and in small group settings. In March 2016, Ms. Weinstein Joseph conducted a re-evaluation of Student to determine his eligibility for special education services as he transitioned from kindergarten to first grade.

39. Ms. Weinstein Joseph observed Student in the classroom, and found him to have an appropriate attention span, able to participate in class activities and read with accuracy and fluency, and maintain focus while other students were reading.

40. She administered the Kaufman Test of Educational Achievement, Third Edition, which includes individually administered tests used for measuring academic achievement in the areas of reading, written language and math. Ms. Weinstein Joseph was qualified to administer the assessment based on her education, training, credentials and experience. The Kaufman Test of Educational Achievement was administered and interpreted in a manner consistent with the publisher's protocols, and the assessment yielded valid results.

41. Based on Student's scores on the tests administered, the curriculum based assessment data, individualized standardized test results, academic reports, teacher information, work samples and classroom observations, Ms. Weinstein Joseph concluded that Student's classroom performance was within the average range when compared to students his age in the areas of reading and listening, comprehension and math concepts. She also found that Student was meeting all grade level standards and able to access the general education curriculum without supports.

42. On April 5, 2016, Ms. Ippolitova issued her psychoeducational assessment, in which she concluded that Student did not appear to meet the eligibility criteria as a student with specific learning disability. She noted that Student's academic assessments indicated average skills in reading, math and written language, and that Ms. Park reported Student was performing at grade level reading, math and written language. Student's kindergarten report card showed proficient skills in all academic areas given

consistent effort. Ms. Ippolitova concluded that Student did not display a severe discrepancy between his general ability and academic achievement, and did not identify Student as having a psychological processing disorder.

43. Ms. Ippolitova also concluded that Student did not appear to meet the eligibility criteria as a student with autism. She acknowledged that Parents reported behaviors in the home setting which were indicative of autism, but those same behaviors were not observed at school, and her review of all records and assessments support a finding that Student presented with age-appropriate communication and social skills.

APRIL 6, 2016 IEP MEETING

44. On April 6, 2016, Student's IEP team meeting was held. Ms. Ippolitova, Ms. Park and Ms. Weinstein Joseph attended the meeting, and Ms. Ippolitova's and Ms. Weinstein Joseph's assessment reports were presented to the team. The IEP team found that Student was not eligible for special education and related services under the categories of autism or specific learning disability. Parents participated in the IEP team meeting, disagreed with the team's conclusion, and requested an independent educational evaluation.

45. District elected to file a due process complaint on May 18, 2016 to defend the appropriateness of the assessment, and its finding that Student should be exited from special education and related services.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The District, as petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

2. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

3. Under the Individuals with Disabilities Education Act (IDEA) and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to an eligible child at no charge to the Parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

⁵ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

participation of Parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

4. In *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

5. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting

the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

6. There are two parts to the legal analysis of a school district’s compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child’s unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

7. The IDEA affords Parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.)

APPROPRIATENESS OF DISTRICT’S APRIL 5, 2016 PSYCHOEDUCATIONAL ASSESSMENT

8. District contends that its April 5, 2016 psychoeducational assessment was

appropriate, and for that reason, District asserts that it is not obligated to fund an independent psychoeducational evaluation for Student. Parents contend that District's assessment was not appropriate and that Student is entitled to an independent educational evaluation.

9. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [Parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to Parents to include information about obtaining an IEE].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

10. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a Parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

11. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. §

1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must provide relevant information that directly assists persons in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed in all areas related to a suspected disability. (Ed. Code § 56320, subd. (c), (f).)

12. Assessments must be conducted by individuals who are both knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district, county office, or special education local plan area. (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).)

13. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3).) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

14. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

15. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

16. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

17. 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 they do not 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” to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).) Thus, “a child is not considered a ‘child with a disability’ if it is determined that a child only needs a ‘related service’ and not special education.” (*W.H. v. Clovis Unified School Dist.* (E.D.Cal. June 8, 2009, No. CV F 08–0374 LJO DLB) 2009 WL 1605356, *21, citing 34 C.F.R. § 300.8(a)(2)(i) (2006).)

18. The evidence established that District conducted an appropriate, comprehensive and thorough assessment which assessed Student in all areas related to suspected disability.

19. The assessment materials used in conducting Student’s April 5, 2015 psychoeducational assessment were selected and implemented by Ms. Ippolitova, Ms. Park, and Ms. Weinstein Joseph, each of whom was knowledgeable about Student’s

disability, and was credentialed and trained in selecting and administering the assessments and tests they each respectively used in assessing Student.

20. The assessment instruments used in the psychoeducational assessment were not racially, culturally or sexually biased, and were provided and administered in English, Student's primary language. The assessments given were valid and reliable and administered according to the instructions provided by the test producers.

21. Ms. Ippolitova prepared the final assessment report incorporating the findings of the other assessors. She established that the assessments yielded relevant information regarding Student's educational needs and produced relevant information that was utilized by Student's IEP team to determine Student's eligibility for special education and related services. This was further supported by Ms. Park, Student's general education teacher, and Ms. Weinstein Joseph, Student's special education resource specialist. The psychoeducational assessment appropriately assessed Student in all areas of suspected disability.

22. District met its burden of proof that its April 5, 2016 psychoeducational assessment was legally appropriate, and that qualified personnel conducted assessments in all areas of Student's suspected disability. Accordingly, Student is not entitled to an independent psychoeducational evaluation at public expense.

STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION AND DISTRICT'S RIGHT TO EXIT STUDENT FROM SPECIAL EDUCATION

23. District contends that Student is no longer eligible for special education under the categories of autism and specific learning disability. Further, District contends that in the absence of any eligibility for special education, that Student should be exited from the special education program.

24. Parents disagree with District's contentions, and contend that numerous inconsistencies during Student's 2015-2016 kindergarten school year establish that he is

eligible for special education and related services. Parents contend that Student did not perfect his scores in language arts, even with assistance from a resource specialist, that he fell below average in reading comprehension and letter naming, and exhibited a weak pencil grip resulting in writing in a messy manner. Parents further argue that Student displayed behaviors at home and in the classroom indicative of autism and specific learning disability.

25. For purposes of special education eligibility, the term "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an "individual with exceptional needs" as a pupil who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code, § 56026, subds. (a), (b).)

26. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).)

27. State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose "impairment . . . requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) In deciding whether a student needs

special education, courts apply the *Rowley* standard and consider whether the pupil can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].)

28. Here, the District reviewed and considered the assessments conducted for the April 6, 2016 IEP team meeting, Student's latest grades, his present levels of performance, his success at meeting his individualized education program goals, along with their individual experiences with Student. The team did not find that Student's verbal and nonverbal communication, nor his social interactions, negatively affected his educational performance. Rather, the consensus was that Student was operating at a level consistent with his typical peers and developmentally appropriate and did not require special education services. The team did not find evidence of characteristics associated with autism, and did not find Student to meet the criteria for eligibility for specific learning disability.

Student's Eligibility Under Autism

29. Autism means a developmental disability significantly affecting verbal *and* nonverbal communication *and* social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

30. Ms. Ippolitova observed Student in both the structured environment of the classroom and the unstructured environment of the playground. She observed Student appropriately participating in classroom and playground activities, following directions, and interacting with his peers. She did not observe any social, communication issues, and noted no issues with transition from the classroom to the playground. Ms.

Ippolitova did not observe any resistance from Student to changes in his environment or daily school routines.

31. Student did not display any stereotypical movements or repetitive activities while at school. Although Parents reported that Student exhibited undue fascination with various objects, was socially awkward and withdrawn, and was not independent at home, he did not display such conduct in the school setting. There was no evidence that Student was intolerant of or showed unusual responses to various sensory stimuli or experiences while at school.

32. The standardized tests utilized by Ms. Ippolitova showed that Student was functioning in the average range academically and socially. While Student performed below average on one of those tests, the Comprehensive Test of Phonological Processing, Ms. Ippolitova did not express concern because the test was the last performed by Student at the end of the testing process, and even so, Student's overall score was still in the average range.

33. With respect to Student's social emotional functions, Ms. Ippolitova, Ms. Park and Ms. Weinstein Joseph did not observe any significant behavioral concerns, and although Parents' concerns regarding the disparity between Student's behavior at school and home, the concerns and behaviors expressed by Parents did not manifest in the school setting.

34. Ms. Park found Student able to perform at grade level, and she did not have any concerns regarding his academics. Ms. Weinstein Joseph's academic assessment showed Student's academic performance to be within an average range when compared to students his own age, and she found that Student was meeting his grade level standards in all of his academic subjects during the reporting period.

35. Student did not, in the classroom setting, exhibit any behaviors associated with autism or autistic-like behaviors. He actively and appropriately participated in

classroom activities such as singing, reading aloud, and speaking before his peers when presenting a project.

36. Ms. Weinstein Joseph found that Student met his IEP behavior goals, and was able to access the curriculum. She concluded that Student was meeting his grade levels and performing in the average range in the areas of reading, math, written language and oral expressions.

37. The March 2015 language and speech assessment did not show that Student presented any significant needs related to language or speech, and his motor functions were determined to be in the average range. Neither Ms. Park nor Ms. Weinstein Joseph had any concerns regarding Student's language function.

38. The evidence establishes that Student did not meet the criteria for eligibility for special education and related services under the category of autism.

Student's Eligibility Under Specific Learning Disability

39. A specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, which manifests itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1402(30)(A); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd.(a).) A specific learning disability includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia, (20 U.S.C. § 1402(30)(B); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).), but does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage. (20 U.S.C. § 1402(30)(C); 34 C.F.R. § 300.8(c)(10); Ed. Code, § 56337, subd. (a).) A child with a specific learning disability, who requires special education services as a result, is eligible for special education services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a); Ed. Code, § 56026.)

40. Eligibility under the category of specific learning disability means first that a pupil 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 the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).) 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. (b)(10)(B).

41. The criteria uses the standardized achievement tests to measure the pupil's levels of academic competence and require finding a severe discrepancy of at least 1.5 standard deviations between the cognitive ability of the pupil and his or her academic achievement. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B) (1).) In the absence of a severe discrepancy on standardized assessments, an IEP team may nevertheless find such a discrepancy if it is documented. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B)(3).) Specific learning disability does not include learning problems that are primarily the result of visual, hearing or motor disabilities; intellectual disability; emotional disturbance; or of environmental, cultural, or economic disadvantage. (Ed. Code, § 56337, subd. (a).) As previously stated, eligibility criteria also require a student to be unable to access the curriculum without specialized academic instruction. (Ed. Code § 56026, subds. (a), (b).)

42. Ms. Ippolitova, Ms. Park and Ms. Weinstein Joseph each observed Student to be appropriately attentive in the school setting, and when Student became distracted during unstructured time in the classroom, he was easily redirected to the task at hand.

43. Student was tested under both the Motor-Free Visual Perception Test and

the Beery-Buktenica Developmental Test of Visual-Motor Integration, and was found to have high average skills in the areas of visual perceptual and average visual motor integration skills.

44. Based on their observations of Student in the classroom and on the playground, both Ms. Ippolitova and Ms. Park found him able to perform functionally. Ms. Ippolitova further found that Student possessed functional sensory-motor skills, and was able to combine input of sensory information with output of motor activity. Ms. Ippolitova also did not find that Student had an auditory processing disorder.

45. Ms. Ippolitova assessed Student's cognitive ability using the Bracken Basic Concept Scale, and Student scored in the average to high average to superior for his age range in the assessment. Further, when Ms. Ippolitova assessed Student using the Bracken Basic Concept Scale, the Comprehensive Test of Phonological Processing, and the Dynamic Indicators of Basic Early Literacy Skills, she found Student to have benchmark skills, with no severe discrepancy between his cognitive ability and academic achievement.

46. The evidence establishes that Student did not qualify for special education and related services under the category of specific learning disability.

47. In sum, to the extent that Student exhibited some indicia of autism or specific learning disability in the home setting, it was not enough to affect his educational performance. Because Student did not meet the criteria for autism or specific learning disability, he is presently not entitled to special education and related services. Accordingly, District may exit Student from special education immediately and cease providing him all special education and related services.

ORDER

1. District's April 5, 2016 psychoeducational assessment was appropriate. District is not required to provide Student an independent psychoeducational evaluation

at public expense.

2. District's request to exit Student from special education is granted, and District may cease to provide special education programs or services to Student.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

DATED: September 26, 2016

/s/

VERNON BOGY

Administrative Law Judge

Office of Administrative Hearings