

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SANTA MONICA-MALIBU UNIFIED  
SCHOOL DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009071020

**DECISION**

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, heard this matter on October 6 and 7, 2009, at Santa Monica, California.

Santa Monica-Malibu Unified School District (District) was represented by Mary Kellogg, Attorney at Law, of the Law Office of Mary Kellogg. Sara Woolverton, Ph.D., Special Education Director, was present on both hearing days.

Student was represented by David M. Grey, Attorney at Law, of Grey & Grey. Student's mother (Mother) was present on both hearing days.

On July 28, 2009, District filed its Due Process Complaint (Complaint). On August 6, 2009, OAH granted a continuance of the hearing, at the request of the parties.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file and serve closing briefs by no later than 5:00 p.m. on October 21, 2009. District and Student each timely filed their closing briefs on October 21, 2009. On that date, the record was closed and the matter was submitted.

**ISSUE**

Whether the psychoeducational assessment conducted by District in May and June 2009 was appropriate, such that Student is not entitled to an independent educational evaluation (IEE) at public expense.

## FINDINGS OF FACT

### *General Background and Jurisdictional Matters*

1. Student is a 12-year old African American girl, who has resided in the District at all relevant times.<sup>1</sup> During the 2008-2009 school year, at the time of the assessment that is the subject of this action, Student was attending sixth grade at Lincoln Middle School (Lincoln) in the District.

2. During the 2008-2009 school year, Mother and Student's teachers noticed that Student was having difficulties. Mother was concerned that Student was having difficulty keeping up with her school work and completing homework. Mr. Ron Vieira, Student's English and history teacher, had similar concerns. He noted that she did not seem to be engaged in the lessons, although she would answer questions when called upon. He was also concerned about her socially, as she did not interact socially with peers and was withdrawn. He was also somewhat concerned with Student's writing, as it took her longer than the other students to process her thoughts and write. Further, her writing lacked the detail that he would expect. Sara Utzinger, Student's sixth grade math and science teacher, was also concerned about Student's performance. Student was an average student in her first semester, but then her grades dropped and her progress declined halfway through the year. Of particular concern to Ms. Utzinger was Student's failure to complete and turn in her homework. When Ms. Utzinger asked Student why she was not completing and turning in her homework, Student would not speak. She was not speaking to peers in class, and not participating in class. Mother requested a special education assessment, and, on April 24, 2009, Mother signed an assessment plan. The assessment plan stated that District would assess Student in the areas of Academic Achievement, Health, Intellectual Development, Language/Speech Communication Development, Motor Development, Processing Skills, and Social/Emotional/Adaptive Behavior.

### *Section 504 Team Meeting*

3. On May 6, 2009, District convened a Section 504 meeting.<sup>2</sup> The school principal, Mr. Vieira, Ms. Utzinger, Mother, and the District counselor attended the meeting. The team reviewed Student's grades, and noted that she had a "C-" in math and social studies, a "D-" in Science, and an "F" in language arts. Student's California Standardized Testing and Reporting (STAR) testing reflected a "Below Basic" score for math and a "Proficient"

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<sup>1</sup> Ordinarily, a pupil's race or ethnicity is not relevant in special education due process matters. However, the case of *Larry P. v. Riles* (N.D. Cal., 1979), 495 F.Supp.926 constrains the types of assessments that may be performed upon African-American children such as Student. Therefore, Student's race is relevant to the analysis of the appropriateness of the assessments that District performed.

<sup>2</sup> Under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, et seq.), Districts may provide accommodations to students with disabilities, if needed, so that they may participate in school as do individuals without disabilities. Such accommodations may be given to students with disabilities who are not found eligible for special education.

score for language arts. Her math performance had declined, and Student had failed her last test. Student was unable to show math homework, and would not participate in one-on-one discussions with the teacher. Student's performance in history had improved to a "C" and her performance in language arts had improved to a "C-" by the time of the meeting, but only because teacher was accepting late work and had modified the length of the assignments. Teachers still were concerned with Student's written and verbal expressive language skills.

4. Mother was concerned with Student's emotional status, because Student's sister had had a negative school experience at John Adams Middle School (JAMS), such that Student could not attend JAMS with Student's friends. Mother was concerned that the lack of peer support had impacted Student's transition to middle school at Lincoln.

5. The team decided that Student was eligible for Section 504 accommodations, as her daily academic performance displayed a written and verbal expressive language deficit, which impacted her daily academic performance and was not at grade level according to academic performance and standardized tests. The team was awaiting the results of the formal evaluation by the school psychologist, and decided to implement accommodations pending the results of the assessment. These accommodations consisted of extended time with daily assignments, a folder to be kept in class for homework and daily class work, and teacher would sign Student's binder reminder daily.

6. After the Section 504 meeting, Mother wrote an e-mail to the school principal expressing her concern with Student's progress in her schoolwork, including spelling, grammar, poor sentence structure, and Student's struggles with math. She was also concerned about Student's poor STAR test scores, and thought that Student should be assessed for learning disabilities.

#### *District's Psychoeducational Assessment of Student*

7. In May and June, 2009, District performed a psychoeducational assessment of Student. Brian Murray, Ph.D., the District psychologist, wrote a draft report of the assessment, dated June 12, 2009. As is further discussed below, on June 18, 2009, Dr. Murray revised the draft assessment report at Mother's request, but his revisions did not alter any of Student's test scores or his analysis of those scores, or include any information that he had not known at the time of writing the draft report. Accordingly, this Decision will discuss the final version of the report.

8. Dr. Murray received a B.A. in Psychology and an M.S. in Counseling with a concentration in School Psychology from California State University, Northridge. He holds a Ph.D. in Educational Psychology from the University of California, Riverside, with concentrations in Achievement Motivation, Human Development, and Research/Statistical Methods. He holds an advanced Pupil Personnel Services credential, and an administrative credential. Among other certifications, he holds a Behavioral Intervention Case Manager (BICM) trainer certificate from the Greater Los Angeles Special Education Local Plan Areas. He has worked in the special education field since 1988, and began his career as a school

psychologist in 1991. He has also been a program specialist and a behavioral intention specialist, and is currently the District's coordinator of special education. Dr. Murray was qualified to perform the assessments. Dr. Murray reported that the assessment was performed to better identify Student's learning strengths and weaknesses, as well as to provide information about accommodations and modifications. The report noted that the results of the assessment would also help determine eligibility for special education.

9. Dr. Murray reported on Student's previous STAR testing results, noting that no previous individual assessments were available for review. Student's STAR testing scores revealed that she had improved from scores of "Basic" in English Language Arts from spring 2005 and spring 2006, to "Advanced" in spring 2007 and spring 2008. In Math, her score rose from "Basic" in spring 2005 to "Proficient" in spring 2006, but it declined back to "Basic" in spring 2007 and declined even further, to "Below Basic" in spring 2008.

10. Dr. Murray reported on Student's educational history from kindergarten through 5th grade. The report noted that Student had difficulty dealing with her emotions in first grade. Student's second and third grade teachers noted Student's difficulty in completing tasks. Student's 4th grade teacher reported that Student had difficulties self-advocating, and Student's fifth grade teacher noted that math had become more difficult for Student. Her kindergarten and third grade teachers commented on Student's excessive tardiness. Her kindergarten and fifth grade teachers noted Student's artistic interests and ability. At hearing, the evidence demonstrated that Dr. Murray had reviewed Student's cumulative file, including all of Student's report cards.

11. Dr. Murray reported on comments made by Student's current teachers. In English and history, she was obtaining "Cs." The English and history teacher reported that Student performed well on tests, but struggled with writing and completing homework. Student had difficulty keeping up with the pace of the class and often seemed as though she was "tuning out." Student's math teacher reported that Student had passed most of her tests and quizzes, but she did not complete a lot of her homework, despite having a binder reminder. Student's art teacher reported that Student does a "fantastic" job, and is focused, creative, careful, and neat. Student's written work in art was also very good. Student was a little behind on her painting, but was working to catch up. Student's P.E. teacher related that Student was not physically fit, and tended to forget her PE clothes and had difficulty finding them. Dr. Murray summarized these comments as showing a history of difficulty with work completion, written work, and self-advocacy.

12. The written report Ms. Utzinger (Student's math teacher) submitted for the assessment stated that Student did not speak to the teacher. The written report Mr. Vieira (Student's English and history teacher) submitted for the assessment also noted that Student "did not respond appropriately to teachers/staff." These teachers' reports also stated that Student did not complete class work on time. Mr. Vieira's report emphasized that Student "never" completed class work on time. This information was not included in Dr. Murray's assessment report.

13. Student's Health and Development assessment revealed no medical concerns.

14. Dr. Murray reported on his interview with Mother. As is further described below, Dr. Murray's summary of his interview with Mother in his final version of the assessment report was modified from his draft report, at Mother's request. In his final report, Dr. Murray noted that when Student was in third grade, a teacher filed a false report with the Department of Children and Family Services (DCFS) accusing Mother of neglect. Student was upset by this situation, cried frequently every morning, and had difficulty attending school. Subsequently, Dr. Murray reported that Student's education was again disrupted. She could not attend JAMS with her classmates as planned for sixth grade because of Student's disabled sister's difficulties with another student and parent at JAMS. Also, Student missed having a teacher from fourth and fifth grades, who had been very supportive of Student. Dr. Murray reported that Mother felt that Student required counseling at school to address her emotional issues. In addition, Mother noted that Student's tardiness was related to Mother's difficulties with Mother's own disability and the disability of Student's sister. Dr. Murray also reported Mother's comment that Student frequently felt ill in the morning and did not want to go to school, or she would state that she was ill while at school and wanted to go home. Student required support with writing activities, especially if she was required to write under a time constraint. Student did much better on multiple choice tasks. Dr. Murray noted Mother's comment that Student was friendly with several peers, but had not really developed a set of friends at Lincoln.

15. Dr. Murray had reviewed, but did not specifically reference in his report the Parent Questionnaire (Questionnaire) that Mother submitted to the District during the assessment process. On the Questionnaire, Mother had noted no diseases or injuries except for normal childhood illnesses, such as ear infections. Mother reported that Student sometimes took a long time to respond or to formulate thoughts. Mother stated on the Questionnaire that Student gets along well with other children, but has difficulty joining a group or game on her own, and that she had been withdrawn. She cried easily. Mother noted that Student did not like school, and that she did not turn in her homework even after she completed it.

16. Dr. Murray also reported on his interview with Student. Student stated that school was "okay." She acknowledged that math was not her strength, and that she had difficulty thinking of things to write. She told Dr. Murray she liked to read, and "really" liked science and art.

17. Dr. Murray observed Student's English/history class for approximately 30 minutes, and included his observations in the report. His report stated that Student appeared to attend to the lesson. She raised her hand several times to ask pertinent questions. The teacher gave a writing assignment, and Student immediately began to work on it. Dr. Murray did not formally observe Student outside of the classroom, such as during passing periods or on the school yard.

18. The report stated that Student was assessed over a period of two days. She was pleasant and cooperative throughout the assessment, but had some difficulty focusing on the verbal tasks. The report records that Student was better able to focus on visual tasks, especially when written work was involved. When verbal tasks were presented, Student frequently took extra time to process verbal information and provides a response. The report stated that none of the tasks presented were timed, so Student's longer processing times did not affect the results of the assessments. She readily responded to questions, and seemed to enjoy the interaction with Dr. Murray.

19. Dr. Murray assessed Student's Cognitive/Processing ability by using several tests. He administered the Test of Auditory Processing Skills-3 (TAPS-3). He reported her scores in age-equivalents, and they ranged from highs of 18-0 in Word Memory and Auditory Comprehension, to 8-2 in Number Memory Forward and 7-6 in Number Memory Reversed. The report summarized the scores as indicating Superior functioning in Auditory Comprehension, Auditory Reasoning, and Word Memory; Average functioning in Word Discrimination, Phonological Segmentation, Phonological Blending, and Sentence Memory, and Low functioning in Number Memory Forward and Number Memory Reversed.

20. Dr. Murray assessed Student's visual perceptual and processing abilities using the Tests of Visual Perceptual Skills-3 (TVPS-3). He reported her scores in age-equivalents. They ranged from a high of 18-11 in Form Constancy to 7-6 in Sequential Memory. His report commented that Student's results show a wide range of scatter. She demonstrated Superior ability in the areas of Spatial Relations, Form Constancy, and Visual Closure, Average ability in the areas of Visual Discrimination, Visual Memory and Figure Ground, and Low ability in Sequential Memory.

21. Dr. Murray administered the Developmental Test of Visual-Motor Integration-5 (VMI-5), to assess Student's ability to perceive a visual model and then correctly copy that model on paper. He reported that Student obtained a standard score of 96, with a corresponding Age Equivalent of 11-2. In the report, Dr. Murray stated this score signified that Student functioned in the Average range in fine visual-motor integration ability.

22. Based on the foregoing assessments, Dr. Murray reported that the best estimate of Student's cognitive ability indicated that she was within the High Average Range. The report noted that Student demonstrated significant strengths in the areas of Verbal Reasoning, Visual Reasoning, and Auditory Short-Term Memory, not involving the mental manipulation of the stimulus. Student demonstrated weaknesses in Auditory and Visual Short-Term Memory functioning when the stimulus involved numbers or manipulation of numbers. Student also demonstrated a weakness in Visual Sequencing.

23. The report also commented on Student's language functioning. During the assessment, Student frequently paused before responding verbally to tasks, however, overall communication skills appeared age-appropriate, and she had a well-developed vocabulary. Dr. Murray referred to the speech and language assessment, which had been performed by a

District speech and language pathologist in May and June 2009, for more detailed information regarding Student's speech and language functioning.

24. To assess Student's academic functioning, Ms. Catazano, a District special education teacher, administered the Woodcock-Johnson III Tests of Achievement, Form A. (WCJ-III-Ach). Ms. Catazano did not testify at hearing, but the assessment report included the results of Ms. Catazano's testing. The assessment report listed Student's age-equivalent, percentile ranks, and standard scores in a variety of the test clusters and subtests of the WCJ-III-Ach. Student's Total Achievement standard score ranged from 89 in Academic Fluency to 109 on Academic Applications. Her score of 107 in Academic Skills was her second-highest standard score. She achieved standard scores of 102 in Broad Reading, 100 in Broad Math, and 97 in Broad Written Language. She obtained standard scores of 91 in Math Calculation Skills, and 90 in Written Expression.

25. Her highest subtest standard score was 114 in Letter-Word Identification, and her lowest subtest standard scores were 84 in Writing Fluency and 85 in Math Fluency. Her Reading Fluency and Calculation standard scores were 94. She obtained a standard score of 105 in both Passage Comprehension and Writing Samples, and a standard score of 106 in Spelling. She obtained a standard score of 110 in Applied Problems. Dr. Murray concluded that Student's academic skills and her ability to apply them were both within the average range. Her fluency with academic tasks was in the low average range. His report states that Student's overall performance is average in the areas of reading, mathematics, math calculation skills, written language, and written expression.

26. Dr. Murray administered the Story Construction subtest of the Test of Written Language-3 (TOWL-3), to further assess Student's writing ability. This subtest required Student to construct a story based upon a stimulus picture. The story is then scored for Contextual Conventions (spelling, punctuation, and capitalization), Contextual Language (vocabulary, grammar, and syntax), and Story Construction (prose, plot, and organization). Student scored at grade level in the areas of Contextual Language and Story Construction, and below grade level in Contextual Conventions.

27. Dr. Murray assessed Student's social-emotional status by having Mother and Mr. Vieira (Student's English and history teacher) rate Student's behaviors on the Behavior Assessment System for Children-2 (Adolescent) (BASC-2). He also administered the self-report rating form of the BASC to Student. Mr. Vieira and Mother both rated Student as Average in the areas of Hyperactivity, Aggression, and Conduct Problems, and Average in the behavior category of Externalizing Problems.

28. Both Mr. Vieira and Mother rated Student as Average in the area of Anxiety. Mr. Vieira rated Student as At Risk in the area of Depression, and Average in the area of Somatization. Mother rated Student as Average in the areas of Depression, and At Risk in the area of Somatization. Mr. Vieira rated Student as At Risk in the areas of Attention Problems, Learning Problems, School Problems, Leadership, and Study Skills. He rated her as Clinically Significant for Atypicality and Withdrawal, and Functional Communication.

He rated her as Average in the areas of Adaptability and Social Skills. He noted that Student seemed lonely, cried easily, and would refuse to talk about matters that bothered her. In addition, Mr. Vieira noted that Student could become easily distracted in the classroom and would occasionally have difficulty following along with the lesson.

29. Mother rated Student as At Risk in the areas of Withdrawal and Functional communication, and as Average in the areas of Atypicality, Attention Problems, Adaptability, Social Skills, Leadership, and Activities of Daily Living. Mother noted that Student would cry easily and had difficulty expressing her thoughts. She also reported that Student worried about doing well in school, especially with respect to tests, and that Student also worried about becoming ill.

30. Student's BASC-2 Self-Report rated only the area of Attitude to School as Clinically Significant. She rated all other areas as Average. Dr. Murray's report stated that school tasks tended to become boring for Student. She became distracted in class, and had difficulty completing assignments, especially homework. She felt that her teachers were very positive, supportive, and fair. Student also felt very supported by Mother. Dr. Murray reported that Student maintained a positive self-concept, and was confident in her ability to problem solve and make decisions on her own.

31. Dr. Murray's report summarized the assessment results, stating that Student was functioning within the High Average Range of cognitive ability, with an approximate standard score of 115, and demonstrated a weakness in the basic psychological processing area of working memory. She was working at grade level in the areas of Reading (102), Math (100) and Written Language (97). Therefore, he determined that there was not a significant discrepancy between Student's cognitive ability of 115 and her academic achievement of 100. He concluded that Student was not eligible for special education under the criteria of specific learning disability. He also reported that Student nevertheless demonstrated learning deficits that impacted her organizational ability, task completion, and self-advocacy skills, which would be discussed at the Individualized Education Program (IEP) meeting.

32. At hearing, Dr. Murray elaborated on his report. The assessments took approximately four to five hours overall, and he divided the testing period into two sessions of approximately two and one-half hours each. He only observed Student in the classroom, because the concerns regarding Student only involved classroom issues. He determined that the results of several of his assessments were consistent with each other, or with other assessments District had performed. He found that the results of the LAS assessment that the District had performed concurrently with his psychoeducational assessment were consistent with Student's results on the TAPS, in that Student's receptive and expressing language process skills, including auditory memory, were above average. He also found that the Student's scores in the Average range on the VMI were consistent with her scores on the TVPS and the TOWL-3. Additionally, he considered Student's results on the TOWL-3 to be consistent with Student's written language scores on the WCJ-III-Ach. He attributed the memory weaknesses reflected in the assessment results to a lack of focus. He also attributed

the scatter in the TVPS to a lack of focus. In his opinion, Student's deficiencies in math and writing fluency were not a basis for special education eligibility, but could be addressed through classroom accommodations.

33. Dr. Murray explained that Student's results on the BASC-2 did not reveal any disabling conditions, such as emotional disorder or attentional and organizational issues that would qualify Student for special education. He felt she was making academic progress. He believed that the Section 504 plan was helping her, as she had raised her grade in science from a "D" to a "C."

34. Dr. Murray sent a draft report to Mother on June 14, 2009, in advance of the IEP meeting date of June 18, 2009. On June 15, 2009, Mother sent an e-mail to the District and to Dr. Murray, criticizing Dr. Murray for not including in the draft report certain matters which Mother had mentioned during her interview with Dr. Murray. These matters pertained to Student's older sister's disability, and more details about the false report that a District staff member had filed against her with DCFS and Student's reaction to that situation, which she had mentioned to him when he interviewed her. In her e-mail Mother requested that the record be corrected, or she would take a variety of actions, including requesting an IEE at public expense.

35. On June 18, 2009, District convened an IEP meeting to discuss Dr. Murray's report. At the IEP meeting, Dr. Murray revised the assessment report based upon Mother's concerns. He inserted information pertaining to the effects of Student's sister's and Mother's disabilities on Student's tardiness, and mentioned the false report that had been filed by a District teacher with DCFS. He modified the first sentence of the report to state that Mother had requested the psychoeducational assessment. He also inserted towards the end of the final report his conclusion that Student demonstrated learning deficits that impacted her organizational ability, task completion, and self-advocacy skills, as well as other details.

36. By e-mail dated July 6, 2009, Mother requested an IEE at public expense. By letter dated July 20, 2009, District refused Mother's request.

#### *Student's Criticisms of the District's Assessment*

37. At hearing, Student's expert, Lee-Anne Gray, Psy.D., criticized numerous aspects of District's assessment. Dr. Gray has been licensed in California as a clinical psychologist since 2004. She received her B.A. in Experimental Psychology from McGill University. She received her M.A. and her Psy.D., in Clinical Psychology from the California School of Professional Psychology. She has been in private practice since 1996, performing individual and family therapy, as well as providing consultations with parents and school district officials regarding special education matters, and performing IEEs. She was employed by The HELP Group from 2001 through 2005 as a staff psychologist, and she also served as a Supervising Psychologist and on the Admissions Assessment Team. As a member of the Admissions Assessment Team, she considered the applications of prospective students for admissions to The HELP Group's nonpublic schools. Dr. Gray is not a

credentialed school psychologist. She has never met or assessed Student. She was not familiar with the policies of the California Department of Education regarding the cognitive assessment of African-American children such as Student for special education placement. She was not totally familiar with the eligibility criteria for special education as set forth in federal and state law.

38. Dr. Gray criticized numerous aspects of the assessment and Dr. Murray's report. Her criticisms fall primarily into four categories: (1) The content of the report; (2) Dr. Murray's analysis and interpretations of the assessment results; (3) The choice of assessments; and (4) The adequacy of the District's evaluation and analysis of Student's language skills.

39. With respect to the content of the report, Dr. Gray criticized the report for not containing more information from Mother's parent questionnaire regarding Student's antipathy towards attending school, and not noting Student's history of ear infections. She criticized Dr. Murray's reporting of scores on the TAPS-3, and the TVPS-3, in age-equivalents instead of standard scores and scaled scores. She criticized Dr. Murray's reporting of Student's TOWL-3 results, because he did not give a specific score, even in terms of grade level. She also testified that Dr. Murray could have more reliably estimated Student's cognitive ability if he had obtained more information about her previous grades and academic progress.

40. With respect to Dr. Murray's interpretations and analysis of the assessment results, Dr. Gray disputed that Student's cognitive ability was within the High Average Range, given Student's low scores on several of the subtests. She testified that Dr. Murray did not give sufficient weight to Student's low Math Fluency and Writing Fluency scores, which were 30 points below Student's estimated cognitive ability score of approximately 115. Dr. Gray also criticized Dr. Murray for not relating Student's score on the TOWL-3 to Student's Writing Fluency score. In her opinion, Student showed significant weaknesses in processing, as reflected in Student's low Math and Writing Fluency scores. Dr. Gray stated that processing difficulties in these areas could impact Student's ability to learn, to cope, and to initiate social interaction, and could lead to Student isolating herself. Dr. Gray also believed that these processing difficulties could suggest a possible learning disability, a speech and language impairment, or a visual processing impairment.

41. Dr. Gray challenged Dr. Murray's summary of Student's cognitive ability. Contrary to the statement in the report that Student demonstrated significant strengths in several areas, including Verbal Reasoning, Dr. Gray maintained that District did not assess Student's Verbal Reasoning. She also challenged Dr. Murray's conclusion that Auditory Short-Term Memory was a significant strength, as those were her lowest scores, and noted that this statement was inconsistent with his statement towards the end of the report that Student demonstrated a weakness in working memory functioning. Additionally, Dr. Gray criticized Dr. Murray for failing to explain the scatter in the Student's subtest scores on the WCJ-III, as well as for the scatter in the Student's subtest scores on the TAPS-3. Dr. Gray noted that scatter could indicate that Student was not giving her best effort.

42. Dr. Gray criticized the assessment instruments. She stated that Dr. Murray did not fully assess Student's cognition, but rather addressed processing exclusively. She testified that he did not assess for crystallized intelligence, fluid intelligence, and verbal reasoning. She further criticized Dr. Murray for failing to assess Student's processing speed, which could help explain Student's low math and writing fluency scores. She criticized Dr. Murray's administration of the VMI-5, because he gave only one subtest, which tested Student's integration of motor and visual skills. The other two subtests of the VMI-5 would have examined, in a somewhat more isolated and specific fashion, Student's motor processing skills and visual processing skills. Possible deficits in these areas could be obscured by only performing the integration subtest.

43. Dr. Gray was concerned with the appropriateness of District's assessment of Student's language functioning. She believed that Dr. Murray's comments in the report regarding Student's vocabulary and overall communication skills were beyond his expertise. She also stated that Student's lengthy verbal response time, which had been noted as a concern by Mother and which Dr. Murray had noticed himself during the assessment, combined with Student's low scores on number memory and sequential memory, indicated a possible difficulty in short term and long-term recall. Yet, neither Dr. Murray nor the LAS assessment addressed this issue, and the District did not comprehensively address Student's memory. Dr. Gray pointed out that Student's LAS assessment had not included the subtests on the Clinical Evaluation of Fundamental Language-4 (CELF-4) that would have evaluated Student's recall. Further, the LAS assessment had not assessed Student's pragmatics skills. Dr. Gray stated that a more thorough LAS assessment would also have provided more information regarding Student's cognitive abilities. She also noted that Student's scaled score of 9 on the subtest of Understanding Spoken Paragraphs was reported by the speech and language pathologist on the CELF-4 protocol as 11. Dr. Gray considered this discrepancy important, because the actual scaled score of 9 indicated a significant discrepancy between that skill and the other subtests on the CELF-4, and also indicated a significant discrepancy as compared to Student's cognitive ability in the High Average Range. She testified that if the LAS assessment had included the additional subtests on the CELF-4, more information might have been elicited regarding these discrepancies.

44. Dr. Gray noted that both Mother and Student's teacher identified Student as having difficulty communicating her thoughts and ideas in their BASC-2 ratings, which she related to previous observations in the report regarding Student's pausing before responding verbally. Dr. Gray criticized Dr. Murray for not explaining this deficit, which he himself had perceived. Dr. Gray believed this issued warranted further assessment. Dr. Gray stated that Student's slowness in responding could reflect a language problem that is impacting Student at some level, and could indicate social anxiety, depression, or self-esteem issues. The BASC-2 provides information regarding the last two, but not regarding social anxiety.

45. Many of Dr. Gray's criticisms of the assessments are not persuasive. Dr. Murray's summary of his interview with Mother and his review of Student's academic progress were adequate. His report did not specifically mention certain aspects of the

teachers' reports, such as Student's refusal to speak to her teachers, and her persistent inability to finish classwork, but Dr. Murray's decision not to mention these matters in his report do not constitute a violation of the IDEA or of the Education Code. In this regard, the evidence demonstrated that Dr. Murray had reviewed and was aware of the information that he was provided. Dr. Gray criticized Dr. Murray for not administering all subtests on the VMI, but there was no evidence that the failure to administer them affected the validity of the VMI-5 test or the assessment in general. Dr. Gray also considered Dr. Murray's analysis of Student's auditory short-term memory as internally contradictory, but her reading of Dr. Murray's analysis discounted the qualification that Dr. Murray had included in his analysis. When read as a whole, the assessment report is not contradictory on that point. Dr. Gray also criticized Dr. Murray for referring in the report to Student's Verbal Reasoning score, stating that Dr. Murray had not assessed for Verbal Reasoning. Dr. Gray acknowledged that Dr. Murray had administered the Auditory Comprehension and Auditory Reasoning subtests of the TAPS-3, but stated that Auditory Comprehension and Auditory Reasoning were not the same as Verbal Reasoning. She did not offer a basis for that statement, or explain it.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. As the petitioning party, District has the burden of proving its contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-58, [126 S. Ct. 528].)

### *Issue: Was District's Psychoeducational Assessment Appropriate?*

2. District contends that its assessment complied with the IDEA and state law. District assessed Student in all areas of suspected disability, and used a variety of assessment tools and strategies. The assessment was not discriminatory and was appropriately administered, using valid and reliable instruments. Dr. Murray was qualified to conduct the assessment, and the assessment report was prepared appropriately. District further contends that Student's criticism of the assessment were hyper-technical, and do not warrant an IEE. Student contends that the assessment and the report did not adequately address Student's weaknesses and needs, did not include significant information, and that Dr. Murray did not properly analyze the assessment data. Student further contends that District did not meet its burden of proof of demonstrating that the WCJ-III-Ach test was appropriately administered, as Ms. Catazano did not testify as to its administration.

### *Assessments*

3. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) 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 whether the student's educational program is appropriate. (20

U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds.(e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child’s special education and related services needs, regardless of whether they are commonly linked to the child’s disability category. (34 C.F.R. § 300.306.)<sup>3</sup> The disability categories under which a child may be found eligible for special education and related services include specific learning disability (SLD), emotional disturbance, other health impaired (OHI) (which, under certain circumstances, may include students who have attention deficit disorder (ADD ) or attention deficit hyperactivity disorder (ADHD), and speech and language impairment (SLI). (Ed. Code, § 56329; Cal. Code Regs., tit. 5, § 3030, subds. (c), (f), (i), and (j).)

4. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) 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)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2),(3); Ed. Code, § 56320, subds. (a), (b).)

5. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, which may assist in determining whether the student is a child with a disability, and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).) The personnel who assess the student shall prepare a written report of the results of each assessment. (Ed. Code, § 56327.) In California, the selection of assessment tools and strategies that may be used in assessing the cognitive abilities of an African-American child, and the analysis of an African-American child’s cognitive abilities, for placement of that child in certain types of special education classes, are constrained in various ways as a result of the injunction issued in the case of *Larry P. v. Riles* (N.D. Cal., 1979) 495 F.Supp.926. For example, the California Department of Education prohibits administering standardized IQ tests to African-American children for assessing special education eligibility. (State Department of Education Assistant Superintendent of Public Instruction Leo Sandoval, mem. to Special Education Administrators of County Offices, et al., August 20, 1997.)

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<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated.

6. A parent is entitled to obtain an IEE of a child. (20 U.S.C. § 1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district. (34 C.F.R. § 300.502(a)(3)(i) (2006).) A parent has the right to request an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must, “without unnecessary delay,” either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense, unless the school demonstrates at a due process hearing that the evaluation obtained by the parent does not meet its criteria. (34 C.F.R. §300.502(b)(4); Ed. Code, § 56329, subd. (c).)<sup>4</sup>

7. Many aspects of the District’s psychoeducational assessment met all legal requirements for assessments. Dr. Murray was qualified to conduct the assessments that he conducted. His assessments were not discriminatory and were appropriately administered. Dr. Murray used assessment instruments that were valid and reliable, and Dr. Murray prepared an appropriate report of the assessment.

8. As was discussed above, certain of Dr. Gray’s criticisms of the assessment were not persuasive. Additionally, as discussed in Legal Conclusion number 5, Dr. Murray’s assessment and analysis of Student’s cognitive abilities were limited by the restrictions imposed by the California Department of Education, based upon its interpretation of the terms of the injunction issued in the case of *Larry P. v. Riles, supra*, 495 F.Supp.926. Dr. Gray had no familiarity with these restrictions, and therefore her testimony regarding deficiencies in Dr. Murray’s assessment and analysis of Student’s cognitive abilities was not persuasive because it did not take these restrictions into account.

9. However, certain aspects of Dr. Gray’s testimony were persuasive, and District did not meet its burden of demonstrating that its psychoeducational assessment was appropriate.

10. A primary flaw in the assessment was District’s failure to assess Student in all areas of suspected disability. For example, Student’s low scores on the TAPS-3 subtests of Number Memory Forward and Number Memory Reversed, and her low score on the Sequential Memory subtest on the TVPS-3 assessment, revealed that Student had certain memory weaknesses. As Dr. Gray testified, Student’s memory weaknesses may be related to her low scores in Math Fluency and Writing Fluency on the WCJ-III-Ach, and may indicate that Student has a processing speed deficit. The background information from Mother and teachers that Dr. Murray considered during the assessment process did not specifically attribute Student’s difficulties, such as her difficulty in expressing herself verbally and in writing, to possible memory deficiencies. Nevertheless, since the results of the Number Memory Forward and Reversed subtests on the TAPS-3, and the Sequential Memory subtest on the TVPS-3 assessment revealed some memory weaknesses, District should have assessed Student’s memory more thoroughly. Memory difficulties can be a factor in eligibility

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<sup>4</sup> At hearing, the parties stipulated that the concept of “unnecessary delay” was not at issue in this case.

categories such as SLD, SLI and OHI. Dr. Murray's attribution of Student's memory weaknesses to lack of focus itself suggests ADD, which can lead to eligibility under OHI.

11. District did not fully assess Student's social-emotional status, and in particular, how Student's possible language deficit might relate to Student's social-emotional status. The information provided to Dr. Murray reflected that both Mother and teachers were concerned about Student's lack of social relationships, and Mother was concerned about Student's attitude toward attending school. Mother's concern was verified by Student, who self-reported a rating of "Clinically Significant" of the BASC-2 in Attitude to School. The only normed assessment District performed in this area was the BASC-2 which, as Dr. Gray testified, did not assess social anxiety.

12. Additionally, as Dr. Gray testified, the assessment revealed that Student may have a pragmatic language deficit that may relate to Student's social-emotional status. During the assessment process, Dr. Murray learned that Mother and Student's teachers had observed that Student was withdrawn, and had difficulty with verbal responses. Ms. Utzinger, Student's math teacher, had reported that Student failed to speak to her altogether. In his report, Dr. Murray included his own observation that Student often took extra time to process and respond to verbal tasks. On the BASC-2, Mother and Mr. Vieira (Student's English and history teacher) reported that she had difficulty communicating her thoughts and ideas. This may indicate that Student's pragmatic language skills may be deficient. Student's pragmatic language skills, in turn, may bear upon Student's social-emotional status. Dr. Murray assessed Student's pragmatic language skills to a certain degree by means of the TAPS-3, as well as during his interview of Student. He did not observe her during passing periods or on the school yard, which might have revealed more information about Student's relationships with her peers and her pragmatic language skills, nor did he perform or recommend other instruments for measuring these skills. Dr. Murray's assessment did not explore or reveal why Student's verbal responses were delayed or non-existent, and how that might impact Student's social-emotional status.

13. In summary, the assessment demonstrated that Student's overall ability and achievement were both at least average, and were, in some respects, better than average. Yet, the assessment also demonstrated that Student was reluctant to attend school, had received failing grades during the 2008-2009 school year, was having difficulty making friends, was having difficulty completing written assignments, was not responding to verbal requests, was having difficulty focusing, and had a weakness in working memory. Indeed, Dr. Murray attributed some of Student's assessment results to a lack of focusing. While some of these issues might be addressed by 504 accommodations, such as the ones the Section 504 team established, others, such as Student's emotional difficulties, and peer difficulties, and not responding to verbal requests, may require more than classroom accommodations. These matters were mentioned in the report, but they were not fully analyzed or discussed, although they could be related to eligibility categories of OHI based upon ADD or ADHD, SLI, or emotional disturbance. These areas warranted further assessment, to meet the requirement that Student be assessed in all areas of suspected disability.

