

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012030516

DECISION

Administrative Law Judge (ALJ) Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Irvine, California on June 12, 2012.

Irvine Unified School District (District) was represented by attorney Alefia Mithaiwala of the Harbottle Law Group. Robin Hunter, Principal of the Early Childhood Learning Center, was present throughout the hearing. Mary Bevernick, Director of Special Education for the District; Liz Krogdsale, a District Special Education Coordinator; and Tracy Petznick Johnson, an attorney with the Harbottle Law Group, were present during part of the hearing.

Student was represented by his father (Father). ALJ Timothy Newlove was present during part of the hearing.

The following witnesses testified during the hearing: Robin Hunter; Jennifer Mobley; Erin Anderson; Lori Wallace; and Father.

At the conclusion of the hearing, the record remained open to permit the parties to submit post-hearing briefs. Both parties submitted post-hearing briefs. The matter was submitted on June 29, 2012.

PROCEDURAL HISTORY

The District filed with OAH a request for due process hearing on March 15, 2012. On April 2, 2012, the parties jointly requested a continuance of the initial hearing date. On April 3, 2012, OAH granted the parties' request and continued the hearing until May 30,

2012. On May 16, 2012, the parties requested a second continuance because of parental unavailability. On May 16, 2012, OAH granted the requested continuance and scheduled the hearing for June 12, 2012. On June 1, 2012, Student requested a continuance because Student's mother would be unavailable due to a business trip. On June 1, 2012, OAH denied Student's request for a continuance.

ISSUE¹

The sole issue at hearing was:

Whether the District's February 2012 multi-disciplinary assessment of Student for special education, in the areas of communication, social/emotional relations and autistic-like behaviors, were appropriate so that the District is not responsible for funding Student's request for an independent educational evaluation (IEE) at District expense?

As a resolution, the District seeks a ruling that the assessments were appropriate and that it need not fund an IEE requested by Student's parents.

FACTUAL FINDINGS

1. Student is a three and one-half-year-old girl who resides with her family within the boundaries of the District. Starting from birth, Student's mother (Mother) spoke Japanese to her, while Father spoke English. From six months to 24 months, Student was cared for by her Chinese speaking grandparents. Student attends a Japanese-only speaking preschool, Kohitsuji Gakuen, four days per week. Student's primary language is Japanese, although her parents estimate she speaks English 30 percent of the time.

2. On November 2, 2011, Robin Hunter, principal of the Early Childhood Learning Center of the District, received a referral from the Regional Center of Orange County (RCOC) for the District to conduct an assessment of Student for special education eligibility.

RCOC Assessment Report

3. On November 17, 2011, RCOC forwarded to the District a copy of a Developmental Evaluation Preliminary Report of an assessment conducted by Autism Spectrum Therapies (AST) to determine eligibility for RCOC services. The report was

¹ The District's complaint also contained a second issue regarding the appropriateness of the District's March 29, 2010 Functional Behavior Assessment Report. This issue was withdrawn at the prehearing conference after Student agreed that the report was appropriate.

written jointly by Valerie Adams, a licensed occupational therapist, and Brian Roper, Ph.D., a speech-language pathologist (SLP). Both worked at AST. At the time of the assessment, Student was 33 months old. The assessment was conducted in English and translated into Japanese by Mother and a translator.

4. The AST assessors administered the Developmental Assessment of Young Children (DAYC) subtests in the areas of cognition, social-emotional, and adaptive behavior; the Bayley Motor Scale; and the Receptive-Expressive Emergent Language Test, Third Edition (REEL-3).

5. On the DAYC, Student received a standard score of 91 on cognition which was in the average range with an age equivalency of 30 months; 72 on social-emotional which was within the low range and had an age equivalency of 17 months; and an 89 as to adaptive behavior which was in the below average range with an age equivalency of 27 months.

6. On the Bayley Motor Scale, Student fell within the below average range with an age equivalency of 22 months in fine motor and 22 months in gross motor. Student received standard scores of 100, which is in the average range, in both receptive and expressive language subtests on the REEL-3. The REEL-3 scores placed her with an age equivalency of 33 months on receptive language and 34 months on expressive language.

7. The assessors noted that the delay in social-emotional “may be attributed [Student’s] withdrawn nature.” They also noted that Student was “able to process language adequately when she began using complex phrases to communicate with her mother.” They also observed: “The etiology of her social communication deficits could not be determined. What is clear is that [Student] is capable of communicating with others, but may choose not to do so.”

Initial Parental Interview with District

8. Following the RCOC referral, the District forwarded to Student’s parents (Parents) a packet which included a Developmental Health History Questionnaire. In the questionnaire, Mother stated that toilet training had been terminated as it had been unsuccessful; Student did not speak to others except for Parents; Student did not follow instructions; and she played by herself and is silent at preschool. Mother also stated that there were no concerns as to gross or fine motor skills. Mother noted that Student cuddled like other children, looked at the person she played with, smiled in response to another’s smile, played simple imitation games, and engaged in reciprocal, back-and-forth play. Student was reported to point with her finger; but Mother reported that she does not use gestures, hold-up objects to direct attention, or show things to people. The only stereotyped behavior reported was that Student imitated other people’s actions. Mother also noted that Student stopped responding to questions like “how old are you?” and “what’s your name?” at 28 months. Mother said that Student “is in her own world and does not interact with others.”

Mother listed as goals for Student that (a) she interact with children, (b) speak and respond to questions, and (c) speak with people other than her parents.

9. On November 21, 2011, Parents attended an intake interview at the District's Early Childhood Learning Center (ECLC). The interviewer was informed that Student was very talkative at home but silent at her Japanese preschool and that Student engaged in Japanese for 75 percent of the day. Parents also stated that Student could understand about half of what was said in English although she never speaks it.

10. The District presented Parents with an Individual Assessment Plan which proposed to assess Student in the areas of academic/pre-academic achievement, intellectual development, social/emotional/behaviors status, language/speech/communication development, health/vision/hearing, self-help/career/vocational abilities, and additional and/or alternative assessment. Parents consented to the plan on December 9, 2011.

Kaiser Permanente Multispecialty Developmental Evaluation

11. On January 17, 2012, Student was evaluated by a team from Kaiser Permanente (Kaiser) consisting of Cindy Jean Evans, M.D., a pediatric physician; Amalia G. Mena, Psy. D, a clinical psychologist; Teri Gahre, M.S., CCC-SLP, a SLP; and Jocelyn Kent, an occupational therapist (OTR). Each submitted a separate written report.

12. Dr. Evans noted that Student was referred due to language and behavioral concerns. Mother reported that Student speaks in sentences in Japanese at home although she does not speak outside the home. Dr. Evans administered a single test, the Childhood Autism Rating Scale (CARS), to Mother. Dr. Evans concluded that Student did not meet the clinical definition of autism, ruled out developmental delay, and assessed her as having "selective mutism."² She recommended that Student be placed in a special day class to improve her ability to use language in social situations and to participate in educational group activities.

13. Dr. Mena made observations during the evaluation and administered the Autism Diagnostic Observation Schedule-Module 1 (ADOS-1), which is based on the assessor's observations of the child. Dr. Mena scored Student above the autism cut-off in communication, reciprocal social interaction, and communication and social interaction. Dr. Mena noted that these scores placed Student within the classification of autism disorder, but she reported that "these results cannot be interpreted in isolation and should be interpreted with caution given that [Student's] ability to comprehend instructions is unknown."

14. Ms. Kent was unable to assess Student for occupational therapy because of Student's "poor compliancy, interaction, and disinterest with activities." As to adaptive

² Dr. Evans fails to define "selective mutism." She apparently is referring to Student deciding not to speak.

skills, Parents reported that Student can cooperate with washing her hair, cutting her finger nails, tooth brushing, undressing, dressing, bathing, hand washing, and brushing her hair.

15. Ms. Gahre did not administer any standardized testing. Her evaluation was based on the AST assessment report and parental report. Ms. Gahre made no attempt to actually conduct any formal or informal testing of Student. She was unable to fully assess Student because she did not participate in the assessment as Student did not orally communicate. Ms. Gahre concluded that her limited evaluation did not reveal a medical necessity warranting speech/language therapy. She also recommended that “[o]nce [Student] is behaviorally able to participate in a speech and language assessment outside the home setting-one should be completed.”

The District’s Multi-Disciplinary Assessment Report

16. The District assessment team comprised Jennifer Mobley, school psychologist; Lori Wallace, SLP; Erin Andersen, special education teacher; Janet Penny-Cook, school nurse; and Parents, who were interviewed and provided information through various rating scales. Tomko Hamisch acted as the Japanese interpreter. Student was evaluated by the team during a three week period when she attended the Diagnostic Preschool Class at ECLC, and on January 13, 2012, when Ms. Mobley, Ms. Wallace, and Ms. Anderson conducted testing and observations at the ECLC. Also, Ms. Wallace observed Student at her preschool on December 9, 2011. The following procedures were part of the assessment: Developmental and Medical History (see Factual Finding 8), review of records, speech/language assessment, curriculum based assessment using the Carolina Curriculum for Preschoolers with Special Needs, behavioral observations, informal parent interview, a review of the Kaiser evaluation reports (see Factual Findings 11 through 15), review of the RCOE assessment by AST (see Factual Findings 3 through 7), and standardized tests. The tests administered by the school psychologist were Developmental Assessment of Young Children (DAYC) subtests in the areas of cognition and social/emotional, the parent and teacher forms of the Adaptive Behavior Assessment System, Second Edition (ABAS-II), parent and teacher rating forms of the Autism Spectrum Rating Scales (ASRS), teacher and parent forms of the Gilliam Autism Rating Scale-Second Edition (GARS-2), teacher and parent rating forms of the Behavior Assessment for Children, Second Edition (BASC-2), and the Autism Behavior Checklist for Educational Planning-Third Edition (ASIEP-3). The standardized tests utilized for the speech and language assessment were the Clinical Evaluation of Language Fundamentals Preschool- 2nd Edition (CELF-P2), DAYC subtest in communication, the MacArthur-Bates Communicative Development Inventory: Word and Gestures (MacArthur), Language Sample Analysis, and the Peabody Picture Vocabulary Test-4 Form B (PVT-4). The written report that was presented at the February 9, 2012 Individualized Education Program (IEP) team meeting contained the following sections which are at issue in this matter: Pre-Academic/Curriculum Based Assessment, Speech and Language Assessment, Behavioral Observations, Cognitive Functioning, Adaptive Behavior,

Social/Emotional, and Special Education Determination sections.³ The assessment was conducted in English and translated by the Japanese interpreter. The written report also contained sections entitled Reason for Referral, Background Information, and Health and Developmental History.

17. The members of the assessment team were trained and knowledgeable in the areas they assessed. Ms. Anderson has a B.S. in Child and Adolescent Studies and an M.S. in Education. She has been an early childhood education specialist with the District since September 2008, has taught the Diagnostic Preschool Class and conducted initial assessments of children in Student's age range for four years. Ms. Mobley has been a school psychologist since 2002 and is licensed by California and Texas as a school psychologist. She has worked for the District since 2005. She holds a B.A. in Psychology and a M.A. in School Psychology. Ms. Mobley has conducted approximately 900 assessments as a school psychologist. Ms. Wallace holds a certificate of clinical competence in speech/language pathology (CCC-SLP) and a license from the State of California as an SLP. She has worked as a SLP since 1986. She has a B.A. in Communication Disorders and a M.A. in Speech/Hearing Science. She has been assessing children for speech and language since 1986. Ms. Wallace was a preschool teacher from 1986 through 2008, and the child-find liaison from 1991 through 2010, in addition to serving as a District SLP.

Pre-Academic/Curriculum Based Assessment

18. Student attended Ms. Anderson's diagnostic class for three weeks with a Japanese interpreter present most of the time.⁴ Student was able to maintain adequate attention in both large group and small group instruction for between 10 and 20 minutes. Student did exhibit resistant behavior in class activities which led to her requiring adult guidance to follow through. Student would not interact with peers and adults without her interpreter. When the interpreters were not present, Student became very shy.

19. Ms. Anderson utilized the Carolina Curriculum for Preschoolers with Special Needs which uses informal educational measurements in the areas of play and structured tasks which are common to the typical preschool curriculums. In the area of pre-academics, Student scored in the 24-30 month level in visual/spatial skill, visual perception (blocks and puzzles) and problem solving/reasoning skills. Student was at age-appropriate levels for visual perception. Student was unable to answer "how many" questions and did not appear to understand the concept of selecting one item from an array of items in number concepts.

20. Ms. Anderson noted that Student was self-sufficient at snack time, continued to work on toileting, and was able to put her backpack in her cubby with prompting. She also observed that Student's fine-motor skills were appropriate for her age.

³ The assessment report was dated February 10, 2012, but it was given to Parents and discussed at the Individualized Education Program team meeting on February 9, 2012.

⁴ Student received services from two Japanese interpreters.

21. As to behavior in the class, Student was passive and would respond to directions and requests by adults after multiple prompts and processing time. But when an interpreter was present, Student would follow simple directions without any additional prompts. When she engaged in oppositional behavior in the classroom, she was redirected with positive reinforcement.

22. In the area of socialization, Student required constant prompting and modeling to interact with her peers. She did not demonstrate non-verbal and verbal communication skills to initiate and respond to interactions with peers appropriately. Student did seem more comfortable when an interpreter was present, often interacting with them by smiling, laughing, and engaged in play with them. It was noted that Student did not interact with her peers unless the interpreter was present. When an interpreter was present, Student would follow instructions. She was observed to have good imitative skills during play activities, and she had the ability to share with her peers. Student demonstrated no rigidity or unusual mannerisms which are signs of autism.

Speech and Language Assessment

23. The speech and language assessment consisted of informal and standardized assessment tools, observations, and parent interview. Ms. Wallace knew of no standardized tests which are normed on children exposed to three languages. Ms. Wallace used standardized tests to gather information as to Student's abilities plus observations by the assessment team members, research and her experience dealing with children who had two language exposures. As part of the speech and language assessment, the assessment team took into account the results of the REEL-3 administered by the AST assessors and a report by the Kaiser SLP dated January 23, 2012. The speech and language assessor did not rely on a single measure, utilized technically sound instruments and a variety of tools and strategies in conducting the assessment. Ms. Wallace administered the standardized tests in accordance with the instructions in the test manuals, used a variety of sources, multiple measures, and the tests were administered in Student's primary language by the use of an interpreter.⁵

24. In the area of pragmatics and social language, the assessor noted that Student did not respond to the greetings of the clinicians although she was comfortable with the interpreter. Based on observations, Student's non-linguistic behaviors were within her age level. Student was compliant and not distracted during the testing. She transitioned easily between activities. Student was observed at her preschool class to imitate gestures to songs although not words. No repetitive or perseverative behaviors were observed by the assessors nor reported by Parents. Student played appropriately and functionally with toys. The observers noted that Student did not use echolalic speech (inappropriate and excessive repetition of speech of others). She exhibited appropriate joint attention with social reference to objects, exhibited communicative intents of showing and comments, and initiated

⁵ Student offered no evidence to contradict the testimony of Ms. Wallace that she administered the standardized tests in accordance with the test manuals.

communicative intent with her examiners and interpreter as well as Parents. Student's verbal exchanges were judged to be commensurate with her developmental language age.

25. The CELF-P2 is a checklist used to assist in evaluating a child's pragmatic behaviors in relation to social expectations for communications. The CELF-P2 checklist is completed by a person familiar with the child's communicative skills. Parents and Student's Japanese preschool teacher filled out the rating scales. Student's non-verbal communication skills were the only area examined because of multiple language exposure. Parents reported Student often used an appropriate tone of voice when angry, happy or sad; and she appropriately responded to a familiar person's smiles, frowns, and looks of surprise or other facial expressions. Parents also reported that Student sometimes appropriately responds to open arms requesting a hug; points to desired objects; appropriately responds to a familiar person's voice indicating anger, sadness or happiness; and she appropriately smiles, frowns, demonstrates surprise or other facial expressions. Parents reported that Student never appropriately responds to a person's signal to be quiet, does not point to a desired object, nor shakes her head "no." Student's Japanese preschool teacher indicated that Student sometimes appropriately responds to a familiar person's facial expressions or responds to a familiar person signaling "be quiet" by raising a finger to the lips. The teacher observed that Student never points to a desired object; shakes her head to indicate "no;" respond to outstretched arms or pointed fingers pointing to a desired objects; responds to angry, happy or sad tones of voice; facial expressions of others; and she does not appropriately use angry, sad , or happy tones of voice. Because the CELF-P2 is normed on mono-lingual English children who are at least three years old, Ms. Wallace did not score the test but rather used it as a method of measuring Student's non-verbal communication skills.

26. The DAYC communication subtest, which measures a broad range of communicative skills, is administered through a parental interview. Parents reported that Student was able to ask "where" questions, use three word sentences, follow directions where she placed one item under another, knows "big" and "little," can name eight or more pictures of common items, can point to common objects described by their use, and whispers. Parents reported that Student can not describe what she is doing, demonstrate an understanding of passive sentences, nor carry out two-step directions. Ms. Wallace reported that the results were in the below average range placing Student at the age equivalency of a 25 month old child who was a mono-lingual English speaker. Since Student is not a mono-lingual English speaker, these results must be viewed with caution as some communication forms present in English may not be present in Japanese.

27. In the MacArthur, Parents reported that Student was able to understand 27 out of 29 phrases in Japanese as compared to five in English. Student was able to understand 308 of 396 single words and produced 248 out of 396 single words in Japanese with some in both English and Japanese. The PVT-4 is a standardized test to determine a child's receptive one word vocabulary. The items were presented in English; but if Student did not respond, the interpreter presented the word in Japanese. Because the test is normed on mono-lingual English speakers, it could not be reported. Student did respond to 19 items correctly, of

which 15 were in Japanese. Had Student been an English speaker, she would have scored in the low average range.

28. Student's language samples were in Japanese and were collected by the interpreter with Parents present. The samples were too limited to analyze as they were in one to four morphemes, which would place her in the 29.3 month range if she was a monolingual English speaker. Student's articulation and voice fluency were unable to be evaluated due to lack of expressive language in English. Student's oral motor skills appeared to be adequate for speech development and production based on Ms. Wallace's observations.

29. On December 9, 2011, Ms. Wallace and Kari Ann Garron, a District transition specialist with an autism background, observed Student at the Kohitsuji Gakuen preschool. Ms. Wallace noted that Student demonstrated many positive behavioral skills. Student was very attentive, she looked at another girl and they laughed together although no words were exchanged. Student also complied with teacher instructions. Although she demonstrated limited verbal communications, Student mouthed the words to songs at times and did accompanying gestures, although she demonstrated limited verbal communication. Student's teacher stated that Student is shy and does not fully participate in the program. The teacher reported that Student can imitate words, sometimes fails to always respond to her name, has flat affect and plays by herself. Additionally, the teacher stated that Student loves crafts and singing but that she is not toilet trained.

30. Ms. Wallace researched the effects of multiple languages on a child of this age group. She knew by experience, that a child in the early stages of multiple language learning focuses on comprehension and does little speaking. Ms. Wallace also made reference to an article by Celeste Roseberry-McKibbin, a California State University, Sacramento professor of speech pathology, which found that the younger the child, the longer the silent period may last; and those preschoolers may be relatively silent for a period of over one year. Ms. Wallace also consulted with Carolyn Conway Manning, Ph.D., CCC-SLP, a professor and chair of the Speech and Language Department of the California State University, Long Beach. Dr. Manning stated that it is common for the child to speak in the home environment but not at school. Ms. Wallace also consulted with a District language learning consultant, Sam Ortiz, who concurred "that multiple language acquisition and acculturative learning are and must be understood as a developmental processes which can affect academic progress, classroom behavior, response-to-intervention, and performance on any assessment or test." Based on Ms. Wallace's research, other factors which need to be taken into account in evaluating Student are:

a) Acculturation: Student attended a Japanese preschool for less than one year (between the ages of six months to 24 months) and Student was cared for full time during the day by her grandparents, who spoke Chinese; Japanese and English are spoken at home; and she had little verbal interaction with Japanese speaking peers.

b) Practice Opportunities: A child's progress in multiple language acquisition depends on the availability of functional opportunities to practice.

c) Avoidance: A student may avoid communicating due to uncertainty about their language competence.

d) High versus Low Input Generation: High input generators are often extroverted and initiate conversations giving them opportunities to practice language. On the other hand, low input generators, like Student, are usually not assertive and thus generate fewer opportunities to practice using language and acquire language skills more slowly.

Based on these factors, Ms. Wallace concluded that Student may be going through a silent period especially in the school setting. Ms. Wallace felt that “a positive indicator is [Student’s] rapid learning of Japanese and English vocabulary and knowledge of some Japanese and English letters and numbers.”⁶ Ms. Wallace also recommended that Student did not qualify for speech/language services as she “does not present as a child with a disability, but rather as a child with the characteristics of children learning in multiple languages.”

School Psychologist’s Assessment

31. Student was assessed in the areas of cognition, adaptive behavior, and social/emotional which included screening for autism. Ms. Mobley used a variety of tools including observations of Student during testing, four observations at the Diagnostic Preschool Class, the reports of Ms. Anderson and Ms. Wallace, and a variety of standardized tests. The school psychologist did not rely on a single measure: utilized technically sound instruments and a variety of tools and strategies in conducting the assessment. Ms. Mobley administered the standardized tests in accordance with the instructions of the test manuals and in Student’s primary language through the use of a Japanese interpreter.⁷

32. During the evaluation on January 13, 2012, Student “presented as a very bright, shy, and slow-to-warm little girl.” She established good rapport and was particularly comfortable with the Japanese interpreter, Tomoko. Student showed interest in the materials and attempted to complete the tasks presented. She also demonstrated a “great attention span” and remained focused for time periods of up to 45 minutes. Student was not distracted and was not easily frustrated. Student made eye contact with the examiners and easily followed directions.

33. Student’s cognitive functioning was tested by the administration of the DAYC cognitive subtest. This DAYC subtest checklist was completed by Parents. Parents reported that Student cannot yet spontaneously name objects; understand the concepts of “one” and “all;” respond to “one” or “one more;” match objects by color or shape; build a bridge using

⁶ This conclusion is consistent with the findings of AST and Dr. Evans at Kaiser (see Factual Findings 7 and 12).

⁷ Student offered no evidence to contradict the testimony of Ms. Mobley that she had administered the standardized tests in accordance with the test manuals.

three blocks; understand “same” and “different;” understand size nor tell if an object is “heavy” or light.” Parents did report that Student can demonstrate use of everyday items; place a small object into a small container; roll wheeled toys; manage three or four toys by setting one aside when given a new toy; look at storybook pictures with adult, naming or pointing to simple objects upon request; match an object to its picture; sequence related action in play; use pretend objects to play; stack six to seven blocks; match simple shapes; put graduated sizes in order; request finger plays with words or action; count by rote to five; match objects that have the same function; and count up to five objects. Student scored a standard score of 95 which placed her in the 37th percentile at an age equivalency of 32 months.

34. In adaptive behavior, Parents and the preschool teacher rated Student using the ABAS-II, which provides a comprehensive norm-referenced assessment of adaptive abilities for individuals from birth to 89 years old. Student received a general adaptive composite standard score of 64 by Parents, which placed her in the extremely low range within the first percentile as compared to children of the same age. Parents scored Student at standard scores of 76 in the conceptual composite, 59 in the social composite, and 68 in the practical composite. Student’s Japanese preschool teacher scored Student with a standard score in the general adaptive composite of 73 which placed her in the fourth percentile within the borderline range. The teacher’s subtest scores were 76 for the conceptual composite, 61 for social composite, and 76 for the practical composite.

35. In the social/emotional subtest of the DAYC, Parents scored Student in the fourth percentile (age equivalence of 18 months) with a standard score of 74. This subtest measures social awareness, social relationships and social competence. Parents noted that Student is not able to bring toys to a caregiver, play well for brief times in groups of two or three children, attempt to comfort others in distress, nor say “please” or “thank you” without being reminded. Parents reported that Student has begun to function on her own and may periodically return to a parent for reassurance; had difficulty sharing with others; had temper tantrums when frustrated; insisted on trying to do many things without help; demonstrated independence; and enjoyed simple make-believe.

36. The BASC-2 is designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders for person between two and 25 years of age. The rating scales were administered to Mother and the Japanese preschool teacher. Scoring is based on T Scores with 50 as the mean score. Scores between 41 and 59 are in the average range, while scores between 60 and 69 and 31 and 40 are in the at-risk range. Scores above 70 and below 30 are in the clinically significant range and suggest a high level of maladjustment. The BASC-2 provides a Behavior Symptom Index and composite scores in externalizing problems, internalizing problems, and adaptive skills. Mother and the Japanese preschool teacher scored Student as follows:

<u>Index or Composite</u>	<u>Mother</u>	<u>Teacher</u>
Behavioral Symptom Index	61	62
Externalizing problems	46	43
Internalizing problems	48	44
Adaptive skills	26	42

The adaptive skills composite is composed of four separate subtests. Mother scored Student with T Scores of 36 in adaptability, 27 in social skills, 33 activities of daily living, and 32 in functional communications. The teacher rating scores were 68 in adaptability, 36 in social skills, and 37 in functional communications.⁸ Mother scored Student in the at-risk range in the Behavioral Symptom Index as did the teacher. Both raters rated Student in the average range for internalizing problems and externalizing problems. Mother rated Student in the clinically significant range in the adaptive skills index compared to the Student being in the average range in the teacher rating.

37. Ms. Mobley administered rating scales to Mother and the Japanese preschool teacher in examining whether Student would qualify for special education under the category of autism-like behaviors. Mother and the teacher completed the GARS-2, ASRS and ASIEP-3. Additionally, Ms. Mobley interviewed Parents.

38. The GARS-2 is a rating scale designed as a screening instrument to assess an individual between three and 22 years for characteristics associated with Autism Spectrum Disorder and other severe behavioral disorders. The subscales measure stereotypical behaviors, communication, and social interaction. Because Student was not three years old, Ms. Mobley used the GARS-2 for informational and educational purposes, and did not score it. Under the stereotypical behaviors subscale, Mother reported that Student sometimes avoids establishing eye contact; stares at hands or objects for at least five seconds; and eats specific foods while refusing to eat what most people eat. Mother did not observe any of the other 11 behaviors listed. In social interaction, Mother frequently observed that Student remained aloof or withdrawn; did not give affectionate responses; and showed no recognition that a person is present. Mother did find that Student sometimes avoids eye contact or looks away when a person looks at her; stares or looks unhappy or is unexcited when praised or entertained, resists physical contact; behaves unreasonably or in a frightened manner. Mother never observed Student using toys or objects inappropriately; doing repetitive or ritualistically type behaviors; objecting when routines are changed; lining-up objects in precise and orderly fashion or becoming upset when the order is disturbed. The teacher frequently observed Student avoiding eye contact or looking away when eye contact is made; not asking for items she wants; not initiating conversation with adults and peers; and lining-up objects.

39. The ASRS is designed to measure behaviors of children aged two years through 18, as reported by parents and teachers, which are associated with Autism Spectrum Disorders. The ASRS should be used with other information to determine the likelihood a

⁸ The preschool teacher did not complete the activities of daily living scale.

child has symptoms characterized by Autism. The ASRS is reported using T scores. Scores in the 60-64 range are “slightly elevated” which demonstrates more concerns than the average person. Scores 65-69 represent “more concerns than typically reported,” while scores above 70 are “very elevated” or that there are many concerns than are typically reported. Scores within 41-59 are in the average range and scores below 40 indicate fewer concerns than typically reported. ASRS contains a total score and scales for social/communication, unusual behaviors, and DSM-IV-TR, which addresses how closely the child’s symptoms compare with the DSM clinical diagnosis criteria. Student was scored at a 60 on the Total Score and 71 on the DSM-IV-TR scale by Mother, while her teacher scored Student at 70 for Total Score and 73 on the DSM-IV-TR scale. Parents scored Student at 74 in social/communications and 44 for unusual behaviors as compared to the teacher scores of 78 and 56, respectively. In the subtests, teacher and Mother rated Student as “very elevated” in the areas of peer socialization, adult socialization, and social/emotional reciprocity. They both rated Student in the “average” range in the areas of atypical language, stereotypy, and attention/self regulation. Parent rated Student in the “low” range in behavioral rigidity and sensory regulation, while the teacher rated her as “low” in behavioral rigidity and “very elevated” in sensory sensitivity. The assessor stressed that the ASRS is highly sensitive to social weaknesses and that the data must be looked at taking into account that Student’s social weaknesses are likely secondary to language learning acquisition. Thus, the assessor interpreted the results as not necessarily suggesting Student is presenting with autistic-like characteristics.

40. The ASIEP-3 is a checklist which is standardized and normed for non-adaptive behaviors in children from two to 13 years 11 months. The checklist was filled out by both Mother and the Japanese preschool teacher. Standard scores below 85 are considered as unlikely to be autistic. Mother scored Student at 87, which placed her in the 19th percentile and “possibly” autistic. The teacher scored Student at 88, which placed her in the 21st percentile and also “possibly” of autistic.

41. In an informal interview, Parents related that their primary concern was Student’s inconsistent behavior as she did not consistently comply with directions. Parents were unsure if these behaviors were due to a lack of understanding of the demands placed on her. They reported that Student generally exhibits appropriate emotional responses. Student did not interact with peers at school; but she interacts with adults at home; nor does she exhibit motoric mannerisms or repetitive behaviors, sensitivities to sounds, smells, or touch. Parents became concerned with Student’s development when the preschool expressed concerns about her social and language skills.

Recommendations for Special Education Eligibility

42. In the area of Speech/Language Impairment, the assessment report recommended that Student did not appear to meet the criteria for Special Education as a student with a language or speech disorder as she did not demonstrate a language or speech disorder in the areas of articulation, abnormal voice, fluency disorder, and receptive and/or expressive language disorder.

43. As to the category of autistic-like behaviors, the report stated that Student did not appear to meet any of the seven criteria for autistic-like behaviors listed in Title 5 of the California Code of Regulations, section 3030, subdivision (g), which are an inability to use oral language for appropriate communications; a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; an obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects or both; extreme resistance to controls; display of peculiar motoric mannerisms and motility patterns; and self-stimulating behavior.

44. The report also recommended that Student was not eligible for special education under the category of emotional disturbance as Student did not demonstrate an inability to learn which 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 exhibited in several situations; a general pervasive mood of unhappiness or depression; and a tendency to develop physical symptoms or fears associated with personal or school problems. The assessors noted that Student “demonstrates some weaknesses related to social development, her lack of interaction and active participation in learning activities appear to be secondary to language learning acquisition.” In support of this finding, the report cites the Roseberry-McKibbin article. (see Factual Finding 30.)

February 9, 2012 IEP Meeting and IEE Demand

45. On February 9, 2012, the IEP team met. Attending were Parents; Sergio Pento, a family friend/advocate; Sandy Avzaradel, ECLC assistant principal; Ms. Wallace; Ms. Anderson; and Ms. Mobley. Parents were presented with the written assessment report, which was dated as February 10, 2012. The participants discussed in detail the assessment report. The IEP team accepted the assessment team’s recommendation that Student was not eligible for special education and related services.

46. On February 11, 2012, Parents, in a letter to Mary Bevernick, the District special education director, requested that the District fund an IEE based “on conflicting evidence in the reports especially the medical diagnosis by Kaiser, ASIEP-3 scores of 87 and 88 by both parent and teacher.”

47. On February 24, 2012, the District denied Parents’ request by letter written by Robin Hunter, the ECLC principal, on grounds that the District had conducted a valid and comprehensive evaluation. On March 14, 2012, the District filed its Request for Due Process Hearing seeking a determination that its assessment was appropriate.

Follow-up Information Provided by Parents to Support their IEE Request

48. Following May 1, 2012, Parents submitted a follow-up report from Dr. Evans of Kaiser and a speech and language evaluation summary by Tomoko Nakamizo-Mukasa, M.A., CCC-SLP, of the Tampopo Speech Clinic (Tampopo). Dr. Evans reported the results

of the Childhood Autism Rating Scale-Second Edition Standard Version (CARS2-ST). This rating scale was based on observations by the examiner and historical information provided by Parents. Dr. Evans assessed Student with “Autism Spectrum Disorder,” and recommended that Student “be evaluated to determine if she would benefit from a behavioral program to improve her pre-language/early language skills and address her maladaptive behaviors.” Other than communication and social factors, Dr. Evans cited to stereotyped and repetitive use of speech; inflexible adherence to specific, nonfunctional routines or rituals; stereotyped and repetitive motor mannerisms; and lack of showing, bringing, or pointing out objects of interest. All of these were not observed by the District assessors which included a 30 day observation period when Student was in Ms. Anderson’s diagnostic class, during the assessment, and an observation at the Japanese preschool.

49. Student commenced receiving speech and language services from Tampopo in March 2012. On April 4, 2012, Ms. Nakamizo-Mukasa administered the Language and Communication Development Scale (LC) to measure Student’s language skills in Japanese. The LC is an assessment tool to be utilized with mono-lingual Japanese children who live in Japan. Student scored standard scores of 74 in both receptive language and expressive language which placed her in the fourth percentile. Ms. Wallace testified that the LC was not an appropriate test for Student as it is normed for mono-lingual Japanese speakers in Japan. The assessor also did not attempt to consider the effect on Student’s exposure to three languages.

50. After receipt of the Kaiser follow-up report and the Tampopo report, the District reviewed the new data. Ms. Hunter has been employed by the District since 1994 as an elementary school teacher, coordinator of school readiness, and since 2005 as principal of ECLC. She has a B.A. and holds credentials or certifications in multiple subject teaching, cross-cultural language and academic development, collaborative literacy intervention program, tier two administrative services and classroom assessment scoring system. Ms. Hunter felt that the Dr. Evans follow-up report was not an appropriate evaluation since it was based on a single instrument, the CARS-ST; there was no observation of Student in a school setting; and no District staff or Student’s preschool teacher had participated.

51. Ms. Mobley, Ms. Wallace and the Japanese interpreter, Ms. Hamisch, observed Student in her Japanese preschool class at Kohitsuji Gakuen. Student acknowledged Ms. Hamisch when the observers arrived. Student sat quietly and appeared to attend to the instruction comparable to her peers. The method of instruction was that the teacher made a presentation and there was little back and forth with students. When the class was directed to take a bathroom break, Student complied but crawled to the bathroom area. The teacher did not correct her. Student joined her classmates in the line waiting for the bathroom. The observers did not see any behaviors or symptoms that would normally be observed with an autistic child. Thus, the District did not change its position relating to Student’s request for an IEE.

LEGAL CONCLUSIONS

Contentions of the Parties

1. The District contends that its assessments were appropriate and that Student was not entitled to a publically funded Independent Education Evaluation. Student contends that the District assessment was “inadequate” (Student’s Closing Statement, p. 3) because (a) its key finding, that Student did not qualify for special education and related services is “incorrect” (Student’s Closing Statement, p. 3); (b) that had the assessment been administered in Japanese, the result may have been different (Student’s Closing Statement, p. 4)⁹; and (c) an independent evaluation is needed because there are no standardized and normed tests which incorporate children exposed to three languages (Student’s Closing Statement, p.2).¹⁰

Burden of Proof

2. The District, as the party petitioning for relief, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

Independent Educational Evaluation

3. Under certain conditions, a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006);¹¹ Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

4. A student is not entitled to a publically funded IEE merely because the Student disagrees with the District assessment. (*Council Rock School Dist. v. Bolick* (3rd Cir. 2012) 20012 WL 377675, at p. 358.) When a student requests an IEE, the public agency must,

⁹ Student offered no evidence as to whether the results of the assessment would have been different had all the examiners spoke Japanese in lieu of using a Japanese interpreter.

¹⁰ Student offered no evidence how another assessor would evaluate Student differently.

¹¹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

Requirements for Assessments

5. Before any action is taken with respect to the initial placement of a student in special education, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)¹² No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

6. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure ..." (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code, § 56320, subd. (c), (f).)

7. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) In assessing a possible language or speech disorder, a student's "difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist ..." (Ed. Code, § 56333.)

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

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

¹² An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

Eligibility categories and IEP's

10. A properly crafted IEP addresses a student's individual needs regardless of her eligibility category. (20 U.S.C. § 1412(a)(3)(B); see *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 (category "substantively immaterial"); *Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 11, 2011) (10-00733) 2011 WL 3957206, p. 3). "The purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." (*Pohorecki v. Anthony Wayne Local School Dist.* (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

ISSUE: Whether the District's February 2012 multi-disciplinary assessment of Student for special education, in the areas of communication, social/emotional relations and autistic-like behaviors, were appropriate so that the District is not responsible for funding Student's request for an independent educational evaluation (IEE) at District expense?

11. Based on Factual Findings 8 through 10 and 16 through 51, the District's February 10, 2012 multi-disciplinary assessment was appropriate. Parents consented to a comprehensive assessment and cited their concerns in the areas of communication delays, failure to follow instructions, and lack of social interaction between Student and peers and her teachers. Parents were cooperative and provided to the District evaluations of Student by AST and Kaiser. The District cooperated with Parents, complied with the assessment plan, and conducted a comprehensive and thorough assessment that assessed Student in all areas of suspected disability. All assessment instruments utilized were properly normed, not racially, culturally, or sexually biased, and were used for the purposes they were designed. The assessors were qualified to administer the assessments, and properly did so. The assessors produced a written report which included all the results of each test instrument, observations, other factors considered, and analyzed whether Student was eligible for special education and related services and the basis for their recommendation.

12. As to the academic portion of the District's assessment, the District established that Ms. Anderson was qualified to administer the Carolina Curriculum for Preschoolers with Special Needs, properly administered it, and the results were accurate. The District also established that Ms. Anderson was qualified to conduct the informal observations of Student during the three week period she attended Ms. Anderson/s Diagnostic class.¹³ Therefore, the academic portion of the assessment was appropriate. (Factual Findings 8 through 10, 16 through 22, and 42 through 45.)

13. As to the speech and language portion of the District assessment, the District assessed Student in all areas related to suspected disability in the areas of language, speech and communication skills. The District established that Ms. Wallace was qualified to administer the various test instruments, did administer the test instruments properly, and considered the results in an appropriate manner. Ms. Wallace also took into consideration the results of the AST and Kaiser reports, observations made by her and fellow assessors,

¹³ Student offered no evidence to the contrary.

consulted with other experts in her specialty, and relied on her experience dealing with children who had exposure to more than one language. Accordingly, the speech and language portion of the District assessment was appropriate. (Factual Findings 1, 3 through 30, 42 through 45, and 48 through 51.)

14. The school psychologist's portion of the District's assessment assessed Student in all areas of suspected disability including cognition, adaptive behaviors, and social/emotional (which included behavior and autistic-like characteristics). The District established that Ms. Mobley was qualified to administer the various test instruments, did administer the test instruments properly, and that the results obtained were accurate.¹⁴ Ms. Mobley also considered information provided by Parents, observations by herself and fellow assessors, the AST and Kaiser reports, and her own experience as a school psychologist. Student's objection to the school psychologist's assessment is that she disagrees with the recommendation that she does not qualify for special education and related services under autistic-like behaviors as opposed to disputing that the assessment was not appropriate. Accordingly, the portion of the District's assessment in the areas of cognition, adaptive behaviors and social/emotional, was appropriate. (Factual Findings 1 and 3 through 51.)

15. Based on Legal Conclusions 11 through 14, the District's assessment was appropriate so that the District need not fund an IEE.

ORDER

The District's February 10, 2012 multi-disciplinary assessment of Student was appropriate and the District is therefore not required to fund an IEE.

PREVAILING PARTY

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

¹⁴ Student offered no evidence to the contrary.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 24, 2012.

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings