

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021120575

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VENTURA UNIFIED SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

APRIL 04, 2022

On December 17, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Ventura Unified School District, called Ventura, naming Parents on behalf of Student. OAH granted a continuance on January 3, 2022. Administrative Law Judge June R. Lehrman, called the ALJ, heard this matter via videoconference on February 15, 22, 23, 24 and 25, 2022.

Attorney Melissa Hatch represented Ventura. Ventura Executive Director of Special Education, Marcus Konantz, attended all hearing days. On February 15, 2022, attorney Phillip Van Allsburg represented Student, and Parents attended. The ALJ

continued the hearing to February 22, 2022 to consider Student's motion to dismiss, discussed below. On February 22, 2022, Van Allsburg notified OAH of his withdrawal as Student's attorney, and that Parents did not wish to attend the hearing. Parents, representing themselves, appeared briefly on February 22, 2022, and confirmed their intention not to attend the hearing. The ALJ nevertheless invited Parents to attend all hearing days. Parents did not attend any other hearing days.

The matter was continued to March 14, 2022 for written closing briefs. The record was closed, and the matter was submitted on March 14, 2022.

## ISSUES

1. Are Ventura's assessments in the report dated October 9, 2021, appropriate such that Student is not entitled to an independent educational evaluation?
2. Did the individualized education program, or IEP, team correctly determine that Student is not eligible for special education at the October 21, 2021, IEP team meeting?
3. May Ventura exit Student from special education and related services without parental consent?

Federal law uses the term "evaluation" instead of the term "assessment" used by California law, but the two terms have the same meaning and are used interchangeably in this Decision.

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) All further references to the Code of Federal Regulations are to the 2006 edition. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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 further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Ventura was the petitioning party and as such, has the

burden of persuasion on its issues. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 12 years old at the time of hearing. Student resided within Ventura's geographic boundaries at all relevant times. Student was eligible for special education under the eligibility category of autism.

## PRELIMINARY MATTERS AND MOTION TO DISMISS

On October 9, 2021, Ventura finalized an assessment report in which it recommended that Student was no longer eligible for special education. On October 21, 2021, the IEP team met, at which District members of the team determined that Student was not eligible for special education. Parents disagreed. On December 7, 2021, Parents sent correspondence through their attorney indicating disagreement with the October 9, 2021 assessment, and asked for an independent educational evaluation at public expense. On December 17, 2021, Ventura filed its request for due process hearing, stating three issues for determination. The first issue concerned Parents' request for an independent educational evaluation. The second and third issues concerned the appropriateness of Ventura members of the IEP team's determination concerning Student's eligibility. After granting a continuance on January 3, 2022, OAH set the matter for hearing to commence on February 15, 2022.

On February 10, 2022, Parents (1) withdrew their request for an independent educational evaluation, (2) disenrolled Student from Ventura, (3) unilaterally placed Student in a private homeschool program, and (4) filed a Private School Affidavit indicating they were the providers of Student's homeschool program.

On February 11, 2022, Student filed a Motion to Dismiss Ventura's complaint, alleging the case was moot and that no live controversy existed to be heard because Student had withdrawn the request for the independent educational evaluation, and had disenrolled from Ventura. On February 15, 2022, the first day of the due process hearing, the ALJ heard oral argument on the motion to dismiss, ordered supplemental briefing, and continued the hearing to February 22, 2022. The parties filed their supplemental briefs on February 16, and 17, 2022. On February 17, 2022, the ALJ denied Student's Motion to Dismiss in an oral order, and OAH informed the parties the case would proceed as scheduled on February 22, 2022. The basis for denying the Motion to Dismiss is set forth below.

A case is moot when the issues presented are no longer "live," or the parties lack a "legally cognizable interest" in the outcome. (*Powell v. McCormack* (1969) 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491.) When a judicial proceeding cannot affect the litigants' rights, there is no jurisdiction to hear a case. (*Allard v. DeLorean* (9th Cir. 1989), 884 F.2d 464, 466.

Children with disabilities in home-school programs must be treated in the same way as other parentally placed private school children with disabilities under the IDEA where, as in California, the state treats home schools as private schools. (See *United States Department of Education Office of Special Education and Rehabilitative Services, Assistance to States for the Education of Children with Disabilities, Discussion of Comments to part 300.133*, 71 Fed. Reg. 46,594 (August 14, 2006).) California does not distinguish homeschool programs from other private schools. (See Ed. Code, §§ 33190, 48222 and 48415.) Under the Education Code, every person or entity conducting private school instruction must file a Private School Affidavit with the California Department of

Education. (See Ed. Code, § 33190.) Thus, for homeschooled students with disabilities, the district's obligation is to comply with the IDEA provisions and governing regulations regarding parentally placed private school students with a disability.

The special education and related services available to students who are unilaterally and parentally placed in private schools are commonly called "equitable participation." (20 U.S.C. § 1412(a)(10)(A); Ed. Code, § 56174.5.) Under the IDEA, the district has an obligation to provide parentally placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B funds that the district has determined, after consultation, to make available to its population of parentally placed private school children with disabilities. The amount of Part B funds available for these services is based on a "proportionate share" calculation. (34 C.F.R. §§ 300.132, 300.137, and 300.138.).

Equitable services for a parentally placed private school child with a disability must be provided in accordance with an Individual Services Plan. A services plan must describe the specific special education and related services that will be provided to a parentally placed private school child with disabilities designated to receive services. (See 34 C.F.R. § 300.138(b).) An Individual Services Plan is "a written statement that describes the special education and related services the [district] will provide to a parentally-placed child with a disability." (34 C.F.R. § 300.37.) The development of an Individual Services Plan requires the district's adherence to various statutory requirements. Services plans must be developed, reviewed, and revised to the extent appropriate, in accordance with the requirements of IEPs. (34 C.F.R. § 300.138(b)(2)(ii).) When developing a Services Plan for private school students, a district must consult with

parents and representatives of the private schools to determine appropriate educational provisions. (34 C.F.R. § 300.134.) The district is also required to maintain documentation of its timely and meaningful consultation. (34 C.F.R. § 300.135.)

Here, Student's unilateral change of placement to homeschooling did not alter the fact that a live controversy remained over Student's special education eligibility. Ventura still had continuing obligations under the IDEA to offer and provide special education and related services under an Individual Service Plan because Student is still eligible for special education. (34 C.F.R. § 300.138.) Ventura has an ongoing legal obligation to comply with IDEA provisions regarding Student's education, and therefore has an interest in the determination of Student's special education eligibility. Therefore, Ventura's issues in its complaint concerning Student's ongoing special education eligibility, are not mooted by Parent's disenrollment of Student.

However, with respect to Issue 1 only, because Parents withdrew their request for an independent educational evaluation at public expense, OAH lacks jurisdiction and the Motion to Dismiss is granted. The procedural safeguards of the IDEA provide that 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) and 56506, subd. (c); see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) 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 at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).) When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense (often referred to as “file or fund”). (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

Ventura contends that irrespective of whether Student requested an independent educational evaluation, Ventura relied on its October 9, 2021 assessment report when making the determination that Student was no longer eligible for special education and related services. Ventura’s argument only pertains to the IEP team’s determination of Student’s eligibility, which is addressed in Issues 2 and 3. However, Issue 1 concerns the entitlement to obtain an independent educational evaluation at public expense, which is no longer at issue. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502; Ed. Code, §§ 56329, subd. (b) and 56506, subd. (c); see also 20 U.S.C. § 1415(d)(2).) Given Parents’ withdrawal of their independent educational evaluation request, OAH lacks jurisdiction over Issue 1. To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation at public expense, which given Parent’s withdrawal of their request is not currently the case here. (34 C.F.R. § 300.502(b)(1) & (b)(2).) There is therefore no current basis for Ventura to file a request for due process hearing to show that its assessment is appropriate, because the “file or fund” provisions only apply when a student requests an independent evaluation, which is not currently the case here. (34 C.F.R. § 300.502(b); Ed. Code, § 56329, subds. (b) and (c).) Issue 1 is therefore hereby dismissed.



ISSUES 2 AND 3: DID THE IEP TEAM CORRECTLY DETERMINE THAT STUDENT IS NOT ELIGIBLE FOR SPECIAL EDUCATION AT THE OCTOBER 21, 2021 TEAM MEETING, AND MAY VENTURA EXIT STUDENT FROM SPECIAL EDUCATION AND RELATED SERVICES WITHOUT PARENTAL CONSENT?

Ventura contends that the October 21, 2021 IEP team procedurally and substantively complied with the IDEA, that the eligibility conclusion by the District members of the IEP team was correct, and that it may exit Student from special education without parental consent. Parents failed to appear at the hearing and made no contentions. Issues 2 and 3 will be analyzed together as the same facts and arguments apply to both issues.

On October 21, 2021, Student's IEP team met to determine Student's eligibility for special education and related services. Ventura's IEP team members determined that Student no longer qualified for special education under any special education eligibility criteria, and therefore Student was no longer entitled to a FAPE. Parents disagreed with this decision and refused consent to Student's October 21, 2021, IEP.

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. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207, [73 L.Ed. 2d 690] (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was appropriate. (*Ibid.*)

Procedurally, the IEP team is required to include one or both of the student's parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, and a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, and is knowledgeable about the general education curriculum and available resources.

(34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5.)

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).)

In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent assessment of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

The decision as to whether the assessment results demonstrate that the degree of the child's impairment requires special education shall be made by the IEP team. In determining eligibility, the IEP team shall consider all the relevant material which is available about the child. (Cal Code Regs., tit. 5, §3030, subd. (a).)

Student began school with a special education eligibility of autism. In 2018, District assessed Student to determine whether Student had needs that supported eligibility for special education and recommended exiting Student from special education because he did not demonstrate needs requiring special education services. Parents did not consent to exiting Student. In the absence of parental consent to exit Student from special education, Ventura continued to support Student even though it did not believe Student needed those supports.

On May 5, 2021, Ventura generated an assessment plan to assess Student in the areas of

- academic achievement,
- social and emotional functioning,
- behavior,
- motor skills development,
- language/speech/communication development,
- intellectual development, and
- health.

On June 17, 2021 Parents consented to the assessment plan. The parties also agreed that the assessments would commence at the beginning of the 2021-2022 school year.

Ventura procedurally complied with the IDEA by conducting a comprehensive multi-disciplinary triennial assessment. For a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (20 U.S.C. § 1401(2)(A); Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8.) Section 3030 of Title 5 of

the California Code of Regulations defines the various eligibility categories under California law. Here, Ventura investigated the special education eligibility categories of

- autism,
- speech language impairment,
- specific learning disability,
- other health impairment,
- emotional disturbance and
- intellectual disability.

## AUTISM

Under California law, autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child's educational performance. Characteristics often associated with autism are repetitive activities, 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).)

The assessment tools that Ventura used to evaluate Student for eligibility under autism in October 2021 included the Autism Diagnostic Observation Schedule, second edition (administered with facemasks and for that reason, used only to gather qualitative observations of Student's behavior and communication skills) and Gilliam Autism Rating Scale, third edition. Additionally, Student's communication, including social communication were evaluated by Speech Pathologist Theresa Vosper. Student's sensory responses, as they might correlate to autism, were evaluated by Occupational Therapist Audrey Bell using the Child Sensory Profile, second edition, and the School Companion Sensory Profile, second edition.

Student exhibited age-appropriate communication skills and reciprocal social interaction skills. He did not exhibit any stereotypical behaviors or restricted interests. He offered consistent and appropriate reciprocal conversation. He answered questions appropriately and completely. He did not have any difficulties answering questions about being happy, afraid, anxious, angry, or relaxed. He used appropriate eye contact. He did not display unusual sensory interests or mannerisms. He did not engage in any self-injurious behaviors, display excessive interests in specific topics, or any compulsions for ritualistic behaviors. He exhibited age-appropriate communication skills and reciprocal social interaction skills.

Observations by numerous assessors revealed no characteristics associated with autism. For example, during academic testing, Student came to testing on his own and on time. Student engaged with the examiner and talked about the quality of his week and weekend, including offering details about what he did over the weekend. Student shared that he watched games on his Chromebook over the weekend and had a good time. During the speech language pathologist's assessment, Student had good attention, transitioned easily, and followed instructions. Two school psychologists, the Occupational Therapist and the Adapted Physical Education Specialist, observed Student, and all collected and documented their observations. These observations spanned a total of nine to 10 hours across multiple educational settings, including lunch, recess, and multiple classrooms. Student's on-task behaviors were similar to that of his peers. He regularly engaged spontaneously with no prompting, was oriented toward the teacher, focused, attentive, and able to answer questions when called upon. He followed the pace of the lessons regularly and without difficulty. He appropriately used body language such as head nods or hand gestures, and appropriately engaged in reciprocal dialog, with his teachers and peers. At recess, Student walked with friends,

joined groups, and engaged in group conversation. Overall, none of the assessors noted any concerns regarding Student's social-emotional engagement. Parents' rating scales rating Student at the high end of the "very likely" range for autism were not corroborated by any other evaluations, observations, interviews, or other data within the school environment. He demonstrated average communication skills, including in the area of pragmatic language. He revealed no unusual responses to sensory experiences. Student did not display deficits associated with autism at a level that adversely impacted his educational performance. Accordingly, Ventura concluded that Student did not meet eligibility criteria for special education under the category of autism.

## LANGUAGE OR SPEECH DISORDER

A student is eligible for special education and related services under the category of language or speech disorder if the student demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education. (Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

Student's communication, including social communication, was evaluated by Speech Pathologist Theresa Vosper. Vosper administered

- the Comprehensive Assessment of Spoken Language, second edition;
- the Receptive One Word Picture Vocabulary Test, fourth edition;
- the Expressive One Word Picture Vocabulary Test, fourth edition;
- the Children's Communication Checklist, second edition;
- the Social Language Development Test-Adolescent Normative Update;
- the Social Thinking Dynamic Assessment Protocol; a language sample, and
- social scenario pictures.

Student's skills in the classroom, speech therapy setting, and social settings all indicated that he had receptive and expressive language abilities that allowed him to participate with both peers and adults on campus as expected for his age and grade. Overall, Student presented with the ability to express his thoughts and feelings in an age-appropriate manner. On the Comprehensive Assessment of Spoken Language, Student obtained some below average subtest scores, and fell below average in the indexes for Expressive Language and Syntactics. However, Vosper credibly concluded that the below-average scores were anomalies because they were inconsistent with Student's demonstrated communication skills. Further, Vosper concluded that these inconsistent below-average scores did not correspond with all her other assessment findings. Student's appropriate pragmatic language skills were confirmed by additional assessment measures, specifically the Function of Social Communication Assessment Teacher Questionnaire to provide additional detail regarding Student's social communication abilities in the classroom. Student's teachers described Student as exhibiting generally age-appropriate social communication skills. No particular areas of deficit in the area of social communication were noted by any of the teachers who completed the questionnaire. Teachers reported that he was happy, calm, organized, and completed tasks. Teachers also reported that Student engaged in banter, had a sense of humor, understood figurative language, asked and answered questions, switched topics appropriately, and talked about issues that were of interest to others.

Other clinically significant informal data showed that Student had age-appropriate abilities in making inferences, interpreting social language including nonverbal language, problem solving, social interaction, and interpreting ironic statements. Student's expressive, receptive, and pragmatic use of language skills was

consistently within the normal and expected range across educational settings. Student did not display deficits in

- articulation,
- voice,
- fluency,
- receptive language,
- expressive language, or
- pragmatic language.

Student did not demonstrate difficulty understanding or using spoken language to such an extent that it adversely affected his educational performance. As a result, Vosper concluded that Student did not meet eligibility requirements for special education under the category of speech language impairment.

## SPECIFIC LEARNING DISABILITY

A specific learning disability is 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, write, spell or perform mathematical calculations. (20 U.S.C. § 1401(30); 34 C.F.R. § 300.8 (c)(10); Ed. Code, § 56337, subd (a).) Each state must adopt criteria for determining whether a child has a specific learning disability. (34 C.F.R. § 300.307(a).) A public agency must use these criteria in determining whether a child has a specific learning disability. (34 C.F.R. § 300.307(b).) California law provides for at least three methods to determine eligibility under the category of specific learning disability. One such method determines whether a student who does not achieve adequately for his age, or to meet State-approved grade-level standards in certain areas, also exhibits a "pattern of strengths and weaknesses in performance, achievement or both, relative to age, State-



approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability.” (34 C.F.R. §§ 300.309 (a)(1) and (2)(ii); Cal. Code Regs., tit. 5, § 3030, subds. (b)(10)(C)(1) and (2)(ii).) This was the methodology used by Ventura. To make that determination, Ventura used a “Pattern of Strengths and Weaknesses Model” that has been endorsed by the Ventura County Special Local Plan Area. The model compares cognitive strengths, which Vlahos identified Student possessed, with certain types of cognitive weaknesses, which Vlahos did not find. Because of the lack of those cognitive weaknesses, Student did not fit within the model.

The model also looks at academic weaknesses, which Ventura also did not find. Special education teacher Rogers assessed Student’s academic achievement using the Woodcock-Johnson Tests of Achievement and Oral Language, fourth edition and certain subtests of the Kaufman Test of Educational Achievement, third edition. Rogers concluded, notwithstanding the certain low scores on the Woodcock-Johnson, that when considering multiple factors including the Kaufman scores, work samples, teacher input, and current grades, Student’s skills fell within the average range. Teacher reports played a crucial part in Rogers’ determination that Student demonstrated academic strengths instead of weaknesses. Because of the lack of academic weaknesses, Student did not fit within the Pattern of Strengths and Weaknesses Model. Ventura therefore found that he did not display a pattern of strengths and weaknesses such as to be identified as having a specific learning disability.

## OTHER HEALTH IMPAIRMENT

Other health impairment means having limited strength, vitality, or alertness that is due to ailments including attention deficit hyperactivity disorder, that adversely affects

a child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9); 34 C.F.R. § 300.8(c)(9). In the area of attention, Student's abilities were rated using the Behavior Assessment System for Children, third edition, and the Conner's Rating Scale, third edition-Short Version. While Parents rated Student's attention as being in the clinically significant range on both instruments, Student's teachers rated his attention as average. Vlahos validated the accuracy of the teachers' responses regarding Student's attention by classroom observations and teacher interviews. Student's presentation in school was not consistent with Parents' ratings of his attention. During numerous observations in the school setting, Student was generally on-task, regularly engaged, oriented toward the teacher, focused, attentive, and was able to answer questions when called upon. There was no evidence that Student suffered from a chronic or acute health problem that would adversely impact his educational performance. Further, based on both observational data and teacher rating scales, Student was able to maintain his strength, vitality and alertness throughout his school day within the general education setting. Accordingly, Ventura determined that Student did not qualify for special education under the eligibility category of Other Health Impairment.

## EMOTIONAL DISTURBANCE

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

- inappropriate types of behavior or feelings under normal circumstances;
- a general pervasive mood of unhappiness or depression; or
- a tendency to develop physical symptoms or fears associated with personal or school problem. (Cal. Code Regs, tit. 5, § 3030, subd. (b)(4).)

The child must exhibit the characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance. (*Ibid.*)

Vlahos analyzed that Student did not demonstrate an inability to learn. Moreover, Student had the ability to build and maintain satisfactory relationships with peers and teachers. He did not demonstrate inappropriate feelings under normal circumstances, nor present with a pervasive mood of unhappiness, or depression. Finally, Student did not demonstrate physical symptoms, or fears, associated with personal or school problems. Therefore, Ventura found that Student did not meet eligibility requirements for special education under the category of emotional disturbance.

## INTELLECTUAL DISABILITY

Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. (Cal. Code Regs, tit. 5, subd. § 3030(b)(6).)

Vlahos assessed Student's cognitive functioning and processing skills. Cognitive functioning is the ability to learn, remember and understand information, apply knowledge, generalize information, and utilize concepts.

Vlahos assessed Student's auditory processing using the Test of Auditory Processing Skills, fourth edition, word discrimination subtest. Auditory processing consists of perceiving, analyzing, and synthesizing speech and other auditory stimuli. Student performed within the average range.

Vlahos assessed executive functioning using the Behavior Assessment System for Children, third edition, and the Conner's Rating Scale, third edition-Short Version. Executive functioning regulates behavior and cognitive functions during purposeful, goal-directed, problem-solving activities. Although Parent's rating scale results indicated that Student struggled in this area, teacher rating scales indicated that Student performed slightly better than others of the same age. Teachers rating scale results related specifically to Student's classroom performance, and thus were more persuasive to Vlahos pertaining to Student's executive function in school.

Vlahos assessed Student's fluid reasoning using the Wechsler Intelligence Scale for Children - fifth edition fluid reasoning composite which measured Student's ability to use inductive and quantitative reasoning, broad visual intelligence, simultaneous processing, and abstract thinking. Student performed within the low-average range for one subtest of this composite, but Vlahos concluded that overall, for fluid reasoning, Student's performance fell within the average range.

Vlahos assessed Student's verbal long-term recall using the Wechsler "naming speed" index composite. Verbal long-term recall is the delayed recall of new verbal learning and the retrieval of previously acquired verbal knowledge. Student performed within the average range.

Vlahos assessed student's visual-spatial long-term recall, which is the delayed recall of new visual-spatial learning, using the Wechsler immediate symbol search, on which Student scored low average, and the recognition symbol translation composite, on which Student scored average.

Vlahos assessed Student's oral language using the Test of Auditory Processing Skills auditory comprehension and processing oral directions subtests. Oral language includes linguistic processes that allow one to communicate, such as the ability to construct meaningful sentences. Student's abilities fell within the average range.

Vlahos assessed Student's phonological processing using the Test of Auditory Processing Skills phonological deletion and phonological blending subtests. Phonological processing involves the awareness and manipulation of phonemes, the smallest units of speech that are used to form syllables and words. Student performed within the average range.

Vlahos assessed Student's processing speed using the Wechsler processing speed composite. Processing speed is how quickly information is processed and how efficiently cognitive tasks are executed over a sustained period of time. Although Student performed within the very low range on one of the subtests for this composite, Vlahos opined that Student underperformed when compared to his true ability on this subtest. His opinion was substantiated based on the results of the second subtest, as well as observing Student in math class completing a speed math test game with accuracy more quickly than did the majority of his peers in the class.

Vlahos assessed Student's visual-spatial processing using the Wechsler visual spatial composite. Visual-spatial processing is the ability to

- perceive,
- analyze,
- synthesize,
- manipulate, and
- transform visual patterns and images.

Student performed average or high average on the subtests for this composite and average overall.

Vlahos also assessed Student's orthographic processing using the Wechsler "naming speed literacy" subtest. Orthographic processing is the ability to visually recognize and remember printed words and parts of words. Student performed within the high average range.

Vlahos assessed Student's verbal working memory using the Wechsler digit span and the Test of Auditory Processing word memory subtests. Verbal working memory is the manipulation and transformation of verbal information that is being held in short-term memory or has been retrieved from long-term memory. Student performed within the high average to the very high average range.

Vlahos assessed Student's visual spatial working memory using the Wechsler picture span Test of Visual Perceptual Skills – fourth edition visual memory subtests. Visual-spatial working memory is the manipulation and transformation of visual-spatial information that is being held in short-term memory or has been retrieved from long-term memory. Student performed within the average range.

Overall, the cognitive and processing testing and rating scale results indicated that Student possessed age-appropriate abilities. Based on Student's educational history, testing results and direct observations, Ventura determined that Student is not eligible under the category of intellectual disability.

## OCCUPATIONAL THERAPY AND ADAPTED PHYSICAL EDUCATION

Pursuant to the May 5, 2021, assessment plan Ventura assessed motor skills development. Occupational therapist Audrey Bell conducted Student's occupational therapy assessment. Bell utilized informal and formal testing measures to assess Student, including a review of Student's records and work samples, observations of Student, interviews of school staff and Parents, and standardized testing. Student's motor skills fell within the below-average range with average fine and visual motor skills. However, Student's low scores were not statistically significant, and did not evidence the need for occupational therapy as Student could and did successfully access his school environment. Parents shared significant concerns regarding Student's balance and strength with Bell. However, neither Bell, nor any of Student's teachers observed or reported Student showing any issues with balance, or strength in the classroom, at school.

Colleen McCutchan conducted Student's adapted physical education assessment. She reviewed Student's records, conducted observations, obtained parent input, and administered several checklists that evaluated Student's abilities to

- run,
- jump,
- gallop,
- hop,

- leap,
- skip,
- stand,
- sit,
- exhibit various skills when playing ball, and
- the like.

Overall results indicated that Student's gross motor skills were age appropriate. Student was successful in accessing his school environment and participating in his general education physical education class.

Ventura assessed Student in all areas of suspected disability. As discussed, the assessment used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The assessment tools were selected and administered so as not to be discriminatory on a racial or cultural basis. Student was assessed in his primary language, English. The assessments were provided in a language and form most likely to yield accurate information on what Student knows and can do academically, developmentally, and functionally. The assessments tools were used for purposes for which the assessments are valid and reliable, and administered in accordance with any instructions provided by the producer of such assessments. The testing instruments were technically sound. Competent and knowledgeable individuals conducted the assessment.

All assessors were qualified to administer and interpret the results of the tests they administered. Rogers, who conducted the academic testing, is a credentialed, special education teacher. Vosper who conducted the speech and language testing is a licensed Speech and Language Pathologist. Vosper also provided speech services to



Student, and was acquainted with Student's speech and language abilities. Bell, who conducted the occupational therapy assessment is a licensed Occupational Therapist. McCutchan who conducted the adaptive physical education testing is an adapted physical education specialist with over 30 years of experience. Davila, who conducted observations of Student and served as an observer to Vlahos' conduct of one assessment, is a credentialed school psychologist who holds a master's degree in counseling and school psychology. Vlahos is the school psychologist who conducted the psychoeducational evaluations and is Ventura's current Interim Deputy Director of Special Education.

Vlahos testified at hearing. His answers were straightforward and comprehensive, exhibiting his extensive background and expertise in the assessments he administered. He forthrightly acknowledged some disparities in the testing results, for example, between Parents' and teachers' rating scales, and some low academic scores on the Woodcock Johnson. When further testing was warranted to further explore such disparities, he undertook it. Vlahos opined that Student underperformed on some scores when compared to his true abilities, and this opinion was substantiated by other assessment results, observations, and teacher reports. Vlahos' testimony was forthright and without defensiveness. His testimony at hearing was given great weight.

## THE IEP TEAM CORRECTLY DETERMINED THAT STUDENT IS NOT ELIGIBLE FOR SPECIAL EDUCATION

Ventura properly convened an IEP team meeting to review the multi-disciplinary triennial assessment results with Parents. Parents attended and participated in the October 21, 2021 IEP team meeting. Ventura IEP team members proposed to exit

Student from special education at the October 21, 2021 IEP team meeting after discussing the multi-disciplinary triennial assessment results and Student's school performance with Parents. Ventura IEP team members were also available during the October 21, 2021 IEP team meeting to discuss Student's academic and social performance in the classroom, and answer questions regarding Ventura's proposal to exit Student from special education. Parents stated that they had no questions, and did not provide their written consent to exit Student from special education.

The IEP offer to exit Student from special education was supported by assessments in all areas of suspected need, and a conclusion that Student no longer qualified for special education under any eligibility category. However, regardless of whether Student meets the edibility criteria for any category, Student also must demonstrate a need for special education services.

Not every student who is impaired by a disability is eligible for special education. A student is eligible for special education and related services if he is a child with a disability who, "by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) and (b); Cal Code Regs., tit. 5, §3030, subd. (a).) California law defines an "individual with exceptional needs" as a student who requires special education because of his or her disability. (Ed. Code, § 56026, subds. (a) and (b).) When determining whether a student needs special education, courts consider whether the pupil can receive educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107.) Here, based on all the evidence Ventura presented, Student did not need special education or related services to access his education.

Student's English, math, history, science, and electives teachers all rated him as "excellent" in classwork, homework completion, grasp of the material and peer interactions. Had a 98 percent in English class, but needed more writing practice to improve his writing skills, as was true of many other students. Student almost always knew the right answer or contributed meaningfully during class discussions. He was always in the top three when doing review activities. He worked very well with others, and was well-respected. Student's math teacher reported that Student had a 76 percent in the class, turned in his homework in, followed along with the lesson well, understood the material well and worked well with other students. In language arts and social studies classes, Student was quiet, worked well with others, was well-liked in groups, and performed well on games and tests. Other students depended on him, and the teacher could depend on him to make good contributions to class. He complied well with classroom rules. Academically, he always understood the concepts he was taking and did well on tests and quizzes. He always performed at the top of group tests done on the computer, and other children were excited for his successes. His teacher reported that no concerns about his academic performance.

As discussed above, during numerous observations in the school setting, Student was generally on-task and regularly engaged. Student

- had good attention,
- had transitioned easily,
- had engaged spontaneously with no prompting,
- was oriented toward the teacher,
- was focused, attentive, and
- was able to answer questions when called upon.

He was on time and followed the pace of lessons regularly and without difficulty. He appropriately used body language such as head nods or hand gestures, and appropriately engaged in reciprocal dialog, with his teachers and peers. At recess, Student walked with friends, joined groups, and engaged in group conversation. Teachers reported that he was happy, calm, organized, and completed tasks. Teachers also reported that Student

- engaged in banter,
- had a sense of humor,
- understood figurative language,
- asked and answered questions,
- switched topics appropriately, and
- talked about issues that were of interest to others.

He displayed age-appropriate abilities in making inferences, interpreting social language including nonverbal language, problem solving, social interaction, and interpreting ironic statements. Teacher rating scales indicated that Student performed slightly better than others of the same age in executive functioning, which regulates behavior and cognitive functions during purposeful, goal-directed, problem-solving activities. Student in math class completed a speed math test game with accuracy more quickly than did the majority of his peers in the class. Student's gross motor skills were age-appropriate. He displayed no issues with balance, or strength in the classroom, at school.

The data upon which Ventura relied was current, based upon recent multi-disciplinary assessments by qualified professionals, which the IEP team discussed and considered at the October 21, 2021 IEP team meeting. Student's teachers and the assessors credibly opined, based upon their knowledge, experience, and assessment

results, that Student was progressing and meeting grade-level expectations for his age group in the general education environment. Ventura met its burden of proof, that Student did not need special education or related services to access his education, and that Ventura is entitled to exit Student from special education.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

### ISSUE 1:

Issue 1 is dismissed.

### ISSUE 2:

The individualized education program team correctly determined that Student is not eligible for special education at the October 21, 2021, IEP team meeting.

Ventura prevailed on Issue 2.

### ISSUE 3:

Ventura may exit Student from special education and related services without parental consent.

Ventura prevailed on Issue 3.

## REMEDIES

Ventura may exit Student from special education and related services without parental consent.

## ORDER

Ventura may exit student from special education and related services without parental consent.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

June R. Lehrman

Administrative Law Judge

Office of Administrative Hearings