

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LASSEN VIEW UNION ELEMENTARY  
SCHOOL DISTRICT,

v.

PARENTS, ON BEHALF OF STUDENT.

OAH CASE NO. 2010050797

**DECISION**

Adeniyi Ayoade, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Los Molinos, California, on June 21, 2010.

Lindsay K. Moore, Attorney at Law, represented the Lassen View Union Elementary School District (District). Mancill Tiss, District's Superintendent, also attended.

Both parents were present and Mother represented Student. A Spanish language interpreter was present throughout the hearing for Mother. Student was not present.

On May 21, 2010, District filed with OAH the Request for Due Process Hearing (complaint) in this matter, and served the complaint upon Mother.

On June 21, 2010, the day of the due process hearing, OAH received a written request for continuance from parents. District opposed the request for continuance. The ALJ considered and denied the request for continuance because good cause was not established. Testimony and documentary evidence were received and the record remained open until July 6, 2010, for the submission of the parties' written closing briefs.<sup>1</sup> The parties submitted their closing briefs on July 6, 2010, and the matter was submitted for decision.<sup>2</sup>

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<sup>1</sup> At the conclusion of the due process hearing, the ALJ encouraged Parents to submit any additional documents which they would like the ALJ to consider in the decision. Parents have submitted additional documents, a total of 51 pages. The documents, which include a letter by Mother to the ALJ, Student's progress report, correspondence between Parents and District dated June 7, 2009, and June 9, 2009, respectively, an evaluation plan and an evaluation report, among other documents, have been collectively marked as Student's Exhibit G. A copy was served on District by OAH. Also, as requested by the ALJ at the hearing, on June 24, 2010, District submitted

## ISSUE<sup>3</sup>

Is Student eligible for special education services in the category of either speech and language impairment or specific learning disability?

## PROPOSED REMEDY

District requests an order finding that Student no longer meets eligibility requirements for special education services.

## CONTENTIONS OF THE PARTIES

District conducted a speech and language assessment in May 2009 as part of Student's triennial assessment, and completed a psychoeducational assessment of Student in November 2009, based upon Parents' request. District contends that it appropriately assessed Student in all areas of suspected disability, which were speech and language impairment and specific learning disability. The District asserts that its assessors properly conducted Student's assessments in a manner that complied with federal and state law; therefore, its assessments were accurate and valid. Additionally, District asserts that Student no longer qualifies for special education services.

Student contends that she continues to qualify for special education services in the category of speech or language impairment or specific learning disability. Additionally, Student argues that she is not performing adequately in her regular education classes due to her speech and language impairment.

## FACTUAL FINDINGS

### *Background Information*

1. Student is a nine-year-old girl currently in the second grade at District's Lassen View Union Elementary School (School). She has been eligible for special education services in the category of speech and language impairment since May 27, 2004, because Student was speaking "unintelligibly," and not using complete sentences when speaking. Student has received speech and language services under an individualized education program (IEP) in the form of speech therapy.

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the resumes of its witnesses that testified at the due process hearing. The resumes have been collectively marked as District's Exhibit 7.

<sup>2</sup> To maintain a clear record, District's closing brief has been marked as Exhibit 8. Student did not submit a closing brief. However, Student's letter to the ALJ, which is included in Student's Exhibit G, pages 49 and 50, shall be treated as Student's closing brief.

<sup>3</sup> The ALJ has reframed the issue for the purpose of clarity.

### *Prior Speech and Language Goal*

2. Under Student's current May 2008 IEP, one goal was developed for her: to speak in complete, coherent sentences using all English speech sounds with at least 80 percent accuracy, in three out of four trials. Parents consented to the IEP. Based on the progress reports and monitoring, Student now uses complete sentences when speaking more than 90 percent of the time. The record established that Student has met or exceeded her speech and language goal.

### *District's Triennial Assessments of Student in Speech and Language*

3. A district must reassess a child before exiting that child from special education. In conducting such a reassessment, a district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability. To determine whether a child continues to have a disability, the IEP team and other qualified professionals must review existing assessment data on the child, including assessments and information provided by the parents, current classroom-based assessments and observations, and teachers' and related service providers' observations.

4. An assessment must be conducted by persons who are knowledgeable and competent to perform the assessment, as determined by the school district. Tests and assessment materials must be used for purposes for which they are valid and reliable, administered in conformance with the instructions provided by the producer of the tests, and in the language and form most likely to yield accurate information. No single measure can be used as the sole criterion for determining whether a student is eligible or whether a particular special education program is appropriate. An IEP meeting to review the assessment results must occur within 60 days of receipt of parental consent for the assessment.

5. As part of the triennial reevaluation, District conducted a speech and language assessment of Student, to determine her current level of functioning with regard to speech and language skills, and identify whether any deficit exists. Ms. Betty Maxwell,<sup>4</sup> District's Speech Language Pathologist, conducted the assessment on May 6, 13, 15, 19 and 20, 2009. Ms. Maxwell is well-trained and qualified to administer the assessment and test tools. She administered several standardized tests and used the tests for purposes for which they were valid and reliable. Multiple test tools were utilized and no conclusions were reached based solely on one test. The tests were not racially, culturally or sexually discriminatory. Prior to, or during, the assessment, Ms. Maxwell reviewed Student's file, and interviewed Student's

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<sup>4</sup> Ms. Maxwell is a licensed and credentialed speech and language pathologist. Between 1997 and July 2009, she was employed as a Speech and Language Specialist by the Tehama County Department of Education (TCDE), and provided speech and language assessments and services to District. She also worked with Student on her IEP goal and provided speech therapy to Student.

teachers and parents. As established below, this assessment complied with all requirements and was appropriate.

6. Ms. Maxwell administered the Structured Photographic Expressive Language Test, Second Edition (SPELT-II) to assess Student's grammar (sentence structure) and morphology (word endings) in a structured language sample. Student scored in the low-average range on this subtest. She scored 84 percent correct on this test and achieved a percentile rank of 11. The result showed that Student has the tendency to omit past-tense endings. In her report, Ms. Maxwell explained that standardization for SPELT-II was conducted on monolingual Caucasian students, unlike Student who is bilingual. Therefore, SPELT-II test scores were used for comparison purposes only, and were not appropriate to determine whether or not a language disability exists.

7. Therefore, in order to further assess Student's speech, Ms. Maxwell administered the Sentence test from *Better Speech and Hearing*. This test was meant to assess Student's "speech in conversation" and articulation. In the five sessions, the Sentence test was administered to Student; she scored 100 percent in four sessions, and 86 percent in one session due to a pronunciation error.<sup>5</sup> The results of this test showed that Student had no articulation errors and her vocal pitch, rate and speech fluency were within normal limits for her age, sex and size. Also, Ms. Maxwell administered the Expressive One-Word Picture Vocabulary Test, Spanish-Bilingual Edition (EOWPVT) and the Receptive One-Word Picture Vocabulary Test, Spanish-Bilingual Edition (ROWPVT) to assess Student's expressive and receptive vocabulary. In the EOWPVT, Student received a score of 92, with a percentile rank of 30. In the ROWPVT, she received a score of 102, and was in the 55th percentile rank. The results of these tests showed that Student's expressive and receptive language and vocabulary were normal and within the average range.

8. Finally, to further assess Student's receptive language, Ms. Maxwell administered the Test for Auditory Comprehension of Language, Third Edition (TACL-3). The TACL-3 assessed Student's vocabulary, elaborated phrases and sentences. On the TACL-3, Student scored in the average range in all areas and received a combined score of 102, which was in the 55th percentile rank.

9. Based on Ms. Maxwell's assessment and teachers' observations, Student now speaks in complete sentences, and shows no difficulty verbally expressing herself. Student is described as "verbally interactive," and "on task and focused" in the classroom. Student's use of language was observed to be appropriate in the classroom, socially and during speech and language therapy sessions. She has been observed in and out of the classroom interacting appropriately with other Students and participating in cooperative learning activities. Student enjoys responding to questions in class and gets along well with other students. She has friends, and her social skills and work habits are "excellent".

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<sup>5</sup> Neither Ms. Maxwell nor her report further identified Better Speech and Hearing as a test battery or other assessment tool.

10. Ms. Maxwell prepared an assessment report. The report was translated into Spanish, Parents' primary language, and a copy was provided to Parents. Based on the assessment results, Student's expressive and receptive vocabulary were within the average range. Even though Student's understanding of English sentence structures and morphology were found to be in the low-average range based on the SPELT-II, her performance on the Sentence test showed that Student had no articulation errors and her vocal pitch and speech fluency were within the normal limits for her age and grade. During speech therapy, in the classroom, and on the playground, Student's use of the English language was observed to be appropriate. Academically, Student was at or above grade level in spelling, math and reading, by the end of the second trimester in second grade.<sup>6</sup> Thus, Student's speech does not impact her ability to benefit from instruction in a regular education environment.

*May 22, 2009 IEP Meeting*

11. On May 22, 2009, District convened an IEP meeting to discuss the speech and language assessment report. Ms. Maxwell presented the assessment report and results to the IEP team members. Mother and her advocate, Terri Lindsay, were present at the meeting. Based on the results of the assessment and the discussion between the members of the IEP team, District determined that Student had met her speech and language goal and that she no longer met the eligibility requirements for speech and language impairment. The team considered exiting Student from special education services. Mother expressed her disagreement with the IEP team's determination and refused to sign the IEP. She requested that Student be allowed to continue receiving special education services.

*Eligibility on the Basis of a Speech and Language Impairment*

12. As discussed in Legal Conclusions 5 and 6, a child qualifies for special education and related services under the eligibility category of language and speech impairment if his or her language abilities are not commensurate with his or her chronological age or if a discrepancy exists between the child's ability and language performance. To be eligible for special education services, Student must require instruction or services that cannot be provided with modification of the regular school program. Student may qualify for special education services on the basis of a speech and language impairment if she has one of the following disorders: articulation disorder, abnormal voice, fluency disorder, or language disorder. Student may have a language disorder if she has an expressive or receptive language disorder, which is shown by scoring at least 1.5 standard deviations below the mean, or below the seventh percentile, for her chronological age or developmental level, on two or more standardized tests in one or more of the following areas: morphology, syntax, semantics or pragmatics.

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<sup>6</sup> In the Standardized Test for the Assessment of Reading (STAR) math, Student's grade equivalent score was 2.1 as of March 6, 2006, meaning that Student's math skills were considered comparable to those of an average second grader after the first month of the school year. Her rank in STAR math was in the percentile rank of 77 for her grade.

13. Student did not meet eligibility requirements for qualifying in the category of speech or language impairment. Student did not score at least 1.5 standard deviations below the mean or below the seventh percentile, for her chronological age or developmental level, on the TAC-3, EOWPVT, ROWPVT or the Sentence subtests. Additionally, Student's speech and language skills were commensurate with her developmental level, which was at the second grade level, as determined by the speech and language assessment and the psychoeducational assessment discussed below.

14. Regarding Student's expressive, receptive and pragmatic language, Student did not have significant deficits that qualified her for special education services based on the tests Ms. Maxwell administered and her observations. Ms. Maxwell did not observe Student displaying problems with her expressive, receptive or pragmatic language during her therapy sessions or the assessment. Additionally, Student was able to communicate adequately with the peers in the classroom and did not display problems with expressive, receptive and pragmatic language. None of District's witnesses observed Student having problems communicating with them or her peers, or understanding classroom instructions. Therefore, the evidence established that Student did not have a language disorder that qualified her for special education services.

15. Ms. Maxwell appropriately concluded, after assessing Student, that Student did not qualify for special education services due to an articulation disorder. Student had met her prior speech and language/articulation IEP goal. Student's test scores and academic performance showed that Student is able to read and speak fluently, and is at a level commensurate with peers of the same age and grade. All assessed areas of her speech and language were within normal limits. There was no evidence that Student has an articulation disorder, abnormal voice, fluency disorder, or language disorder. Based on the standardized test results, observation of Student, and reports from her teacher, Student did not meet the eligibility criteria for a child with a speech and language impairment at the time of the May 22, 2009 or the December 11, 2009 IEP team meeting. There is no evidence that she meets the eligibility criteria at this time.

#### *Events Following the May 22, 2009 IEP Meeting*

16. On June 7, 2009, by a letter to District, Mother requested additional evaluation of Student. Mother requested assessments in the areas of intelligence quotient (IQ), physical and occupational therapy, and to determine if Student qualified for services under Section 504 of the Rehabilitation Act of 1973. On June 9, 2009, District, in a letter to Mother, explained that it did not believe that a physical therapy or occupational therapy assessment of Student was needed in order to create an IEP for Student, as "there is no indication of a physical, medical or motor impairment that is impacting [Student's] access to the educational environment." District explained that its determination was based on teachers' observations, Student's performance in the classroom and during small and large motor activities, and a review of Student's file. Nonetheless, District offered to conduct a psychoeducational assessment of Student, to address Mother's concerns regarding Student's potential for learning, and to obtain additional information relating to Student's IQ. District believed that

the psychoeducational assessment would help determine whether Student met the eligibility requirements for specific learning disability. District included an assessment plan, together with its June 9, 2009 letter to Mother.

17. On June 10, 2009, District met with Parents to further discuss Mother's request for additional evaluation of Student. District discussed its offer to conduct a psychoeducational assessment of Student, and presented Parents with an assessment plan. There is no evidence showing that Parents requested additional assessment at the June 10, 2009 meeting.

#### *Psychoeducational Assessment*

18. District conducted the psychoeducational assessment of Student between September and November 2009. Ms. Mary Stephenson, Resource Specialist for District,<sup>7</sup> and Bryan Osak, School Psychologist,<sup>8</sup> contributed to this assessment. The purpose of the psychoeducational assessment was to evaluate Student's cognitive functioning, examine her learning style, assess her academic functioning, and determine if she met the criteria for specific learning disability. Ms. Stephenson and Mr. Osak were trained and qualified to administer the assessment tools that they used. They administered several standardized tests, and used the tests for purposes for which they were valid and reliable. Multiple test tools were utilized and no one test was used, solely, to reach a conclusion. The tests were not racially, culturally or sexually discriminatory. Prior to or during the assessment, both assessors reviewed Student's file, and conducted teacher and parent interviews regarding Student.

#### *Psychoeducational Assessment Tools Administered By Bryan Osak*

19. Mr. Osak administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The WISC-IV assesses a student's intellectual functioning in a number of cognitive domains, such as verbal comprehension and verbal reasoning, and provides a composite score representing the child's general intellectual ability. Student was tested in the following areas: verbal comprehension, perceptual reasoning, working memory, and processing speed. Student performed in the low-average range (88 standard score) in the verbal comprehension, average range (94 standard score) in the perceptual reasoning, average range (99 standard score) in the working memory, and in the high-average range

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<sup>7</sup> Ms. Stephenson holds a Bachelor's degree, and has teaching credentials in both general and special education. She has been employed by the TCDE as a Resource Specialist since 2002. At TCDE, she is also a bilingual Instructional Service Provider, and was assigned to District to provide special education assessments and services in 2009.

<sup>8</sup> Mr. Osak has a Master's degree in Applied/School Psychology, and a Bachelor's degree in Health Science/Health Education. He holds a Pupil Personnel Services and teaching credentials, and has worked for District, through the TCDE, as a School Psychologist since 2009.

(106 standard score) in the processing speed subtests. Student's Full Scale cognitive ability performance was measured in the average range, with a Full Scale IQ of 91.

20. The results of the WISC-IV showed that Student's nonverbal skills were more developed than her verbal skills. Student scored in the low-average range in her verbal skills. Her performance on the processing speed subtest indicates that Student gives adequate attention to visual detail, is mentally alert, and can complete timed tasks. She is able to process visual material quickly and accurately. Based on the WISC-IV, Student's short-term auditory memory and active working memory were all normal and within the average range.<sup>9</sup>

21. To investigate areas of Student's verbal learning and memory, and to further clarify Student's performance in the verbal comprehension subtest of the WISC-IV, Mr. Osak administered the Children's Auditory Verbal Learning Tests, Second Edition (CAVLT-2). This test required Student to recall a long list of words over repeated trials. Student was able to recall 14 out of 16 words after about 20 minutes delay. She achieved standard scores of 129, 130, and 135 in the Level of Learning, Immediate Recall and Delay Recall components of the CAVLT-2, respectively, which placed Student above average on this test.

22. Based on the result of the CAVLT-2, no deficit was revealed in Student's short-term or long-term memory ability for auditory information. Student showed that she was able to adequately encode and learn information presented to her. The CAVLT-2 also established that Student has excellent auditory memory and auditory learning ability.

23. Further, Mr. Osak administered the Beery Developmental Test of Visual-Motor Integration (VMI), to assess Student's visual-motor integration.<sup>10</sup> On the VMI, Student performed in the low-average range and achieved a standard score of 82. Although Student's score was in the low-average range, Mr. Osak did not find that Student had a deficit in the area of visual-motor integration. He explained that Student rushed through this test to return to class and participate in an ice cream party that was going on in her classroom. Mr. Osak credibly testified that Student's score was not reflective of her abilities, as Student was able to correctly replicate other drawings, more complex than the ones on the VMI, after testing had ended. Further, Student achieved a high-average-range score of 106 in the processing speed component of the WISC-IV.

24. Mr. Osak administered the Comprehensive Test of Phonological Processing (CTOPP), to identify areas of concern in phonological processing. The CTOPP consists of

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<sup>9</sup> Because Student was uncooperative during the perceptual reasoning and working memory subtests, Mr. Osak additionally administered the picture completion and the arithmetic subtests, respectively. The picture completion and the arithmetic subtests assess the same skills tested in the perceptual reasoning and working memory subtests, and Student performed in the average range in both.

<sup>10</sup> Visual-motor integration involves the ability to coordinate visual and motor movements, such as copying simple images or handwriting.

two composites: Rapid Naming, and Phonological Awareness and Phonological Memory. In the Rapid Naming composite, Student scored in the above average range, suggesting that Student could quickly and efficiently retrieve phonological information from long-term and permanent memory, and sequence operations to decode unfamiliar words. In the Phonological Awareness and Phonological Memory composite, Student's scored in the below average range. Despite the below average score in the second composite, Mr. Osak credibly testified that Student is able to read, and that she performed in the average range on the tests of reading achievements, administered as part of the Woodcock-Johnson Psychoeducational Battery-III Academic Achievement subtest. Further, Mr. Osak explained that the results of both the Rapid Naming composite of the CTOPP, and the Process Assessment of the Learner (PAL) test, showed that Student's reading ability is in the normal range. On each, Student performed in the above average range and normal/average range, respectively.

25. Mr. Osak administered the PAL subtest due to Student's below-average-range score on the Phonological Awareness and Phonological Memory composite of the CTOPP, to further assess the skills Student needed for reading and writing. Student performed "very well" on most of the areas assessed with PAL. Her scores range from adequate (standard score of 60-80) to proficient (standard score of 90-100) in the following subtests: Alphabet Writing, Receptive Coding, RAN Letters, Words, Digits, Words and Digits, Phonemes, Word Choice, Sentence Sense and Pseudo-word Decoding. She performed in the at-risk range (standard score of 30-40) in the Rimes subtest, and deficient (standard score of 10-20) on the Syllables subtest. Mr. Osak credibly explained that the low scores on the Rimes and Syllables subtests did not concern him, because Student performed well on other tests, such as Pseudo-word Decoding and Broad Reading on the WJTA-III, which measured the same skills involved in the integration of phonological skills and reading fluency.

26. Finally, Mr. Osak administered the Behavior Assessment System for Children, Second Edition (BASC-2), an integrated system designed to facilitate the diagnosis and classification of a variety of emotional and behavior disorders in children, and aid in the development of treatment plans. Student performed in the average range in all areas of the BASC-2, and no social, emotional or behavioral concerns were identified or observed.

*Psychoeducational Assessment Tools Administered By Mary Stephenson*

27. Ms. Stephenson administered the Woodcock Johnson Tests of Achievement, Third Edition (WJTA-III), to measure various aspects of Student's scholastic achievement in the areas of reading, math and written language. Student also completed some curriculum-based measurement tasks in reading fluency, and was administered a set of subtests from Key Math, Revised Edition, a diagnostic inventory of essential mathematics.

28. Based on the WJTA-III, Student's academic knowledge and skills, fluency with academic tasks and ability to apply academic skills were all within the average range. She performed in the high-average range in the written expression component, and in the average range in basic reading, reading comprehension, math calculation skills, math

reasoning and basic writing skills components of the WJTA-III. In the Broad Reading component, measuring word identification, reading and word pronunciation skills, Student met the reading standard for her age. In the Broad Written Language Skills component, which tested Student's spelling, writing rate and quality of written expression, her performance was in the average range, with an age-equivalent score of an eight-year-five-month-old student.<sup>11</sup> Student demonstrated her strongest skills in the Writing Samples subtest, with an age-equivalent score of a 10-year-and-six-month-old student. In Student's weakest area, spelling, she performed in the average range when compared to other students of her age.

29. In the Broad Math subtest of WJTA-III, Student was able to correctly add and subtract multiple-digit numbers in the average range with an age-equivalent score of an eight-year-and-four-month-old student. Further, in the curriculum-based measurement, Reading Fluency subtest, Student read a second grade passage at the rate of 86 correct words per minute. Finally, Ms. Stephenson administered the Key Math subtest, where Student performed in the average range. Student demonstrated adequate skills in geometry and measurement (length, weight, area and capacity). It was noted that her estimation and computation skills were developing, and that her performance was age-appropriate and grade-appropriate.

*December 11, 2009 IEP Meeting*

30. District must hold an IEP meeting to review the assessment results within 60 days of the receipt of parental consent for an assessment. Failure to hold an IEP meeting within the specified timeframe can result in a procedural violation of special education law. Mother requested the psychoeducational assessment on June 7, 2009, and an assessment plan was provided to Mother on June 9, 2009, and again on June 10, 2009. The IEP team met to discuss the results of the assessment on December 11, 2009. At the hearing, it was not established when Parents returned the assessment plan, or otherwise consented to the assessment. It was not established that District failed to timely hold the IEP team meeting.

31. At the IEP team meeting, which included Parents,<sup>12</sup> Mr. Osak presented the assessment report and explained the assessment tools used and what each tool measured. All the assessments used, their outcomes and summaries of the findings were reviewed. Based on the assessments' results, District members of the IEP team determined that Student did not meet the eligibility criteria for special education services, either in the category of speech or language impairment or specific learning disability. They recommended that Student be exited from special education services. Mother expressed her concern and belief that Student

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<sup>11</sup> Student was about eight years old in November 2009, when she was assessed. She received a standard score of 101, which was in the 52nd percentile rank for her age and grade.

<sup>12</sup> Apart from Parents, other IEP team members who attended the December 11, 2009 meeting included: Mr. Tiss, Julie Howard, the Assistant Director for the Tehama County Special Education Local Plan Area, Carla Bakerville, general education teacher, Ms. Stephenson, special education specialist/teacher, Carol Holland, Speech and Language Specialist, Francia Barbier, Spanish Language interpreter, and one other participant (name illegible).

continued to have difficulty with her speech and, thus, continued to need special education services. She disagreed with the IEP team's determination and recommendations.

32. Mother testified that Student "does not know English" very well, and does not know how to communicate or speak Spanish very well. Mother believes that Student "is not learning well" and has problems with her memory. At the hearing, Mother initially testified that she had an assessment report that identified Student as mentally retarded. However, when asked whether she would like to submit the report as an exhibit, Mother indicated that the report did not exist. She explained that an unidentified person at a Regional Center had informed her that Student was mentally retarded, but Mother provided no further evidence to support her claims.

#### *Eligibility on the Basis of Specific Learning Disability*

33. As discussed in Legal Conclusion 10, there are two methods by which District may determine whether Student is eligible for special education services on the basis of a specific learning disability: the severe discrepancy method and the response to intervention method. District used the severe discrepancy method. The IEP team must make the decision about whether Student has a severe discrepancy between achievement and intellectual ability, taking into account all relevant information about Student. No single test or procedure shall be the sole criterion for the IEP team's decision.

#### *Disorder of Basic Psychological Processes*

34. As discussed in Legal Conclusions 8 and 9, a specific learning disability is a disorder of one or more basic psychological processes, including attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization, and expression. Student may have a specific learning disability if there is a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning.

35. As determined in Factual Finding 23, Student's score on the VMI was in the low-average range for visual-motor integration. However, comparison of his scores on the processing speed tests on the WISC-IV, observations of Student, and interviews with his teachers do not support finding that she had a deficit in either visual processing or attention. Her processing speed score on the WISC-IV was 106, which was in the high-average range, and was inconsistent with her low-average score on the VMI. Therefore, there is no evidence that Student had a disorder of one or more basic psychological processes at the time of the December 11, 2009 IEP. There is no evidence that she has one at this time.

#### *Severe Discrepancy Method to Determine Specific Learning Disability*

36. As discussed in Legal Conclusions 11 and 12, Student may have a specific learning disability if there is a severe discrepancy between achievement and intellectual

ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning.

37. As determined in Factual Findings 19 through 29, Student has a full-scale IQ standard score of 91. Her standard scores in achievement range from 94 to 114. Student's intellectual functioning was in the average to above average range and her academic achievement was in the average range based on Student's WISC-IV scores and the WJTA-III. Ms. Stephenson's and Mr. Osak's findings regarding Student's intellectual functioning and academic achievement were supported by Student's performance in the classroom and on standardized testing. All of her scores were in the average range; they range from a low standard score of 94 in the Basic Writing skills to a high of 114 in the Written Expression components of WJTA-III. She scored in the average range on the Reading Fluency subtest, indicating that she is able to complete academic tasks quickly and accurately. She exhibited a relative strength on the Writing Samples subtest, indicating that she is able to create content for her writing. Student's scores indicate that she is functioning within the average range in the general education curriculum. She did very well on both the STAR Math and the STAR Reading without any accommodations. Student's scores and performance on the WJTA-III, which is a comprehensive, standardized battery of academic achievement tests, assessing Student's current level of functioning in reading, mathematics, oral language, and writing, established that Student is performing in the average range for her age and grade.

38. In second grade, Student continued to perform at the above average proficiency level in mathematics, language arts and oral English language. Student did well on the California Content Standards, benchmark assessments, which showed that Student was performing at an above average level, and was progressing. Further, Student's May 2010 STAR Math and Reading scores were 3.3 (third grade and three months) and 3.6 (third grade and sixth months) respectively, showing that Student was performing above the third grade level in Math and Reading. Based on the BASC-2, there were no social, emotional or behavioral issues with Student, and her behavior, attendance and effort have been excellent. Student has not needed nor utilized accommodations or modifications in the general education setting.

39. Student functions well in class, and receives average to above average grades. She is meeting grade-level standards in all areas. Student is performing successfully in a general education environment and has appropriate relationships with peers. She has not used or needed accommodations or modifications to be successful in the general education setting. Her performance or other indicators at school do not corroborate Mother's concerns. There was no severe discrepancy between any of Student's achievement and intellectual ability at the time of the May 22, 2009 and the December 11, 2009 IEP meetings. Therefore, there is no evidence that Student had a specific learning disability at the time of the May 22, 2009 or the December 11, 2009 IEP meetings, or at this time. The evidence establishes that Ms. Stephenson and Mr. Osak properly assessed Student for a specific learning disability, and District properly determined that Student did not qualify for special education services under the category of specific learning disability.

## *Need for Special Education Services*

40. As discussed in Legal Conclusion 3, to be eligible for special education services, Student must require instruction or services that cannot be provided with modification of the regular school program. Student is performing successfully in a general education environment. She has appropriate relationships with peers. At the time of the May 22, 2009 or the December 11, 2009 IEP meetings, Student did not need instruction or services that could not be provided in the regular education setting. There is no evidence that she needs instruction or services that cannot be provided in the regular education setting at this time. Student is no longer eligible for special education services under either the category of speech or language impairment, or specific learning disability.

## LEGAL CONCLUSIONS

### *Applicable Law*

#### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 537], the party who filed the request for a due process hearing has the burden of persuasion. The District filed for this due process hearing and bears the burden of persuasion by the preponderance of the evidence.

#### *Exiting Student from Special Education Services*

2. The issue in this case is whether Student continues to be eligible for special education services under the category of speech or language impairment, or whether Student is eligible under the category of specific learning disability. Before determining that the student is not or no longer is a student eligible for special education services, a school district shall assess or reassess a student. (20 U.S.C. § 1414(c)(5)(A); 34 C.F.R. § 300.305(e)(1)(2006);<sup>13</sup> Ed. Code, § 56381, subd. (h).) Special education students must be reassessed every three years or more frequently, if conditions warrant, or if the pupil's parent or teacher requests a new assessment and that a new IEP be developed. (20 U.S.C. § 1414(a)(2); Ed. Code § 56381.)

#### *Eligibility for Special Education Services*

3. A child is eligible for special education services if an IEP team determines that the child meets the requirements of one of the eligibility categories and the impairment requires instruction and services that cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subds. (a), (b).)

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<sup>13</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

### *Assessment<sup>14</sup> Requirements*

4. 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 student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or for determining an appropriate educational program for the student. (Ed. Code, § 56320, subs. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b).) 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).) 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) [tests of intellectual or emotional functioning must be administered by a credentialed school psychologist], 56322 [assessment shall be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education local plan area]; 56324 [a psychological assessment shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed].) Persons knowledgeable of the student's disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).) Following the assessment, an IEP team meeting shall be held within 60 days of receipt of parental consent. (Ed. Code, § 56329.)

### *Speech or Language Impairment Eligibility Requirements*

5. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.) The difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that the difficulty results from any of the following disorders: (1) articulation disorders, such that the child's production of speech significantly interferes with communication and attracts adverse attention; (2) abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; (3) fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener; (4) inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the child's language performance level is found to be significantly below the language performance level of his or her peers; and (5) hearing loss which results in a language or

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<sup>14</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

speech disorder and significantly affects educational performance. (*Ibid.*) Similarly, under federal law, a speech or language impairment means a communication disorder, such as stuttering, impaired articulation, language impairment, or a voice impairment, that adversely affects a child's educational performance. (34 C.F.R. § 300.8(c)(11).)

6. A child who has a language or speech impairment meeting one or more of the following criteria is eligible for special education services: (1) Articulation Disorder; (2) Abnormal Voice; (3) Fluency Disorders; (4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria: (a) The child scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or (b) The child scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in (a) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

*District's Assessment Showed that Student Does Not Have a Speech or Language Impairment*

7. Pursuant to Factual Findings 5 through 10, District conducted a speech and language assessment that complied with the legal requirements and which appropriately assessed Student in all areas of suspected disability. Ms. Maxwell was qualified to conduct the assessment and administer the test instruments. Multiple test tools were utilized and no conclusions were reached based solely on one test. The tests were not racially, culturally or sexually discriminatory. The assessment results were discussed at the May 22, 2009 IEP team meeting. Pursuant to Legal Conclusions 4 through 6, and Factual Findings 13 through 15, Student's articulation and expressive, receptive or pragmatic language abilities were age-appropriate based on the District's assessments and observations of Ms. Maxwell and Student's teachers. Based on Factual Finding 40, Student does not need instruction or services that cannot be provided in the regular school program or educational setting. Therefore, Student does not qualify for special education services in the category of speech or language impairment.

*Specific Learning Disability Eligibility Requirements*

8. 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).) A

specific learning disability 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.)

9. Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) Intellectual ability, for the purpose of calculating a severe discrepancy, includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning. (*Ibid.*, subd. (j)(2).) The level of achievement, for the purpose of calculating a severe discrepancy, includes the student's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests. (*Ibid.*, subd. (j)(3).)

10. A school district shall determine that a child has a specific learning disability using one of two methods: the severe discrepancy method, or the response to intervention method. (20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.309(a); Ed. Code, § 56337, subs. (b), (c).)

11. The severe discrepancy method requires that a student have a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6)(A); 34 C.F.R. § 300.309(a)(1)(ii); 71 Fed.Reg. 46651 (Aug. 14, 2006); 34 C.F.R. § 300.309(a)(2)(ii) [authorizes the continued use of a discrepancy method to determine eligibility for specific learning disability]; Ed. Code, § 56337, subd. (b); Cal. Code Regs., tit. 5, § 3030(j).) The severe discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030(j)(5).)

12. If standardized tests are valid for the student, a severe discrepancy is demonstrated as follows. The achievement and ability test scores are converted into common standard scores with a mean of 100 and a standard deviation of 15. The difference between these two common standard scores is compared to the standard criterion, which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A difference between the achievement and ability common standard scores which equals or exceeds this standard criterion, adjusted by one standard error of measurement, not to exceed four common standard score points, may indicate a severe discrepancy. The discrepancy must be corroborated by other assessment data, which may include other tests, scales, observations, and work samples. (Cal. Code Regs., tit. 5, § 3030(j)(4)(A).)

13. The response to intervention method determines if a student responds to scientific, research-based intervention as part of the assessment process. (20 U.S.C. § 1414(b)(6); 34 C.F.R. § 300.309(a)(2)(i); Ed. Code, § 56337, subd. (c).) Federal law further defines the response to intervention model. A student who does not make sufficient progress to meet age-appropriate or State-approved grade-level standards in one or more of the following areas may be found to have a specific learning disability: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving, based on the child's response to scientific, research-based intervention. (34 C.F.R. § 300.209(a)(2)(i).)

14. The decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel, which takes into account all relevant material which is available on the student. No single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the IEP team as to the student's eligibility for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).)

*District's Assessment Showed that Student Does Not Have a Specific Learning Disability*

15. Pursuant to Factual Findings 18 through 29, Ms. Stephenson and Mr. Osak assessed Student for a specific learning disability. Both were qualified to assess Student regarding any possible learning disabilities based on their experience, training and education. They used proper test instruments to measure Student's intellectual functioning and academic performance, and considered information presented by Parents concerning Student's academic problems, especially with speech. Multiple test tools were utilized and no conclusions were reached based solely on one test. The tests were not racially, culturally or sexually discriminatory. The results of the assessment were discussed at the IEP team meeting on November 11, 2009.

16. Based on Legal Conclusions 8 through 14, and Factual Findings 35 through 39, Student's assessment, classroom performance and test results established that her intellectual functioning is in the average to slightly above average range, and her academic achievement is commensurate with her intellectual functioning. Student did not have any discrepancy between her intellectual functioning and her ability on standardized tests administered by Ms. Stephenson and Mr. Osak. District properly assessed Student for a specific learning disability and there was no evidence that Student had a disorder of one or more basic psychological processes. Based on Factual Finding 40, Student does not need instruction or services that cannot be provided in the regular school program or educational setting. Therefore, Student does not qualify for special education services under the category of specific learning disability.

*Procedural Requirement that District Hold an IEP Meeting within 60 days of Receiving Parental Consent for an Assessment*

17. Following an assessment, an IEP team meeting shall be held within 60 days of receipt of parental consent. (Ed. Code, § 56329.) A procedural violation of the Individuals with Disabilities Education Act (IDEA) and related laws only results in the denial of a FAPE if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) That rule applies to flaws in an assessment. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; *San Ramon Valley Unified School Dist. v. Student* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009061134; *Capistrano Unified School Dist. v. Student* (2006)(amended decision) Cal.Offc.Admin.Hrngs. Case No. 2005090873.)

18. As discussed in Factual Finding 30, and Legal Conclusion 17, Mother requested the psychoeducational assessment on June 7, 2009, and an assessment plan was provided to Mother on June 9, 2009, and again on June 10, 2009. The IEP team met to discuss the results of the assessment on December 11, 2009. It was not established at the hearing when Mother returned the assessment plan, or otherwise consented to the assessment. Therefore, it was not established that District failed to timely hold the IEP meeting.

19. However, as discussed in Legal Conclusion 17, even if a procedural violation was established, not every procedural violation of special education law deprives a student of a free appropriate public education (FAPE). To constitute a denial of FAPE, there must be a showing that the procedural violation resulted in a loss of educational benefit, or that it significantly interfered with the opportunity of a parent to participate in the IEP process. It was not established that a loss of educational benefit or that a significant interference with parental participation in the IEP process occurred. Also, since Student was no longer eligible for special education services, at the time of the May 22, 2009 IEP meeting and prior to the June 7, 2009s request for a psychoeducational assessment, a loss of Student's educational benefit or a significant interference with parental participation in the IEP process cannot be found.

*Is Student eligible for special education services under the category of either speech or language impairment or specific learning disability?*

20. Pursuant to Legal Conclusions 7, 15 and 16, and Factual Findings 15, 35, 39 and 40, at the time of the May 22, 2009 or the December 11, 2009 IEP meetings, Student did not have a speech or language impairment, or a specific learning disability. Therefore, Student was no longer eligible for special education services under the category of speech or language impairment, and was not eligible as a child with a specific learning disability. Student did not need instruction or services that cannot be provided in the regular education setting and there is no evidence that she needs instruction or services that cannot be provided in the regular education setting at this time.

