

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

LOSANGELESUNIFIEDSCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007040393

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on September 10 through 17, 2007, in Los Angeles, California.

Los Angeles Unified School District (District) was represented by My T. Huynh, attorney at law, Office of the General Counsel, District. At various times District due process specialists Victoria McKendall, Cynthia Shimizu and Diana Massaria, were present on behalf of District.

Student was represented by Rebekah H. Parker, attorney at law, of Quinn Emanuel Urquhart Oliver & Hedges, LLP, and Anna Rivera and Maronel Barajas, attorneys at law, of the Disability Rights Legal Center (DRLC). Mother (Parent) and Student were present at various times during the hearing. DRLC's law clerks also attended the hearing.

District's due process hearing request was filed on April 11, 2007. On May 30, 2007, OAH granted a continuance of the due process hearing. Sworn testimony and documentary evidence were received at hearing. The parties requested the opportunity to file written closing arguments. At the conclusion of the hearing, the parties waived the

45-day period for issuance of the decision, and stipulated closing briefs would be filed by October 2, 2007, and the decision would be issued on October 26, 2007. The parties filed their closing briefs on October 2, 2007, and the matter was submitted.

## ISSUES

1. Did District fail to assess Student during the 2004-2005 school year.<sup>1</sup>
2. Did District fail to provide an independent psychoeducational evaluation (IEE) at public expense to assess whether Student had a severe learning disability.
3. Did District deny Student a free and appropriate public education by failing to find Student eligible for special education under the category of specific learning disability (SLD) for the 2005-2006 and 2006-2007 school years.

## REMEDIES

Student requests a finding that District should have assessed her during the 2004-2005 school year as requested. Student requests reimbursement for the psychoeducational IEE conducted by Dr. Carlos Flores to determine whether Student had a severe learning disability. She also requests a finding that Student is eligible for special education services under the category of SLD due to a severe discrepancy in the area of math. Finally, as a consequence of District's failure to find her eligible for special education she requests compensatory education for two years of lost instructional time in the form of 3 hours a week of intensive individual instruction with a non-public agency

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<sup>1</sup>Student's due process hearing request was filed on April 11, 2007. A two-year statute of limitations applies to this action. ( 20 U.S.C. § 1415 (b)(6)(B).) Accordingly, this decision only addresses disputes related to events that occurred during April 11, 2005 through April 11, 2007. In Student's due process hearing request she claimed that District failed to identify Student as a pupil with a disability from April 2005 through December 2005. This issue was further clarified at the prehearing conference and at trial.

retained to provide instruction and practice designed to improve: mathematical concepts and computation; performance in fractions and decimals; and application of mathematical knowledge to appropriate situations.<sup>2</sup>

## CONTENTIONS OF THE PARTIES

Student alleges that District failed to assess Student during the 2004-2005 school year in response to Parent's request. District maintains that it timely agreed to assess Student.

Student contends that District failed to fund an IEE as required by statute. At the hearing, District stipulated to a judgment on this issue and agreed to reimburse Parent \$2500 dollars for the IEE conducted by Dr. Carlos A. Flores.

Student further avers that District denied her a FAPE by failing to find Student eligible for special education under the category of SLD during the 2005-2006, and the 2006- 2007 school years. Student maintains that she qualifies as SLD in math due to the severe mathematical discrepancy between her ability and achievement. Student argues that her severe discrepancy between intellectual functioning and ability is corroborated by her repeated failure to pass high school Algebra and Geometry and to perform at a basic level in math on statewide performance tests. Student claims that her ADHD affects her basic psychological processes of attention. She argues that she requires special education services because the accommodations provided by the school for her ADHD in her general education math class have not been effective.

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<sup>2</sup>In her due process hearing request, Student also requested compensatory education to "provide instruction and practice designed to improve word retrieval and reading comprehension." Student confirmed at the hearing that she was not claiming that her SLD eligibility arose from a speech and language processing disorder. Student did not indicate that any compensatory education was required in these areas at hearing or in her trial brief.

Although District identified Student with ADHD in 1999, it denies that she is eligible for special education as SLD in math. District maintains that discrepancies Student exhibited between her ability and achievement in math were not severe, and that Student does not meet the criteria for a processing disorder. District further maintains that Student's struggle with math can be addressed in the regular education setting with her 504 accommodations and other available regular education interventions.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND INFORMATION

1. Student has lived in the District with her Parent and siblings and attended District schools since kindergarten. Each year District promoted Student with her peers to the next grade, where she participated in District's general education program. During the 2004-2005 school year, Student attended eighth grade at a District middle school. After eighth grade promotion, Student enrolled in South Gate High School, (South Gate), a District high school, where she is currently sixteen years old and in eleventh grade. Student was a ninth grader during the 2005-2006 school year, and a tenth grader during the 2006-2007 school year.

2. Student has never been found eligible for special education. In 1998, Student was assessed by a licensed clinical social worker, (LCSW), employed by her health care provider. The LCSW diagnosed Student with Attention Deficit Hyperactivity Disorder, (ADHD), Combined Type, meaning that Student exhibited serious inattention problems and serious problems with hyperactivity and impulsivity.<sup>3</sup> District accepted Student's

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<sup>3</sup>The diagnosis was made in accordance with the Diagnostic and Statistical Manual of Mental Disorders, (DSM), the standard reference book for diagnosing psychological conditions. All references to the DSM shall be to the Fourth Edition, Text Revision, DSM-IV-TR.

diagnosis of ADHD and acknowledged that as a result of her condition she had difficulty focusing and remaining on task which affected her ability to learn. Before the completion of Student's fifth grade year in elementary school, District developed an initial accommodation plan for her pursuant to Section 504 of the Rehabilitation Act of 1973 (504 Plan)<sup>4</sup> Student has had a 504 Plan each school year thereafter. Her 504 Plan provided, among other things, preferential seating, extra time to complete homework and tests, daily or weekly reports home, and extra sets of books to be left at home, and shortened assignments.

#### PARENT'S REQUEST FOR ASSESSMENT DURING THE 2004-2005 SCHOOL YEAR

3. Student contends that District failed to assess her during the 2004-2005 school year. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual.<sup>5</sup> All referrals for special education and related services shall initiate the assessment process and shall be documented. Based upon the statute of limitations applicable to this action, Student's claim is limited to the time period on or after April 11, 2005.

4. At Parent's request, District conducted an initial psychoeducational

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<sup>4</sup>Section 504 plans are authorized by the federal Rehabilitation Act. (29 U.S.C. § 794 (1973).) Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more of life activities, or if they have a record of or are regarded as having such an impairment. (*Ibid.*; 34 C.F.R. § 104.3(j) (2004).)

<sup>5</sup>District and Student referred to Parent's May 2005 and July 2005 assessment requests as reassessment requests. However, Student was never determined to be eligible for special education and accordingly, District's assessments were not reassessments. (Ed. Code, § 56381, subd. (a)(1).)

assessment of Student in June 1999 when she was eight years old and in second grade. At that time District determined that Student was not eligible for special education and related services as SLD because she was functioning at grade level and did not appear to be hyperactive.

5. In March 2003, when Student was in seventh grade, Parent requested that District assess Student for special education. In response to Parent's request, District reviewed Student's health, assessment and educational records, and observed Student. District declined Parent's assessment request. Based upon its review, District concluded that Student was appropriately placed in her middle school's general education program because she "possessed the necessary skills to access the core curriculum with her peers" and was "currently achieving in the average and above average range in her classes." District made reference to Student's 504 Plan as a further ground for declining Parent's assessment request.

6. In May 2005, when Student was in eighth grade, Parent again requested that District assess her for special education. District again declined to assess Student for the same reasons it declined two years earlier. Two months later, in July 2005, after Parent retained counsel, she repeated her request. Consistent with Parent's request District agreed to assess Student to ascertain whether Student had a SLD.

7. At the time of Parent's May 2005 request Student was experiencing difficulties with algebra. As she progressed from grade to grade the material was getting more difficult for her to understand. Student participated in an after-school program to work on her math, "Beyond the Bell." Student had never achieved a passing score in the math portion of the annual statewide achievement test, California's Standardized Testing and Reporting Performance Report (STAR). Student consistently performed below basic each grade year from fifth grade through eighth grade on the STAR exam.<sup>6</sup> The STAR

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<sup>6</sup>STAR grading is divided in the following manner: advanced, 430 or above; proficient, 350 through 429; basic, 300 through 349; below basic, 248 through 299; and far

exam was administered in the Spring of each school year, including March 2005.<sup>7</sup>

8. Parent's request for an assessment initiated the assessment process. District was obligated to assess Student in May 2005 based upon Parent's request. In addition, it was appropriate to assess Student near the end of middle school where Student's increasing struggle with more advanced math in eighth grade was corroborated by her historically below basic performance on the STAR exam. For these reasons, Student fulfilled her burden of proof that District should have agreed to assess Student in May 2005.

#### SPECIAL EDUCATION ELIGIBILITY FOR A SPECIFIC LEARNING DISABILITY

9. Student contends that she is eligible for special education under the category of specific learning disability (SLD) in math based on ADHD. There are two factors to consider in determining whether a child has a SLD under the severe discrepancy

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below basic, any score below 248.

<sup>7</sup> In her due process hearing request and again in the prehearing conference, Student identified the issue as a "failure to identify" Student, but also set forth factually District's failure to respond to Parent's request for assessment. At trial, Student claimed that she was not alleging that District violated its "child find" obligations during the 2004-2005 school year, but that District failed to respond to Parent's request for assessment. In her closing brief Student asserted again that District failed to appropriately respond to Parent's request, based upon its child find obligations. Student cited the wrong statute. Child find is inapplicable here where District had previously identified Student as a pupil with a disability, ADHD, and had assessed her for special education and related services. Student was "found" and accordingly, District did not violate its "seek and serve" obligation by not assessing Student during the 2004-2005 school year, as of April 11, 2005.

method: 1) Does a severe discrepancy exist between the child's intellectual functioning (or cognitive ability)<sup>8</sup> and her academic achievement; and 2) Does a child have a disorder in one of the basic psychological processes such as attention. If the answer to both questions is "yes," the child is considered to have a SLD. A determination must then be made regarding whether the pupil's unique needs can be addressed in general education. If not, the District must provide the pupil special education.

10. In the instant case, Student contends that she has a SLD because the difference between her ability and achievement is 22.5 points, or 1.5 multiplied by the standard deviation, when measured by standardized testing instruments. First, a severe discrepancy measured in this manner requires a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement tests" which demonstrates a difference in standard scores greater than 1.5 multiplied by the standard deviation. Second, once the required mathematical discrepancy between intellectual functioning and achievement is confirmed, the discrepancy must be corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples.

#### SEVERE DISCREPANCY BETWEEN INTELLECTUAL FUNCTIONING AND ACADEMIC ACHIEVEMENT

11. There are two assessments that are relevant to a determination of whether Student exhibited a severe discrepancy between intellectual functioning and academic achievement: an assessment completed by District in December 2005, and Student's IEE of June 2006 challenging District's assessment.

12. In response to Student's July 2005 request for assessment, District school psychologist Dr. Amir Mirkiani (Mr. Mirkiani) assessed Student to determine whether she qualified for special education under the category of SLD. Mr. Mirkiani completed his

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<sup>8</sup>The terms "intellectual functioning" and "cognitive ability" are used interchangeably throughout this decision.



assessment in December 2005 (District's 2005 Assessment) when Student was in 9th grade. District conducted an initial IEP team meeting on December 15, 2005, to discuss the results of the assessment. Mr. Mirkiani found a discrepancy between estimated ability and achievement in mathematics. He identified a "weakness" in the area of attention. He did not find that Student exhibited a processing disorder. He determined that Student's academic deficiencies could be corrected within the general education program.

13. Mr. Mirkiani applied alternative assessment procedures to determine whether Student had a SLD which included an analysis of current and previous test results, observations, interviews, review of records and teacher comments.<sup>9</sup> Mr. Mirkiani was unavailable to testify at the hearing so he could not be cross-examined directly about the bases for his opinion. For this reason, little weight was given to opinions drawn from his personal observations or discussions with faculty, or his ultimate conclusion that Student did not qualify for special education. His assessment was not disregarded, however. District's 2005 Assessment was considered by reviewing Mr. Mirkiani's raw data with District and Student experts.

14. District relied upon its expert, Delia Flores to explain Mr. Mirkiani's assessment. Delia Flores is the Least Restrictive Environment Specialist, Psychological Services, for District. She is a credentialed school psychologist responsible for supervising 42 school psychologists assigned to 48 District schools. She has evaluated and reviewed

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<sup>9</sup>Prior to July 1, 2005, SLD eligibility was determined by one method known as the "severe discrepancy" method. After July 1, 2005, the IDEA broadened the methods used to determine SLD beyond the mathematical discrepancy model. (20 U.S.C. § 1414(b)(6)(A); see also 34 C.F.R. 300.309 (b); Ed. Code, § 56337, subd. (b).) California law was modified to reflect these changes. (Ed. Code, § 56337 (b) (2006)). During the time period relative to this dispute District utilized alternative assessment practices because it prohibited consideration of full scale intelligent quotients (FSIQ) in determining the eligibility of students for special education.

between 300 and 400 psychoeducational assessments, and has personally conducted approximately 700 psychoeducational assessments during her career. She was well-qualified to testify about District's assessment practices, the validity and application of various testing instruments, and the scores reported by Mr. Mirkiani in District's 2005 Assessment. Delia Flores was candid about the extent of her knowledge about District's 2005 Assessment. Her testimony mainly addressed District's assessment practices and the 2005 District Assessment she reviewed previously with Mr. Mirkiani, but did not prepare. Her opinion was given less weight when it differed from Student expert, Dr. Carlos Flores, because, unlike Dr. Carlos Flores, she did not have ever met, observed, or tested Student.

15. Delia Flores described an assessment process that required a careful review of areas of Student's strengths and weaknesses and extensive corroboration of data obtained from a variety of sources. Delia Flores did not dispute Mr. Mirkiani's finding of a discrepancy. She acknowledged that District's assessments demonstrated a discrepancy between intellectual functioning and academic ability. She agreed that a severe discrepancy could be found in one subject area only. Nevertheless, from her review of Mr. Mirkiani's assessment she concluded that Student did not qualify for special education because the mathematical discrepancy could not be corroborated by Student's educational history.

16. Mr. Mirkiani administered two tests to determine Student's intellectual functioning: The Wide Range Assessment of Memory and Learning (WRAML); and the Matrix Analogies Test (MAT). These tests were selected to assess how Student processed information. The WRAML provided scaled index scores in the area of verbal memory (98), visual memory (105) and memory screening (100). Delia Flores testified that index scores indicate ability within the average mean of 100. MAT produced a total test standard score of (95) with subtest scores of pattern completion (95), reasoning by analogy (105), serial reasoning (110), spatial visualization (85). Delia Flores indicated that the total score in the MAT was a more accurate indication of Student's overall cognitive ability than the subtests. Delia Flores confirmed that it was accurate to characterize Student's overall

cognitive ability as 100.

17. Mr. Mirkiani indicated that Student's cognitive ability was in the average range. There was considerable testimony at the hearing as to what constituted "average" test scores. Student expert, Dr. Carlos Flores, indicated in his assessment report the following numerical ranges used by the test makers: 80-89 (low average); 90-109 (average); 110-119 (high average). Delia Flores could not effectively challenge these numerical ranges. At the hearing, Delia Flores testified that Mr. Mirkiani's "average" encompassed the low average range but she could not find supporting authority for her position. Accordingly, Delia Flores's testimony that District's 2005 Assessment indicated that Student's overall cognitive ability was 100 was consistent with Mr. Mirkiani's finding that Student cognitive ability was in the "average range."

18. Mr. Mirkiani administered two academic achievement tests: The Kaufman Test of Educational Achievement (KTEA); and The Wide Range Achievement Test (WRAT) On the KTEA Student obtained a score of 74 in mathematics computation, (below average) and a score of 80 in mathematics application (low average).<sup>10</sup> Math computation tested Student's basic math skills and math applications tested her grasp of math concepts. Her overall mathematics composite score was 76 (below average). Student's performance on each of these subtests indicated that her achievement compared favorably to mid- to upper- level fourth graders taking the test. On the WRAT, Student obtained a score of 60 in arithmetic (below average), which was equivalent to a third grade pupil taking the same test.

19. The data derived from Mr. Mirkiani's administration of the two cognitive

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<sup>10</sup>The test was administered twice. Certain second scores increased upwards by one to two points, a statistically insignificant change. The scores listed here are the lower scores set forth in District's 2005 Assessment. Delia Flores testified that it was inappropriate to administer the same test twice within one year as the scores of the second test administered could be artificially inflated due to the "practice effect

tests and the two academic achievement tests supported his conclusion that there was a discrepancy between Student's cognitive abilities and her achievement. Mr. Mirkiani acknowledged that Student's math skills were well below grade level with math applications in the "low average range" and math computation in the "low average and markedly below average range." According to Mr. Mirkiani, her math skills "are inconsistent and not at the mastery level in the four basic operations." He noted that Student "needs further instruction and practice in fractions and decimals."

20. Delia Flores did not question whether Mr. Mirkiani found a severe discrepancy from Student's test results. Mr. Mirkiani's conclusion that Student did not qualify for special education with a severe learning disability was derived in part from his review of her academic performance as recorded in Student's educational records. Following alternative assessment procedures Mr. Mirkiani corroborated his testing data with a review of Student's educational records. Mr. Mirkiani found that Student was achieving average grades in middle school and on standardized tests. Student passed eighth grade Algebra with a D. At the time of District's 2005 Assessment Student was in her first semester of ninth grade. Mr. Mirkiani indicated that Student's most recent grades were A in Chorus, F in Computers, D in Biology and what appeared to be an incomplete or I in Math Prep.<sup>11</sup> Based upon Mr. Mirkiani's summary of Student's educational history, Delia Flores also concluded that Student did not qualify for special education under the category of specific learning disability because of her average record of achievement.

21. Delia Flores admitted that her understanding of Student's academic record was based upon Mr. Mirkiani's incomplete report of Student's standardized test scores. Mr. Mirkiani indicated that Student had performed within the average range on statewide tests. Mr. Mirkiani failed to memorialize and explain Student's consistent below basic performance in the math portion of the annual statewide achievement test, California's

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<sup>11</sup>For the fall semester ending on February 3, 2006, Student received a F in Algebra

Standardized Testing and Reporting Performance Report (STAR). Student consistently performed below basic each grade year from fifth grade through eighth grade on the STARexam. Delia Flores was unaware of Student's STAR test scores when she concurred with Mr. Mirkiani's opinion.

22. To establish that she was eligible for special education under the category of specific learning disability, Student principally relied upon the independent educational assessment conducted by her expert, Dr. Carlos A. Flores (Dr. Flores), and his critique of District's 2005 Assessment. Dr. Flores met with Student twice during April and May 2006, and issued his report in June 2006. His report was presented at the IEP team meetings in November and December 2006.

23. Dr. Flores is a board certified clinical neuropsychologist and qualified medical examiner. As an adjunct university professor he taught neuropsychological assessment. District certified him to conduct assessments. He has extensive experience with neuropsychological assessments. Dr. Flores was well-versed in assessment administration and protocols. He was qualified to interpret District's 2005 Assessment and its 2006 assessment of Student, to administer Student's IEE, and to confirm Student's clinical diagnosis of ADHD. Undoubtedly Dr. Flores is a capable and experienced neuropsychologist. There were flaws in Dr. Flores's testimony, but overall his conclusion that Student had a severe discrepancy between achievement and ability was well-supported by his administration of a variety of tests and measures, his corroboration of his results with District's 2005 assessment, and his clinical judgment.

24. Dr. Flores was initially retained to assess Student's cognitive, academic and emotional functioning. As required, Dr. Flores used a wide variety of assessment tools and strategies for the purpose of obtaining a complete picture of Student. To assess the range of Student's functioning, Dr. Flores administered fifteen tests. He reviewed Student's medical and educational history, interviewed and observed Student during his administration of tests, interviewed Parent, obtained teacher and parent rating scales, and reviewed a wide variety of school records, including Student's 504 plan, and District's 2005

Assessment.

25. In his report, Dr. Flores concluded that Student exhibited signs of a language processing disorder, "which may well underlie her reading comprehension and reported memory difficulties." Dr. Flores recommended a more in depth speech and language evaluation to rule out a language processing disorder. Consistent with Dr. Flores's recommendations, a qualified District assessor conducted a speech and language assessment. District concluded that Student did not have a language processing disorder.

26. To support Student's claim at the due process hearing that she had an SLD in math consistent with the 22.5 points or 1.5 standard differential between achievement and ability, Dr. Flores administered the Test of Nonverbal Intelligence – 3 (TONI-3). Dr. Flores was accustomed to administering this test to brain injured clients or clients with limited English proficiency.

27. At the time of his administration of this test, Dr. Flores was aware that Student, although of Hispanic heritage, only spoke English and that English was the only language spoken at home. He still considered her Hispanic heritage a factor in selecting a nonverbal test. Dr. Flores admitted that his consideration of Student's Hispanic heritage was not clinically justified in this action. Although he suspected a language processing disorder at the time of his administration of the test, it was ultimately ruled out by District's subsequent assessment. Nevertheless, at the hearing Dr. Flores maintained that in his professional judgment, the nonverbal TONI-3 test provided the most accurate and fair representation of Student's innate ability. Student obtained a full scale intelligent quotient (FSIQ) of 106 on the TONY-3. Her score indicated that her cognitive ability was average, or within the 57th percentile of test takers. Dr. Flores added that the score was accurate within four points, or 102.

28. After Student completed the TONI-3 test, Dr. Flores administered another standard test of cognitive ability, the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), to corroborate Student's score on the TONI-3. WISC-IV is the most recent version of the assessment. It was published in 2004. WISC-IV may be used to

determine overall cognitive functioning as well as to assess pupil's strengths and weaknesses in specified areas. It is generally considered a valid and reliable indication of a pupil's discrete abilities as well as overall cognitive ability.

29. The test is comprised of four areas, or composite indices, including verbal comprehension (VCI), perceptual reasoning (PRI), working memory (WMI), and Processing Speed (PSI). Student VCI composite score was 77, or within the sixth percentile rank. Student's PRI composite score of 104 positioned her in the 61st percentile rank. Her WMI composite score was 88, or the 21st percentile rank, and her PSI composite of 100 placed her in the 50th percentile rank. Student's full scale intelligent quotient of 89 (FSIQ) was derived from the sum of the composite indices.

30. The FSIQ score is usually considered the score most representative of general intellectual functioning. However, the use of the FSIQ is not mandatory and not clinically indicated in every case. The examiner's manual cautions against wholesale application of the FSIQ score especially where there is considerable variability across the composite indices and/or subtest scores.

31. Dr. Flores's analyzed the composite scores and the subtests within each composite. He contrasted Student's VCI score with her PRI score. The VCI score is the sum of scaled scores for three subtests, similarities, vocabulary, and comprehension. Student obtained scaled subtest scores of 7, 5 and 6, respectively. The PRI score is the sum of the scaled scores for three subtests, block design, picture concepts and matrix reasoning. Student's PRI scaled subtest scores were 12, 9, and 11, respectively. Dr. Flores considered the substantial differences between her visual and verbal skills and concluded that the differences were due "primarily to tasks that rely heavily on word knowledge and that are commonly reflective of academic achievement."

32. Dr. Flores elected to ignore the FSIQ derived from his administration of WISC-IV due to the variability between the composite scores. He maintained that the FSIQ of 106 from the TONI-3 more accurately represented the overall cognitive capabilities of Student. In Dr. Flores's judgment it would not be "doing justice" to Student

to measure her overall cognitive abilities by including the disparate and deviant WISC-IV, VCI score. As a "good clinician" he thought he would get a better reading of her cognitive abilities by eliminating what he considered to be a score that reflected acquired knowledge in a school setting. Dr. Flores maintained that the PRI composite of 104 was more representative of her overall cognitive abilities and consistent with the TONI-3 nonverbal score of 106 that also measured perceptual knowledge.

33. Dr. Flores was examined and cross-examined in excess of one full day. Dr. Flores discussed the importance of using the latest assessments. According to Dr. Flores, selecting tests is not a "cut-and-dry" exercise; it takes experience, like "prescribing medication." In Dr. Flores's opinion, it was important to utilize the most recent versions of testing instruments because pupils are constantly being exposed to new knowledge and if older, more "lenient" tests are used a pupil's learning difficulties can be missed. He explained that knowledge is expanding so rapidly that tests essentially become outdated in ten years. WISC-IV is the latest version of this testing instrument. It was published in 2004. The TONI-3 was published in 1997 and is an older test. Nevertheless, TONI-3 remains a valid test of cognition. Dr. Flores's decision to use the test was appropriate especially in view of the variability between the indices in Student's WISC-IV test scores.

34. Dr. Flores never intended to use the WISC-IV FSIQ of 89 as the benchmark of Student's cognitive ability and he was not required to use it. The WISC-IV FSIQ was not noted or explained in his assessment report. His decision to use the WISC-IV to measure Student's discrete abilities only was discretionary. He administered the WISC-IV to corroborate the results of the TONI-3 as a measure of perceptual intelligence. The 106 score on the TONI-3 closely correlated with the composite measure of 104 for perceptual intelligence on the WISC-IV assessment.

35. District expert, Delia Flores, did not successfully challenge Dr. Flores's decision not to apply the WISC FSIQ of 89. Her testimony regarding the strength of the WISC-IV test as a reliable measure of discrete and overall ability was consistent with the testing instructions. However, her suggestion that the application of the WISC FSIQ was



appropriate in this case was not consistent with District's own practices. District does not use the WISC-IV to assess pupils for special education placement.

36. To meet the threshold element of a SLD, Student had to demonstrate a severe mathematical discrepancy of 1.5 standard deviations, or 22.5 points, between her cognitive ability and academic achievement. Dr. Flores made a credible case for his reliance on Student's perceptual intelligence of 106, or 106 minus 4, as a true estimate of Student's cognitive ability which was also consistent with the average score of 100 in District's 2005 assessment. Dr. Flores's results indicated that Student possessed average cognitive abilities. His findings were consistent with District's 2005 Assessment prepared by Mr. Mirkiani's. The data derived from District's 2005 Assessment corroborates Dr. Flores's conclusion that Student has a severe discrepancy between cognitive ability and achievement in math.

37. Dr. Flores administered the Wechsler Individual Achievement Tests- Second Edition (WIATT-II) to ascertain Student's ability in numerical applications. She received a score of 79. Her score was equivalent to a pupil in grade 4.9 taking the test. Applying Dr. Flores's estimate that Student's cognitive ability is 106 minus 4, or 102, a 25 point discrepancy exists between Student's cognitive ability and achievement in numerical applications. Dr. Flores did not administer the math reasoning score and did not test Student using the full composite math score. However, District also administered achievement tests in its 2005 Assessment and District's expert, Delia Flores, agreed that these tests were consistent with Dr. Flores's estimate of Student's academic achievement. On the KTEA, Student received a standard composite score of 76 in mathematics and a standard test score of 74 on mathematics computation. On the WRAT she achieved an arithmetic standard score of 60. The difference between Student's achievement scores and her cognitive ability demonstrates a severe mathematical discrepancy.

38. To determine whether Student qualifies for special education as SLD, mathematical evidence of a severe discrepancy must be corroborated with other data which may include other tests, instruments, observations and work samples. Dr. Flores

corroborated his mathematical calculation of a severe discrepancy with other assessment data, including Student's medical and educational history, District's assessments, IEP team meeting reports, Student observations during testing and rating scales from Student's math teacher and Parent. Dr. Flores did not observe Student in the classroom, but he reasoned that observing inattentive-type ADHD would not yield any new information. Delia Flores agreed that it would be difficult to observe inattentive type ADHD. Teacher witnesses also indicated that most high school pupils appear inattentive so it would be difficult to observe. Dr. Flores noted common testing errors made by Student, but, like District in its 2005 Assessment, did not otherwise review schoolwork samples. Dr. Flores's assessment and testimony support a finding that Student suffered a severe discrepancy between intellectual functioning and academic achievement.

39. District claims that further information it obtained as a result of its October 2006 assessment demonstrates that Student does not have a severe discrepancy between her general cognitive ability and academic achievement. In response to Dr. Flores's IEE, Ms. Ben Huynh, school psychologist, conducted an assessment of Student "to focus attention on major characteristics of suspected disability of Attention Deficit Hyperactivity Disorder." Ms. Huynh did not conduct additional assessments to measure Student's overall intellectual functioning. Instead, she relied upon previous assessments in reaching her conclusion that Student's general cognitive ability was within the average range.<sup>12</sup> Ms. Huynh is an inexperienced and conscientious school psychologist. At the hearing she appeared confused as to whether she was questioning whether Student had ADHD, or whether she was determining whether Student's ADHD impeded her access to education.

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<sup>12</sup>Ms. Huynh relied upon the services of District's resource specialist, Dr. Louise Still, to reassess Student's academic achievement. District's 2006 assessment of Student's academic achievement using the Woodcock-Johnson III achievement test is accorded no weight because the scores deviated substantially from both District's 2005 Assessment and Student's IEE and the accuracy of the scores could not be verified

## DISORDER IN ONE OF THE BASIC PSYCHOLOGICAL PROCESSES

40. Student contends that she qualifies for special education under the category SLD in math because of her ADHD. A pupil whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder and who meets the eligibility criteria for specific learning disability is entitled to special education and related services. Attention is one of the basic psychological processes involved in understanding or in using language.

41. Student maintains that her ADHD diagnosis establishes as a matter of law that she has a processing disorder. Student was diagnosed with ADHD in 1998, and it is uncontroverted that she continued to suffer from ADHD throughout the time period relevant to this dispute.

42. Student currently suffers from inattentive type ADHD. With this type of ADHD pupils are more likely to avoid tasks or be more easily distracted when tasks are challenging. Typical symptoms include careless mistakes, easy distractibility, difficulty following instructions, and organizing or completing tasks. Dr. Flores testified that inattentive type ADHD is not easily recognizable because pupils can remain generally quiet and may not appear distracted. His testimony on this point is consistent with Delia Flores's opinion.

43. Student's LCSW at Kaiser Permanente, Mr. David Zelen (Mr. Zelen) testified about Student's diagnosis. Mr. Zelen has been practicing at Kaiser for 19 years. With little exception, he treats young adults under 25 years of age. Fifty percent of his caseload involves pupils with ADHD. Mr. Zelen has been treating Student for a long time. Mr. Zelen demonstrated his credibility through his education, experience with treating young adults with ADHD, and his personal knowledge of Student. According to Mr. Zelen, Student exhibited behaviors associated with ADHD.

44. Student was originally diagnosed with the combined type of ADHD but now exhibits symptoms associated with the inattentive type of ADHD. Student no longer

exhibits the impulsivity associated with hyperactivity. Mr. Zelen worked with Parent and District to identify successful accommodations which would help Student complete her high school class work. He attended an IEP team meeting with Student, District and Student's attorneys about two years ago to discuss Student's math problems. He recommended an extra set of books, reduced homework, preferential seating, prompts, and extra time accommodations for tests and homework. He recalled that the accommodations were successfully implemented by Student's high school English teacher. In contrast, it was an "ongoing struggle" to implement successful accommodations in math.

45. Notwithstanding Student's ADHD diagnosis, District maintains that Student does not have any of the delineated five basic processing disorders, including attention processing, required for SLD eligibility. Mr. Mirkiani concluded that Student had a "weakness in the area of attention" but not a processing disorder. Yet Mr. Mirkiani recommended that District continue and even enhance Student's 504 accommodations for her ADHD in lieu of special education services. District maintains that its recognition of Student's ADHD condition and its provision of a 504 Plan does not establish that Student has a processing disorder. The evidentiary record, however, indicates that Student does have an attention processing disorder.

46. Dr. Markiani conducted observations of Student and collected rating scales from teachers and Parent to further determine whether Student's ADHD appeared in the classroom. Mr. Mirkiani's maintained from his observations of Student that she did not exhibit any signs of hyperactivity or impulsivity. He observed Student in her biology, math and computer classes. He did see signs of inattention but concluded that they were in the normal range. Inattention is difficult to observe. Delia Flores explained that inattention is better displayed in Student's work samples, not in direct observations. Dr. Flores concurred that it would be difficult to identify pupils with the inattentive type ADHD by observing them in class. Unlike the hyperactive type of ADHD, it is difficult to distinguish between a neurotypical high school student and one with inattentive-type ADHD.

47. Teachers<sup>13</sup>reported contrary impressions of Student to Mr. Mirkiani. She appeared focused to certain teachers, but to others she was easily distracted, too social during class time, and unable to complete work assigned. Mr. Mirkiani did not obtain a rating scale from Student's math teacher.

48. The rating scale referred to as the Attention Deficit Hyperactivity Disorder – Fourth Edition (ADHD-IV-School Version) was also administered by Mr. Chris Lizardi, Student's Computer teacher. Student received an F the first grading period and a D the second grading period in Mr. Lizardi's class. On this rating scale Mr. Lizardi indicated that Student exhibited average behaviors for hyperactivity and impulsivity. Mr. Lizardi ranked Student in the 80th percentile for inattention, meaning out of 100 test takers only 20 were less attentive than Student. Delia Flores indicated that Mr. Lizardi's ranking of 80 percent was still within the normal range; and that only scores above 84th percentile could be considered outside of normal. However, when contrasted with Student's music teacher, Mr. Lizardi's rating was very high. The music teacher's rankings indicate a wide disparity in Student's behaviors in her class and in Mr. Lizardi's class. Her music teacher rated Student in the 25th percentile for hyperactivity/impulsivity or inattention.

49. The Conners' Teacher Rating Scale is another valid tool used to measure pupils' behaviors, including behaviors symptomatic of ADHD. Student's ninth grade Algebra teacher, Mr. Travis Holden, completed the rating scale on April 24, 2006, during the time Student was enrolled in his class. Mr. Holden scores indicated that: Student often forgot things she learned; often failed to give close attention to details; avoided or was reluctant to engage in tasks that required sustained mental effort; was often inattentive; and often had difficulty sustaining attention in tasks or play activities. District claims that Mr. Holden's rating scale should be disregarded because Student helped him

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<sup>13</sup>Mr. Mirkiani's report does not clarify what he means by "teacher reports." It is unclear whether he is referring to the rating scales administered to three teachers or whether he also spoke with these same teachers, or any other teachers

fill out the rating scale. Student's extensive cross-examination of Mr. Holden established that he completed the rating scale truthfully without being told by anyone how to answer each question. Mr. Holden's rating scale is consistent with Student's claim that she suffers from a discrete SLD in math.

50. Ms. Ben Huynh testified that Student's ADHD did not appear as a processing disorder at school. Ms. Huynh conducted tests to assess whether Student's cognitive processing skills were adversely affected by ADHD. One of these tests, the Cognitive Assessment System (CAS) tests planning, and simultaneous and successive processing, and Ms. Huynh analyzed each of these discrete processes separately. Two timed subtests, Expressive Attention and Number Detection involved direct focused and sustained effort and concentration. Student's scaled scores of two on these tests indicated that she had problems with tasks involving "two aspects of stimulus separately." These subtests demonstrated that Student had a processing disorder. However, after Ms. Huynh corroborated the results of this test with an untimed test, she concluded that Student did not have a processing disorder. This untimed test, however, involved a simple memory task that only required that Student pay attention to one stimulus, not multiple stimuli. Accordingly, Ms. Huynh's opinion that Student did not have a processing disorder was not supported by her test data.

51. Ms. Huynh also administered the Barkley Screening Checklist for ADHD – Disruptive Rating Scale and the BASC-2 to several teachers including the physical education teacher, chemistry teacher and English teacher. She did not distribute rating scales to Student's math teacher. The English teacher indicated at-risk levels for attention, but otherwise, Ms. Huynh reported that none of the teachers indicated symptoms of ADHD marked by inattention, impulsivity and hyperactivity. Ms. Huynh also observed Student in class and at recess and did not observe signs of ADHD.

52. Mr. Mirkiani expressly indicated that Student evidenced a discrepancy between her cognitive ability and achievement in math. Ms. Huynh's opinion presumes that Student's ADHD only manifests as an attention processing disorder if it appears

systematically across all school settings. Ms. Huynh's assumption is contrary to the governing law which expressly provides that the psychological processing disorder of attention can manifest in one area such as mathematics. Mr. Mirkiani's found a discrepancy in one subject area. Delia Flores agreed that a SLD can be limited to one subject area. In contrast to hyperactive-type ADHD, inattentive-type ADHD is not easily observable. It is especially acute where Student is challenged and where the subject matter is not interesting to the pupil. Accordingly, Ms. Huynh's assessment did not support a finding that Student does not have an attention processing disorder that manifests in math.

#### ADEQUACY OF SERVICES IN THE REGULAR EDUCATION CLASS

53. Student qualifies for special education under the category of SLD only if the discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program. District is not required to narrow the mathematical discrepancy between Student's own achievement and intellectual ability, or maximize Student's potential. District is required to provide adequate services in the general education classroom so that Student can benefit educationally from the instruction. Decisions regarding special education eligibility and services are made at individual education program (IEP) team meetings. The decisions of the IEP team are judged in terms of what was reasonable at the time of the IEP meeting.

#### DURING THE 2005-2006 SCHOOL YEAR

54. District's 2005 Assessment by Mr. Mirkiani was presented at an IEP team meeting on December 15, 2005, a few months after Student entered ninth grade, her first year at South Gate.

55. Through his administration of the KTEA, Mr. Mirkiani identified Student's serious challenges in math. Mr. Mirkiani observed that Student became "frustrated" and "distracted" during the test. Student expressed to him "several times" that she did not like

math. Mr. Mirkiani noted that Student expressed particular difficulty with multiplication, fractions, and advanced number concepts. It was apparent to him that Student had problems applying her mathematic knowledge to appropriate situations. Student's computation skills were also weak in the area of regrouping subtraction, advanced subtraction, and fractions.

56. Mr. Mirkiani's suggested that Student's negative attitude distorted her math ability. He noted one example of a careless error at the beginning of the test as exemplary of the manner in which Student's negative attitude affected her performance. In view of the consistency between the KTEA scores and Student's consistent below basic performance on the STAR test, Student's negative attitude had a negligible impact on her math score.

57. At the time of the December 15, 2005, IEP team meeting Mr. Mirkiani's information about Student was limited to her educational history through middle school, and her first months at South Gate. At the middle school, Student was passing all her classes, including Algebra, and faithfully participated in "Beyond the Bell", a regular education support program. From the STAR test results it was clear that Student was still not proficient in math, but she was passing math and taking advantage of interventions.

58. Student testified about her historical difficulties with math. She confirmed that her difficulties with math became more pronounced as the courses became more demanding. She testified that math was much easier in middle school, until eighth grade. She was able to perform addition, subtraction and multiplication, with help from friends. In eighth grade math became more difficult. She had trouble understanding Algebra and following class instruction. Student was candid when speaking about her struggle with math. Her testimony about her academic limitations was carefully considered.

59. Mr. Mirkiani believed that Student could still function "within the instructional range" of the general education curriculum without special education services. When Mr. Mirkiani assessed Student the math teacher reported that she was in danger of "failing" or "meeting promotion standards." Eventually, Student did receive an F



in the fall of her ninth grade year. Mr. Mirkiani did not relate Student's failure to her consistent low performance in math. He concluded that her deficiencies were the consequence of her absences failure to complete assignments, make up missing work or receive additional help. After considering Student's behavior, Mr. Mirkiani concluded that Student's deficiencies could be accommodated in the regular education class. He recommended regular school attendance, improved work habits, after-school tutoring, and participation in the Beyond the Bell intervention program.

60. Student claims that by the time Student entered South Gate it was apparent that her 504 Plan and other general education interventions were ineffective and that District had exhausted its general education interventions. Student was consistently performing below basic on the STAR exam. District knew from Mr. Mirkiani's assessment that Student did not have a sufficient grasp of basic mathematical skills despite a 504 Plan and after school tutoring program. District was aware that she struggled with eighth grade algebra and that ninth grade algebra was more demanding. At the time of the December 2005 IEP team meeting it was not reasonable for the IEP team to conclude that 504 Plan accommodations and regular education tutoring would continue to provide Student an educational benefit. For these reasons, Student met her burden of proof that District denied her a FAPE by failing to find her eligible for special education during the 2005-2006 school year.

#### DURING THE 2006-2007 SCHOOL YEAR

61. The results of the assessments by Dr. Flores and District were presented at IEP team meetings in November and December 2006, when Student was in tenth grade. At the 2006 IEP team meetings District again concluded that Student did not qualify for special education.

62. By the time Dr. Carlos Flores and school psychologist Ben Huynh presented their assessment report, at the IEP team meeting November 2006, there were strong indications that Student's math struggle continued unabated at South Gate. Ms. Huynh

prepared her report on October 21, 2006. By this time, Student had twice failed the first semester of high school Algebra, and again scored below basic on the ninth grade STAR exam. Ms. Huynh noted the results from the STAR exam, but only recorded Student's final passing grade in Algebra. On the algebra portion of the ninth grade STAR exam, Student correctly answered 29 percent of questions pertaining to number properties, operations, and linear equations whereas proficient pupils answered at least 75 percent of the questions correctly. Student's score was closer to proficient pupils in other algebraic content areas but still below basic.

63. In ninth grade District revised Students 504 Plan. The 504 Plan provided a range of accommodations on an as needed basis including, extra time for completion of homework, shortened assignments, presentation of work in smaller increments, simplification of complex directions, sitting in front of the class, providing an extra set of books, preparation of log to record homework, missing assignments and provide advanced notice of exams to Parent.

64. Parent worked hard to make sure the accommodations were in place and that she received feedback so that she could effectively monitor Student. Parent testified that she spoke regularly with school officials and Student's teachers to inform them of Student's accommodations and to make sure that teachers notified her of any concerns. Her efforts were confirmed by District's Assistant Principal and Student's teachers, including her math teachers.

65. The accommodations worked with varying success. Several teachers testified. Ms. Miriam Ehrlichmann, Student's 10th grade English teacher always gave opportunities to make up missing work. Student took the initiative to complete assignments by staying after class to find missing homework, asking about missing assignments. Student received B's in English and would have received A's if she had completed all her assignments.

66. Student's tenth grade History teacher, Mr. Ron Davis, testified. He was aware of Student's 504 Plan and tried to provide accommodations by providing extra time on

assignments and quizzes. Student received a D, first term and a C second term. Student missed a very simple project. He gave her an extra week to complete the work. When Student did not hand it in, he extended the deadline. He was "disappointed" when Student did not complete her paper because she had been doing so well.

67. Student's teachers were also available for tutoring.<sup>14</sup> Mr. Louis Harnish, Student's tenth grade Chemistry teacher testified that her grade improved from a D to a C after he tutored her. Mr. Holden, Student's ninth grade Algebra teacher stated that he was available for tutoring but Student rarely asked him to help her with algebra. At Parent's request he provided Student with an extra set of books. He was told that Student was uncomfortable being alone with male teachers.

68. Mr. David Lavi, Student's Geometry teacher is credentialed and qualified as a general education math teacher. He testified credibly about the accommodations he offered. He was generally pleased with Student's progress during the first term of Geometry, although he noted on her progress report that Student failed to complete assignments or tasks. Student was able to make an oral presentation using a two column proof. Student's performance during the last term of Geometry earned her an F. During that term, Mr. Lavi focused on four pupils, including Student, that were in danger of failing he class. He reminded her to make up quizzes and assignments. He completed the parent log as best hecould. Mr. Lavi noted in her last failing report card that she was "improving to meet the standards of the course."

69. Mr. Lavi offered daily tutoring during the thirty minute lunch break each day. Student rarely took advantage of his offer. Student admitted that she did not often attend lunch time tutoring because it conflicted with the short lunch break. Parent explained that the lines were long and by the time Student bought her lunch, the lunch

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<sup>14</sup>From the testimony of Student, Parent and District it was unclear whether the Beyond the Bell program was offered or consistently available during the 9th and 10th grade

break was nearly over.

70. Mr. Lavi is not credentialed or knowledgeable about special education. He testified that he thought Student understood geometry concepts, but nevertheless could not always know what "was going on inside her head." He could not explain why Student scored "far below basic" in geometry on the STAR exam if she understood geometry. Student testified that she had difficulty understanding geometry.

71. District contends that Student's extensive absenteeism was also responsible for her failing math. Student did have a large number of absences during her ninth and tenth grade years due to side effects from her ADHD medication. Nevertheless, Student's absenteeism did not account for Student's inability to benefit from her regular education math curriculum. Student continued to struggle in math the remainder of tenth grade. Student passed the equivalent of one semester of high school Geometry with a passing grade of C, but failed the second semester twice. Student has yet to pass the second semester of high school Geometry. In tenth grade Student scored far below basic in geometry on the STAR exam. On the geometry portion of the tenth grade STAR exam, the distance between Student's score and that of proficient pupils was cavernous in all content areas of geometry. Student obtained between 25 and 27 percent correct in logic and geometric proofs, volume and area formulas, angle relationships, constructions, and lines. Proficient students answered at least sixty percent of questions concerning these areas correctly. Given her ability to pass other courses, and her consistent low performance in algebra and geometry, both in class and on the STAR exam, her absenteeism does not account for her failure in math.

72. At the end of tenth grade, Student also failed her first attempt at passing the math section of the California High School Exit Exam (CAHSEE). A minimum score of 350 is required to pass the math section of CAHSEE Student obtained a score of 327 in math. Student obtained correct answers in approximately one-third of the questions asked in probability and statistics, measurement and geometry and algebra. She answered 45 percent of the questions correctly in algebra and functions and 41 percent in number

sense. In contrast, she provided correct answers for 86 percent of the questions in word analysis, 72 percent in reading comprehension and 92 percent in writing strategies. Student has five opportunities to pass CAHSEE. District offers a "boot camp" for pupils in their senior year if they failed CAHSEE several times. District is confident that Student will pass the exit exam. Student's test score indicated that she was about eight questions shy of passing the exam. At boot camp pupils are drilled so that they can pass the exam; boot camp is not designed to duplicate and supplement classroom learning.

73. District maintains that its general education accommodations were sufficient to provide Student an educational benefit. Mr. Joseph Di Leva, South Gate's Assistant Principal testified about the school's general education tutoring programs and graduation requirements. District offers an after-school tutoring program to assist pupils with classroom content in core subjects, including algebra and geometry, two to three times a week. The tutors are general education teachers. The after school tutoring is not individualized; it is provided to a group of Students. Teachers must have a certain number of Students present in order to provide tutoring. Students with concerns in any math course may participate in the same session. Student attended one or two sessions of after school tutoring. One session was cancelled because there were an insufficient number of Students attended. Student did not benefit from the other session she attended because the teacher was responding to questions about other math topics that did not pertain to her course.

74. District also offers a general education one-on-one tutoring program as part of its "No Child Left Behind" obligations. The program provides tutoring once a week with an outside vendor. This tutoring program is arranged directly between the outside agency and pupils and can be provided in the home. Every Student is eligible for the program. There was no evidence that tutoring program was ever offered to Student.

75. District's general education accommodations were not sufficient for Student during the 2006-2007 school year. Student testified that she did not understand geometry and that her teachers did not know how to teach her geometry. She didn't

complete all her homework assignments because she didn't understand them. Student would have benefited from attending Mr. Lavi's one-half hour tutoring sessions, but given her history with math and her consistent low performance on STAR, she needed more individualized and specially tailored instruction than the one-half hour general education tutoring session could provide.

76. Dr. Louise Still, District's resource specialist testified that South Gate follows a full inclusion model of specialized instruction as opposed to a pull-out model. In the full inclusion model the resource specialist provides support to the regular education instructor. The same model can be applied to tutoring. In class and in tutoring, the resource specialist would work with the regular education instructor to find more effective ways to make the subject matter understandable. Alternatively, a special education instructor could provide the tutoring directly.

77. During the 2006-2007 school year, Student's SLD could not be fully accommodated in the regular education program. Student has met her burden of proving that District denied Student a FAPE by failing to find her eligible for special education during the 2006-2007 school year.

#### COMPENSATORY EDUCATION

78. Compensatory education is an equitable remedy which may be ordered to provide appropriate relief where a pupil was denied a FAPE. An award of compensatory education need not be on a "day-for-day" basis.

79. District denied Student a FAPE during the 2005-2006 and 2006-2007 school years, because it could not provide adequate services and supports in her general education math classroom so that Student could benefit educationally from the instruction. Compensatory education is therefore appropriate to offset the deficiencies in the general education math classroom.

80. Student's chronic difficulties with math were demonstrated by her STAR results, District's 2005 Assessment and Dr. Flores's IEE. She took the equivalent of five

semesters of Algebra and still underperformed on STAR and CAHSEE. She repeated one semester of Geometry twice and has yet to pass it. Student spent on average 90 minutes a day in high school general education math classes. Her teachers were credentialed as general education math and generally did their best to provide Student accommodations, but nevertheless Student continued to struggle. General education tutoring was offered but it was not tailored to meet Student's particular challenges, or offered for a sufficient duration of time. Student testified that she did not benefit from group tutoring involving varied subject matter. One-on-one after school tutoring was not provided.

81. In District's 2005 assessment Mr. Mirkiani found that Student's math skills were well below grade level with math applications in the "low average range" and math computation in the "low average and markedly below average range." He noted that Student had not obtained mastery of the four basic operations and that she needed further instruction and practice in fractions and decimals. Dr. Carlos Flores concluded that Student was deficient in basic math applications. District's STAR exam sets forth critical areas of weakness in Student's performance in algebra and geometry. Student further requires specialized instruction to modify her remaining Geometry lessons.

82. An educator's guidance on appropriate educational policy is generally given deference. District's resource specialist, Dr. Louise Still, described the special education "magic" she and other resource specialists perform in the general education classroom by co-teaching with general education teachers to break down and pace the assignments according to the needs of the particular pupil. The resource specialist can work with the general education math teacher and tutors to tailor the curriculum for Student with her attention deficits in mind. Special education instructors can also provide tutoring directly to Student.

83. Based upon the evidentiary record of Student's math challenges and Dr. Louise Still's testimony, Student is entitled to receive the assistance of a resource specialist to work with her general education math teacher to tailor her curriculum, and to develop a one-on-one tutoring program to tutor Student in geometry as well as basic math skills

as indicated in District's 2005 Assessments, Student's IEE, and STAR, including, but not exclusive to, computation, numerical applications, and fractions and decimals. A resource specialist shall spend no more than ten hours to consult with Student's geometry teacher to develop an appropriate curriculum and, on an as needed basis, provide consultative services to the teacher throughout the course, including visitation to the classroom, and review of Student's work. A resource specialist shall spend no more than seven hours to work with general education tutors to develop a one-on-one tutoring program for Student and, on an as needed basis, consult with tutors, and review Student's progress. Student is entitled to a total of 38 hours of one-on-one tutoring, divided into one hour sessions, no less than once a week, which may be provided at District's election by a District teacher, after school, or through a nonpublic agency. Compensatory education and services shall be provided during the 2007- 2008 school year only.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

### BURDEN OF PROOF

1. Student has the burden of proof on the contested issues. (*Schaffer v. Weast*(2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

### THE GENERAL PRINCIPLES OF THE IDEA

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA children with disabilities have the right to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A district must provide a basic floor of opportunity consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the child with a disability. (*Bd. of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, (1982) 458 U.S.



176. 200-201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp.198-199.)

3. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

#### ELIGIBILITY

4. Special education is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student whose educational needs cannot be met with modification of the regular instruction program. (20 U.S.C. § 1402(29).) Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) This right to FAPE arises only after a student is assessed and determined to be eligible for special education.

5. A student is eligible for special education and related services if he or she is a "child with a disability" such as mental retardation, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and as a result thereof, need special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b).)

#### REFERRAL FOR ASSESSMENT

6. The IDEA and state law imposes upon each school district the duty to

actively and systematically identify, locate, and assess all children with disabilities or exceptional needs who require special education and related services, including children with disabilities who may be homeless or migrant, wards of the state, or not enrolled in a public school program. (20 U.S.C. §1412(a)(3); 34 C.F.R. §300.125; Ed. Code, §§56300, 56301.) This statutory obligation of a school district to identify, locate, and assess children with disabilities is often referred to as the “child find” or “seek and serve” obligation and applies also to children who are suspected of having a disability and in need of special education even though they may be advancing from grade level to grade level. (34 C.F.R. §300.125(a)(2).) A state must ensure that these child find duties are implemented by public agencies throughout its jurisdiction as part of its general obligation to ensure that FAPE is available to all children with disabilities who reside within the state. (34 C.F.R. §300.300(a)(2).)

7. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed. Code, §56029, subds. (a)-(b).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, §3021, subd. (a).) A referral for assessment is appropriate where a pupil has not made adequate progress after an appropriate period of time. (34 C.F.R. § 300.309 (c).) A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, §56303.)

#### INDEPENDENT EDUCATIONAL ASSESSMENTS/PUBLIC EXPENSE

8. The procedural safeguards of the IDEA provide that 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); 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 assessment means an assessment 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 assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

9. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or
- (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) The public agency may ask for the parent’s reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) In other words, when a parent requests an IEE, and the district neither files its own due process complaint nor provides the IEE, the burden of proof is on the district to demonstrate that the parent’s privately obtained IEE did not meet agency criteria. (See 34 C.F.R. § 300.502(b)(2)(ii); *Schaffer v. Weast, supra*, 126 S.Ct. at p. 534 [“When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute.”])

## ELIGIBILITY FOR SPECIFIC LEARNING DISABILITY

10. A student is eligible for special education under the category of "specific learning disability" if: 1) based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement tests" has a severe discrepancy between intellectual ability and achievement the 2) the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations; and (3) the discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j)).<sup>15</sup> The discrepancy shall not be primarily the result of limited school experience, or poor school attendance. (Cal. Code Regs., tit.5, § 3030, subds. (j)(4) & (5).) SLD does not include problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, environmental, cultural, or economic disadvantage. (34 C.F.R. § 300.8(c) (10)(ii); Ed. Code, § 56377, subd. (a).) Further a pupil is not eligible for special education if the determining factor for such eligibility is lack of appropriate instruction in reading or math, or if the pupil has limited English-proficiency. (Ed. Code, § 56329, subd. (a)(2).)

11. The courts apply the *Rowley* standard and consider whether the pupil is receiving some educational benefit from the general education classroom. (*Hood v.*

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<sup>15</sup>The operative federal regulation as of July, 2005, 34 Code of Federal Regulations part 300.7, was not amended until October 13, 2006, and the comparable regulation, 34 Code of Federal Regulations part 300.8, does not substantively differ from its predecessor. The new federal regulations are numbered differently than the old federal regulations. The citations herein are to the new regulations, because the applicable statute is the reauthorized IDEA

*Encinitas Union Sch. Dist.* (9th Cir. 2007) 486 F. 3d 1099,1107.) In *Hood*, it was undisputed that the pupil was progressing in the general curriculum along with her peers by achieving nearly uniformly average or above average grades, and performing at or above grade level. (*Id.* at p. 1108.) In *Hood*, the school district offered 504 accommodations, but the pupil's parents removed her from public school shortly after the 504 accommodations were implemented. The court affirmed the ALJ's determination that pupil was not eligible for special education under the category of SLD because pupil could not demonstrate that 504 accommodations would not be sufficient to correct her deficiencies in the regular education classroom. (*Id.* at pp. 1108-09.) The courts must defer to school districts' notions of sound educational policy. (*Id.* at p. 1108.)

12. A student "whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder" and who meets the eligibility criteria for specific learning disability under Education Code section 56377 and California Code of Regulations, title 5, section 3030, subdivisions (f) and (j), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

13. "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) "Specific learning disability" does not include "learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).)

#### COMPENSATORY EDUCATION

14. When a school district denies a child a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359, 369 (1985); *Student W. v. Puyallup*

*School Dist.*, 31 F.3d 1489 (9th Cir. 1994); 14 U.S.C. §1415(i).)

15. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for- day compensation.” (*Id.* at p. 1497.) Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

#### DETERMINATION OF ISSUES:

ISSUE 1: DID DISTRICT FAIL TO ASSESS STUDENT DURING THE 2004-2005 SCHOOL YEAR

16 Based upon Legal Conclusions 1, 6 through 7, and Factual Findings 1 through 8, Student met her burden of proof that District failed to assess Student pursuant to Parent’s request for assessment in May 2005. Parent made a written request for assessment. District was obligated to assess Student in May 2005 based upon Parent’s request. In addition, it was appropriate to assess Student near the end of middle school where Student’s increasing struggle with more advanced math in eighth grade was corroborated by her historically below basic performance on the STAR exam. There is no evidence that District acquired new information about Student between May 2005 and July 2005 when Parent repeated her request and District agreed to assess Student.

ISSUE 2: DID DISTRICT FAIL TO PROVIDE AN IEE AT PUBLIC EXPENSE TO ASSESS WHETHER STUDENT HAD A SEVERE LEARNING DISABILITY.

17 Based upon Legal Conclusions 8 through 9, and District’s stipulation to a finding on this issue, District failed to provide an IEE at public expense. District agreed to reimburse Student for the IEE prepared by Dr. Carlos Flores in the amount of \$2500 dollars.

ISSUE3: DID DISTRICT DENY STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION BY FAILING TO FIND STUDENT ELIGIBLE FOR SPECIAL EDUCATION UNDER THE CATEGORY OF SLD FOR THE 2005-2006 AND 2006-2007 SCHOOL YEARS

18 Based upon Legal Conclusions 1 and 10, and Factual Findings 11-39, Student met her burden of proof that she suffered from a severe discrepancy between her intellectual functioning and academic achievement. She also met her burden of proof that she had a processing disorder, as set forth in Legal Conclusions 1, 12 and 13, and Factual Findings 1 through 2, and 40 through 52. Student was diagnosed with ADHD in 1998, and it is uncontroverted that she continued to suffer from ADHD throughout the time period relevant to this dispute. District recognized that Student's ADHD condition impacted her access to education with its provision of a 504 Plan. Further, the evidentiary record indicates that Student's processing disorder manifests in math.

19 Student met her burden of proving that her SLD could not be corrected in the regular education class during the 2005-2006 school year. Based upon Legal Conclusions 1 through 5, and 10 through 11, and Factual Findings 53 through 60, it was not reasonable for District to conclude that Student's SLD could be addressed adequately in the general education classroom. Student had a history of underperforming in math as indicated in the statewide STAR exams. District had provided Student with accommodations throughout middle school where Student attended a regular education after school tutoring program. Student's struggle with math intensified in eighth grade. At the time of the December 2005 IEP it was not reasonable for District to conclude that accommodations within the regular education classroom would be effective.

20. Student met her burden of proving that Student's SLD could not be corrected in the regular education class during the 2006-2007 school year. Based upon Legal Conclusions 1 through 5, and 10 through 11, and Factual Findings 44, and 51 through 77, it was apparent that District's accommodations were not working in Student's math classes. The regular education interventions were not sufficient. Student failed Algebra twice and Geometry twice. Student's standardized test scores confirmed that she

could not understand geometry. Student would have benefited from the lunch time tutoring offered by her math teachers, but the curriculum needed to be modified and the individual tutoring offered by the regular education math teachers at lunch time needed to be supplemented with additional individualized tutoring.

21. Based upon Legal Conclusions 14 through 15, and Factual Findings 78 through 83, Student provided a sufficient basis for the ALJ to exercise her discretion to award compensatory education. To receive an educational benefit, Student's general education math curriculum required modifications made by a District resource specialist. The resource specialist needed to break down the lessons to improve her ability to absorb the instruction and complete her assignments. Student would have also benefited from a one-on-one tutoring program developed by the resource specialist.

## ORDER

1. District shall reimburse Student for the IEE of Dr. Carlos Flores in the amount of \$2500 dollars within 30 days of this decision.

2. District shall provide the following compensatory education which will terminate at the end of the 2007-2008 school year.

(A) District resource specialist(s) shall provide a total of ten hours of services to:

(1) work with Student's general education math instructor(s) to develop her remaining Geometry curriculum;

(2) on an as needed basis, review Student's progress with Student's general education Geometry instructor(s), provide guidance to the instructor(s), review Student's work, and work with Student in the classroom.

(B) District resource specialist shall provide a total of seven hours of services to work with Student's tutor(s) to develop a tutoring program, to provide consultation to Student's tutors and to monitor Student's progress. The tutoring program shall be designed to address Student's math deficiencies in Geometry, and other deficiencies noted in District's 2005 Assessment, Student's IEE and STAR, including, but not exclusive



to, numerical applications, math computation, and fractions and decimals. The tutoring program shall be distributed to Student's tutors and her math teacher for use with Student.

(C) District shall provide Student a total of 38 hours of one-on-one after school tutoring, for a one hour period of time, no less than once a week, to address Student's math deficiencies in Geometry, and other deficiencies noted in District's 2005 Assessment, Student's IEE, and STAR, including, but not exclusive to, numerical applications, math computation, and fractions and decimals. At District's election, the tutoring program can be provided by District teachers, on-site as an after-school program, or by a non-public agency of District's choice. District's one-on-one tutoring program shall not be used in the place of other regular education tutoring programs available to Student as a District pupil, such as tutoring programs designed for passage of the CAHSEE.

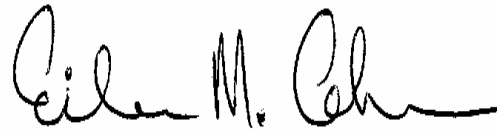
## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on all issues heard and decided in this due process matter.

## RIGHT TO APPEAL THIS DECISION

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

DATED: October 26, 2007

A handwritten signature in black ink, reading "Eileen M. Cohn". The signature is fluid and cursive, with the first name "Eileen" being the most prominent.

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EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division