

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

PAJARO VALLEY UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2005120162

DECISION FOLLOWING REMAND

Administrative Law Judge (ALJ), Trevor Skarda, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 28, March 1, 2, 3, 6, and 7, 2006, in Watsonville, California.

Petitioner Student was represented by attorneys Mandy G. Leigh and Emily Berg. Petitioner's parents, Mother and Father, each attended the hearing on Petitioner's behalf during portions of the hearing. Student did not attend the hearing.

Respondent Pajaro Valley Unified School District (District) was represented by attorney Laurie E. Reynolds. Carol Lankford, the special services director of the Pajaro Valley Unified School District Special Education Local Plan Area (SELPA) and Linda Sorranto, the SELPA program director, attended the hearing on behalf of the District.

Student called the following witnesses to testify: Student's Mother; Student's Father; Sandii Alamillo, instructional assistant in the District; Rosa Sanchez, instructional assistant in the District; Ruth H. Kaspar, audiologist; MaryAnn Otero Gomez, retired instructional assistant in the District; clinical psychologist Roslyn Wright, Ph.D.; and, Judith W. Paton, audiologist.

District called the following witnesses to testify: Leslie Viall, school psychologist in the District; Nancy Clasipill-Navarro, resource specialist teacher in the District; Susan Audet, general education teacher in the District; Laurell Ann Nakanishi, speech and language specialist in the District; Shelby Speer, general education teacher in the District; Ian Macgregor, principal in the District; Jody Winzelberg, audiologist; and, Carol Lankford.

On January 4, 2005, the Student filed an Amended Request for Due Process and Mediation.¹ On February 23, 2006, ALJ Trevor Skarda conducted a telephonic prehearing conference. On February 27, 2006, ALJ Skarda issued a prehearing conference order. Sworn testimony and documentary evidence were received at the hearing on February 28, and March 1, 2, 3, 6 and 7, 2006. Upon receipt of the written closing arguments, the record was closed on March 20, 2006, and the matter was submitted.

On May 5, 2006, ALJ Skarda issued the final decision in this matter, ruling in favor of the District. After the final administrative decision was issued, Student appealed to the United States District Court. (*E.M. v. Pajaro Valley Unified School Dist.* (Case No. C 06-4694-JF). The parties filed cross motions for summary judgment. On October 16, 2008, the Honorable Jeremy Fogel, United States District Court Judge, Northern District of California, San Jose Division, issued an Order Denying Cross Motions for Summary Judgment and Remanding Case to ALJ for Further Proceedings (Remand Order). The

¹ Student filed an earlier hearing request, to which the District filed a notice of insufficiency. The District's objection to the sufficiency of the complaint was sustained, and Student was granted leave to file an amended complaint. Student filed a timely amended complaint on January 4, 2006. The District filed a second notice of insufficiency, which was overruled.

Remand Order requires “further analysis and explanation” of Factual Findings 8, 14, 21, 30, 33, 35, and 37, and Legal Conclusions 14, 15, 16, and 19.

This Decision Following Remand repeats the text of the May 5, 2006, decision, but adds lettered paragraphs under the paragraphs that need further explanation according to the Remand Order. Factual Finding 30, for example, is newly supplemented by Factual Findings 30a, 30b, and so forth. Legal Conclusion 12a is also added.

On December 23, 2008, ALJ Skarda convened a telephonic conference to discuss a briefing schedule. Both parties submitted briefs to OAH related to the Remand Order on February 17, 2009.

ISSUES²

1. Did the District fail to fulfill its child-find and search and serve obligations from December 5, 2002, through the present?

2. Did the District fail to consider a parent-obtained assessment at the October 2004 Individualized Education Program (IEP) team meeting, and if so, did this procedural violation result in a denial of a FAPE to Student?

3. Did the District deny Student a free and appropriate public education (FAPE) from December 2002 to the present because it failed to find Student eligible for special education and related services under the eligibility category of specific learning disability (SLD)?

4. Did the District fail to assess Student in all areas of suspected disability in October 2004 and May 2005, when it failed to assess Student’s auditory processing, hearing and behavior?³

² For purposes of clarity and organization, the ALJ has reorganized Student’s issues as identified in Petitioner’s amended due process hearing request.

5. If Student prevails on any or all of Issues 1 through 4, above, is Student entitled to the following relief: (a) a private assistive technology assessment; (b) a private behavior observation; (c) auditory integration therapy (AIT); (d) a private speech and language assessment; (e) parent training to be provided by the private assessors and therapy providers; (f) a determination that Student is eligible for special education and related services as a pupil with an SLD; and, (g) tutoring?

CONTENTIONS OF THE PARTIES

Student contends that the District should have referred Student for a special education assessment beginning in December 2002, in large part, because of declining grades and distractibility. The District's position is that it fulfilled its global "child-find" responsibilities – districts are required to have a continuous child-find system designed to locate children who may be eligible for special education and related services – and that it also had no individual duty to refer Student for an assessment during the time period at issue.

Student contends that the District failed to consider a private assessment of Student at an IEP team meeting in October 2004, and that this procedural violation resulted in a denial of FAPE. The District's position is that it not only considered and

³ At the prehearing conference Student sought to add an issue not found in the amended complaint, i.e., whether the District should have assessed Student for attention deficit disorder (ADD) and/or attention deficit-hyperactivity disorder (ADHD). The District moved to strike this proposed issue because it was not identified in the amended complaint. The ALJ granted District's motion to strike. Student's attorney sought to add the same substantive issue on March 3, 2006, the fourth day of hearing, and her request was again denied.

discussed the assessment at the pertinent IEP team meeting, it relied on tests administered by the psychologist in the private assessment when it determined that Student was not eligible.

Student contends that, from December 2002 onward, Student was eligible for special education and related services as a child with a specific learning disability. Because the District never found him eligible and provided no special education services, the District denied Student a FAPE during this entire period. The District contends that Student was not eligible because, when tested in the fall of 2004, Student did not exhibit a severe discrepancy between intellectual ability and academic achievement in any area.

Finally, the Student contends that the District failed to assess Student in three areas of suspected disability: auditory processing, hearing and behavior. The District contends that it assessed Student in all three areas.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Student is an eleven-year-old sixth-grade pupil who resides with his parents within the geographical boundaries of the Respondent District. He has never been found eligible for special education and related services.

FACTUAL BACKGROUND

The District's Continuous Child-Find System

2. SELPA Director Carol Lankford's testimony established that the District has written policies and procedures, including written notice to all parents of their rights and the procedures for initiating a referral for special education. Every year the District sends written notices to all parents; the notices describe the special education referral process.

Teachers and other special education staff, including general education teachers, receive training regarding the special education referral process each fall.

3. Student failed to establish that the District's continuous child-find system was inappropriate from December 2002 to the present.

Child-Find During The 2002-2003 School Year

4. For the 2002-2003 school year, Student attended the third grade at the District's Mintie White School. He was taught by regular education teacher Angela Daley. Ms. Daley did not refer Student for a special education evaluation during the school year. Student did not receive special education or related services during this school year.

5. Student performed satisfactorily in reading during the 2002-2003 school year, exhibiting "good fluency," according to Student's report card prepared by Ms. Daley. Student experienced difficulty in the area of writing during the second quarter. However, his writing "improved a lot" by the end of the school year. In the area of mathematics, Student performed satisfactorily two quarters and unsatisfactorily another quarter. Student's listening and speaking skills were satisfactory all three quarters. Student's performance in the areas of science, social studies, health/physical education and arts (visual and performing) was satisfactory. In all academic areas, Student was performing at or above grade level standards by the final quarter of the academic year.

6. Student was promoted to the fourth grade at the end of the 2002-2003 school year.

7. Mother's testimony established that Student was somewhat distractible during the 2002-2003 school year in the classroom. Mother had several conversations with Student's teacher regarding, in pertinent part, Student's distractibility. Mother never requested that Student be referred for a special education assessment.

8. Student failed to establish that the District had a duty to initiate a referral for special education and related services 2002-2003 school year. Although Student exhibited some distractibility, he performed at grade level standards and advanced to the fourth grade without the need for special education and related services.

8a. Factual Finding 8 is based on Factual Findings 4-7. The District was required to initiate its own referral within a reasonable time after it had knowledge of facts tending to establish a disability and the need for special education services. The evidence established that District had no knowledge of facts tending to establish that Student had a disability during the 2002-2003 school year. Student presented as a child with some weaknesses, including distractibility, focus, problems working independently and efficiently, and difficulty completing all of his assignments. In hindsight, these may appear to have been suspected disabilities. However, at the time in question, despite these weaknesses, Student's report card reflects that he fared "well" in reading and math, and his writing skills improved during the school year. Moreover, without special education or related services, Student progressed in the general education curriculum sufficiently to advance to the next grade. Based on the evidence, Student did not establish that District had knowledge of facts tending to establish a disability and the need for special education services. To the contrary, the District could correctly conclude from the information it had at the time that Student did not need special education and related services by reason of his disabilities, if any.

Child-find During The 2003-2004 School Year

9. For the 2003-2004 school year, Student attended the fourth grade at the District's Mintie White School. He was taught by regular education teacher Susan Audet. Ms. Audet has over ten years of teaching experience. Student did not receive special education or related services during this school year.

10. Student's performance declined considerably during the fourth grade. Student received marks of "C" and "D" in reading, "D" in writing, "B" in listening and speaking and "C" in mathematics. Student was designated as "at risk for retention" because of his poor classroom performance. Student was easily distractible and frequently failed to turn in homework.

11. Susan Audet did not suspect that Student had a learning disability and did not refer him for an assessment. Ms. Audet believed that Student was a "passive" learner and that he generally lacked motivation. Student was in the average range as compared to the other thirty-one to thirty-three students in her fourth-grade class. Student did not fail to complete his homework because he was unable to complete the assignments. Rather, Student played video games after school in lieu of completing his homework. Overall, Student's classroom participation was average. He did well in geometry, a subject he enjoyed. Student did not have difficulty understanding multiple directions, and although he was distractible, he was not more distractible than numerous other Students in his general education fourth-grade class, including some children who were receiving special education and related services.

12. Rather than initiate a referral for special education and related services, Ms. Audet first attempted to improve Student's performance through classroom interventions. For example, she moved Student to the front of her class so that he would be less distracted. Ms. Audet also shortened some of Student's assignments. She met with Student's mother on three occasions and had frequent telephone contacts with Mother regarding, in part, Student's failure to complete his homework. Ms. Audet tracked the classroom interventions she attempted in a "classroom intervention log."

13. Student was promoted to the fifth grade at the end of the 2003-2004 school year.

14. Student failed to establish that the District had a legal duty to initiate a referral for special education and related services during the 2003-2004 school year. Although Student exhibited some distractibility and was at risk for retention, it was appropriate for Ms. Audet to first attempt to improve Student's academic performance attempting classroom interventions before referring Student for a special education assessment.

14a. Factual Finding 14 is based on Factual Findings 9-13. Again, the District was required to initiate its own referral within a reasonable time after it had knowledge of facts tending to establish a disability and the need for special education services. Student contends that District was obligated to initiate its own referral based on its knowledge that Student was more distractible than other students his age. However, a level of distractibility higher than other regular education students in the class did not furnish knowledge of facts tending to establish a disability. Additionally, under state law, the District could refer Student for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. Student's declining grades and his perceived lack of motivation did not provide the District with knowledge of facts tending to establish a disability and the need for special education services because the District was required to utilize regular education resources first. Ms. Audet established through her testimony that she attempted to utilize regular education resources during the school year.

Child-find from August 2004 to the Present

15. As determined above, the District had no legal duty to initiate a referral during the 2003-2004 school year. The 2003-2004 school year ended in June 2004. Student presented no evidence establishing that the District had a duty to initiate a referral from June 2004 to August 2004. In August 2004, at the end of the summer and just prior to the fifth grade, Student's mother requested an assessment of Student. The

District developed an assessment plan and commenced and completed an eligibility evaluation of Student in a timely manner. Thereafter, as discussed below, the District convened an IEP team meeting on October 13, 2004, to discuss the assessment and to determine if Student was eligible.

16. In Spring of 2005, Student's parents requested additional assessments. The District again assessed Student and convened an IEP team meeting to discuss the assessments in June 2005.

17. Student failed to establish that the District had a duty to initiate a referral for special education from June 2004 to the present. The District had no duty to initiate a referral from June 2004 to August 2004. Additionally, when Student's parents initiated a referral in August 2004, the District no longer had a duty to initiate a referral because Student's parent had already expressly requested a referral. At that point the District's obligation was to timely assess Student in all areas of suspected disability. (Cal. Educ. Code § 56320.)

Failure to Consider Dr. Wright's Assessment

18. Student's parents obtained a forensic psycho-educational assessment of Student in July 2004. Roslyn Wright, Psy.D, performed the assessment.

19. The Notice of Referral and Proposed Action, completed by District personnel on August 26, 2004 after the Student's parents requested that their son be assessed, confirmed that Dr. Wright's assessment was considered when the District assessors developed an assessment plan.

20. School Psychologist Leslie Viall's testimony established that the IEP team relied on Dr. Wright's assessment; indeed, the District's eligibility determination was based primarily on scores obtained by Dr. Wright when she assessed Student.⁴ Ms.

⁴ Leslie Viall is the District psychologist who assessed Student in the fall of 2004.

Viall's report lists some of Dr. Wright's test results. The IEP team discussed Dr. Wright's scores at the IEP team meeting convened in October 2004.

21. The District considered Dr. Wright's assessment when it developed its own assessment plan and at the October 2004 IEP team meeting. The District committed no procedural violation and thus, did not deny Student a FAPE.

21a. Factual Finding 21 is based on Factual Findings 18-20. If the parent or guardian obtains an independent educational assessment a district is required to consider the assessment. An LEA's failure to consider a parent's assessment is a procedural violation which may result in a FAPE denial under certain circumstances.

21b. Additional evidence supports the conclusion in Factual Finding 21 that the District considered Dr. Wright's assessment. When the District conducted its own assessment, it prepared a Notice of Referral and Proposed Action form. The form indicates that Dr. Wright's assessment, in part, led to the District's decision to assess Student. Moreover, as described in part above in Factual Finding 20, School Psychologist Leslie Viall included Dr. Wright's scores in her own assessment results, and she used Dr. Wright's scores in her analysis regarding whether or not Student displayed a severe discrepancy between ability and achievement.

Eligibility for Special Education Under the Category of Specific Learning Disability

22. Student alleged that the District incorrectly determined that Student was not eligible for special education and related services under the category of SLD at the October 2004 and June 2005 IEP team meetings. Under applicable law, as described in Legal Conclusions 9, 10, 11 and 12, a child must exhibit a severe discrepancy between intellectual ability and academic achievement. "Intellectual ability" is a child's cognitive ability. "Academic achievement" is evaluated in the following areas: (1) oral expression; (2) listening comprehension; (3) written expression; (4) basic reading skills; (5) reading

comprehension; (6) mathematics calculation; and (7) mathematics reasoning. Both ability and achievement are measured using standardized tests, unless standardized tests are determined to be invalid. A “severe discrepancy” exists (in pertinent part) when the difference between a child’s intellectual ability and achievement exceeds 22.5 points, plus or minus 4 points (one standard error of measurement).⁵

Student’s Intellectual Ability

23. The crux of the dispute in the instant case is whether the District used the correct intellectual ability score in October 2004 when it determined that Student was not eligible under the category of SLD. Student alleges that the District should have used a score of 111, obtained from the Kaufman Assessment Battery for Children (K-ABC). The K-ABC was administered to Student by School Psychologist Leslie Viall on October 6, 2004. The District argues that a more accurate measure of Student’s intellectual ability is his “performance” score of 104 on the Wechsler Intelligence Scale for Children – Third Edition (WISC III) administered by Dr. Wright on July 22, 2004.

24. School Psychologist Leslie Viall’s testimony established that the performance score on the WISC-III of 104 is the valid measure of Student’s intellectual ability. Ms. Viall is a credentialed school psychologist with more than 15 years experience administering educational assessments to children. She testified that the WISC is the most common intelligence quotient test administered to children, as well as the best predictor of school performance. Ms. Viall administered the K-ABC when she assessed Student in October 2004 only because the parent’s assessor, Dr. Wright, had

⁵ To be eligible, a child must also have a disorder of one of several “basic psychological processes” and he or she must have a need for special education and related services, i.e., it must be show that the discrepancy between ability and achievement cannot be ameliorated through regular education services.

recently administered the WISC-III If Ms. Viall had administered the WISC-III less than four months after Dr. Wright's administration, Ms. Viall would have obtained an invalid score. When Ms. Viall obtained a significantly higher score on the K-ABC (111), she administered another intelligence test, the "Test of Nonverbal Intelligence" (TONI) to obtain more information. Student's TONI score of 98 was consistent with Student's performance score on the WISC-III, not the inflated score on the K-ABC. Accordingly, Ms. Viall determined that 104 was the most reliable, valid measure of Student's intellectual ability.

25. Student's expert, Dr. Wright testified that the K-ABC score of 111 was the appropriate measure of Student's intellectual ability. Dr. Wright's testimony was not credible on this point. First, Dr. Wright never explained why the K-ABC score should be used instead of the WISC-III score that she obtained. Indeed, her own report states that the performance score on the WISC-III was an accurate measure of Student's "true cognitive potential." Second, as explained above, the WISC-III performance score was corroborated by the TONI score while the K-ABC score was not corroborated by any score or observation. Third, Dr. Wright's testimony was generally not credible because she made recommendations that were not supported by the facts and were clearly not within in her area of expertise.

26. For example, Dr. Wright testified that the District should conduct a functional analysis assessment (FAA) of Student. FAA's and the resultant "behavioral intervention plans" (BIP) are required only when a child exhibits a "serious behavioral problems." (Cal. Code Regs., tit. 5, § 3052.) "Serious behavior problems" means the individual's behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001(aa).) There was no evidence that Student has

exhibited serious behavior problems of any type. Student has had a single disciplinary referral during all school years at issue in the present dispute.

Academic Achievement

27. As discussed above, to be eligible under the category of specific learning disability, a child must have a severe discrepancy – at least 22.5 points – between intellectual ability and academic achievement. Accordingly, Resource Specialist Nancy Navarro and, to a lesser extent, Leslie Viall, assessed Student’s academic achievement in the fall of 2004. Ms. Navarro administered the Woodcock Johnson III Tests of Achievement (WJ-III).⁶ Dr. Wright also administered the WJ III in July of 2004.

28. Using the standard score of 104 as a measure of Student’s intellectual ability, Ms. Navarro and Ms. Viall’s testimony established that Student did not exhibit a severe discrepancy between intellectual ability and academic achievement in any of the pertinent academic areas. Again, the relevant academic areas include: (1) oral expression; (2) listening comprehension; (3) written expression; (4) basic reading skills; (5) reading comprehension; (6) mathematics calculation; and (7) mathematics reasoning.

29. Student’s lowest standard score in any of the above-listed academic areas was in the area of “listening comprehension.” Student received a standard score of 87 on the “auditory interpretation of directions” subtest of the Test of Auditory-Perceptual Skills – Revised (TAPS-R) administered by Ms. Viall. This subtest is a valid measure of a child’s “listening comprehension” according to Ms. Viall. Thus, Student’s largest discrepancy between intellectual ability (104) and academic achievement (87) was a total of 17 points, far less than the requisite 22.5 points required by applicable law.

⁶ Student’s age-normed standard scores on the WJ-III administered by Ms. Navarro were, in pertinent part, as follows: Broad Reading – 96; Broad Math – 98; Broad Written Language – 93; Math Calculation Skills – 99; and, Written Expression – 88.

30. Because Student did not exhibit a severe discrepancy between ability and achievement, he was not eligible for special education and related services as a student with a specific learning disability. Moreover, because Student was not eligible for special education and related services, he was not entitled to a FAPE.

30a. Factual Finding 30 is based on Factual Findings 22-29. It is additionally based on Factual Findings 30b-30f, discussed below. In sum, the evidence, and particularly the testimony of Ms. Viall, established that the WISC-III performance score of 104 is a better measure of Student's cognitive ability than his K-ABC score of 111 because the WISC-III score was corroborated by another measure, the TONI (98). Ms. Viall, who testified that the WISC-III performance score was the best measure of Student's cognitive ability, was a credible witness. Her analysis was thorough and careful and her report was detailed, factual and balanced. She persuasively explained why she administered the K-ABC (because Ms. Viall had so recently administered the WISC-III). When she obtained a score that was discrepant from the WISC-III obtained by Dr. Wright, she administered another assessment that corroborated Dr. Wright's performance score on the WISC-III. Ms. Viall reasonably determined that the TONI and WISC-III scores were consistent and average. And still, she utilized the highest score on the WISC-III (Student's Full Scale score on the WISC-III, according to Dr. Wright's assessment, was a 95).

30b. Moreover, Ms. Viall's testimony was more persuasive than Dr. Wright's regarding what score should be used by the IEP team because of her background and experience as a school psychologist who regularly applies special education concepts in her work. Dr. Wright's testimony revealed that he did not have a working familiarity with many basic special education concepts, as discussed above.

30c. In contrast, Student failed to present a detailed, thorough, fair or balanced analysis from any witness regarding why the second-highest composite score on the K-

ABC should be used to determine whether Student had a severe discrepancy. Dr. Wright never explained why the K-ABC should be used. Rather, Dr. Wright's testimony supported the efficacy of the WISC-III, Dr. Wright stated in his report states that:

Although there are numerous measures of children's intelligence, the Wechsler scales remain by far the most popular (Daniel, 1997). Even in assessing bilingual children and limited English-speaking students, the WISC was reported to be the most frequently used test (Ochoa, Powell, & Robles-Pina, 1996).⁷

Whether the District Used a Single Measure or Assessment as the Sole Criterion

30d. In determining whether a pupil is an individual with exceptional needs, an LEA is not permitted to use a single measure or assessment as the sole criterion.⁸

30e. The District did not use a single measure or assessment as the sole criterion. The District used three measures, the K-ABC, WISC-III, and the TONI, to determine Student's intellectual ability, the starting point in the determination of whether a pupil exhibits the requisite severe discrepancy between ability and achievement. The TONI score (98) and the performance score on the WISC-III (104) both

⁷ Dr. Wright's report states that Student has a discrepancy between ability and achievement, but she uses a different standard (one deviation, or 15 points) not the special education standard of 22.5 points.

⁸ As the Court correctly points out, the ALJ's analysis in the original decision was deficient because it did not address whether the District used a single measure or instrument as the sole criterion, which is not permitted.

provided scores in the average range, and the similarity of the scores supports the conclusion that the WISC-III performance score presented an accurate measure of Student's ability.

30f. The District also considered Nancy Navarro's September 2004 assessment report at the IEP team eligibility meeting. Her report includes a statement of Student's "strengths and weaknesses." Ms. Navarro found that Student had never been retained, that he has "done better every year in language arts on standardized testing," and that his "writing will probably improve as he reads more and receives more writing instruction." Ms. Navarro also noted that Student had "attentional issues" but that they did not appear to severely impact his learning. She opined in her summary that Student would "continue to improve in the classroom" without special education and related services, but that the school need to address his problems focusing and completing homework. Student's teacher corroborated Ms. Navarro's findings.

30g. In sum, the District did not use a single measure or assessment as the sole criterion to determine if Student was eligible. It used three cognitive measures, two of which it relied on. Moreover, it considered contemporaneous corroborative information from other assessors and educators.

Assessment in All Areas of Suspected Disability

31. Student alleged that the District failed to assess Student in the areas of auditory processing, hearing and behavior.

Auditory Processing

32. Leslie Viall administered the Spanish and English version of the Test of Auditory Perceptual Skills – Revised (TAPS-R) on September 28, 2004, and October 8, 2004. One of the subtests of the TAPS-R is "auditory processing." Ms. Viall was qualified

to administer the TAPS-R, and she followed the required protocols for the administration of both the English and the Spanish versions of the test.

33. Student failed to establish that the District failed to assess Student in the suspected area of disability of auditory processing.

33a. Factual Finding 33 is based on Factual Finding 32. While Student subsequently obtained an assessment from a private audiologist who determined that Student had an auditory processing disorder (although as the District correctly points out, her ultimate conclusion in that regard was vague) there was no persuasive evidence that Ms. Viall was not appropriately trained and qualified to administer the TAPS-R, which, as determined above, tests "auditory processing." The fact that Student obtained a different result from a different test administrator does not detract from the fact that the District did assess Student in the area of auditory processing.

Hearing

34. Student's initial evaluation report dated October 13, 2004, states that Student was screened for hearing problems. Student passed the hearing screening.

35. Student failed to establish that the District failed to assess Student in the area of hearing.

35a. Factual Finding 35 is based on Factual Finding 34. Student's initial evaluation report established that he was screened for hearing problems. While Student listed this as an issue, he presented no evidence in support of his claim that the District failed to screen his hearing. Accordingly, as the party with the burden of proof, Student did not prevail on this issue.

Behavior

36. As part of Student's initial evaluation in September 2004, Leslie Viall administered the Conners' Rating Scales to Mother and Student's teacher. The Conners'

Rating Scales measure, in pertinent part, behavior. Regarding behavior, Leslie Viall's assessment report states, in relevant part, that based on "observations, descriptions of [Student's] behavior in class, and his mother's ratings on the Conners suggest attentional difficulties. . . ." The District assessed Student's behavior.

37. Student failed to establish that the District failed to assess Student in the suspected area of disability of behavior.

37a. Factual Finding 37 is based on Factual Finding 36. Additional evidence supports this conclusion. Ms. Viall's assessment in September 2004 included classroom observations, during which she observed Student's behavior, including his distractibility. Ms. Navarro's September 2004 assessment also addressed various behaviors exhibited by Student, including his problems completing homework, attention issues and focus. Student failed to meet his burden of establishing that the District's assessment, which included standardized measures and observations, did not assess behavior.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique

needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.C. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

3. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

4. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, 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.)

5. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed 2d 387].) However, regardless of the applicable burden of proof, or any presumptions regarding the appropriateness of an IEP, as discussed below, the District established that they complied with the IDEA and concomitant State special education laws, and that Student was not eligible for special education and related services as a child with a specific learning disability.

6. Special education students 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 an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subd.(e), (f).) 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, subd. (a), (b).)

7. If the parent or guardian obtains an independent educational assessment a district is required to consider the assessment. (Ed. Code, § 56329, subd. (c).)

8. The IDEA and State law impose an affirmative duty on school districts to ensure that all disabled children who are in need of special education and related services are “identified, located, and evaluated.” (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300). Districts are required to establish written policies and procedures for a continuous child-find system. (Ed. Code, § 56301.) A district’s duty is not dependent on any request by the parent for special education testing or referral for services. The duty arises with the district’s knowledge of facts tending to establish a suspected disability and the need for IDEA special education services. (*Dept. of Educa., State of Haw. V. Cari*

Rae S., 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001) citing *W.B. v. Matula*, 67 F.3d. 484, 501 (3rd Cir. 1995).) Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

9. A specific learning disability is defined in special education law as a “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” (20 U.S.C. § 1401(25)(A); Cal. Code Regs. tit. 5, § 3030(j).) Basic psychological processes include “attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression.” (Cal. Code Regs. tit. 5, § 3030(j)(1).)

10. For a student to qualify for special education because of a specific learning disability, he or she must meet three requirements. First, there must be a severe discrepancy between intellectual ability and achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematical reasoning. (34 C.F.R. § 300.541(a)(2); Ed. Code, § 56337(b).) Second, the severe discrepancy must be due to a disorder of one or more of the basic psychological processes and must not be primarily the result of an environmental, cultural, or economic disadvantage. (34 C.F.R. § 300.546(b)(3), (4); Ed. Code, § 56337(b).) The final requirement is that the discrepancy cannot be ameliorated through “other regular or categorical services” offered within the regular education program. (Ed. Code, § 56337(c); 34 C.F.R. § 300.543(a)(6).) The determination of whether a severe discrepancy exists between ability and achievement is to be made by the IEP team. (Cal Code Regs. tit. 5, § 3030(j)(4).)

11. With regard to the first requirement, a severe discrepancy can be established by the following:

[F]irst, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests.

(Cal. Code Regs. tit. 5, § 3030(j)((4)(A).)

12. From the calculation of this formula, a severe discrepancy between ability and achievement is found when the difference in standard scores is at least 22.5 points (1.5 multiplied by the standard deviation of 15), adjusted by 4 points, which is one standard error of measurement. This computed difference constitutes a severe discrepancy when "such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments and work samples, as appropriate." (Id.)

12a. In determining whether a pupil is an individual with exceptional needs, an LEA is not permitted to use a single measure or assessment as the sole criterion. (Ed. Code, § 56320, subd. (e).)

DETERMINATION OF ISSUES

Issue 1: Did the District fail to fulfill its child-find and search and serve obligations from December 5, 2002, through the present?

13. As discussed above in Legal Conclusion 8, the District is required to have in place a continuous child-find system, which must include written policies and procedures, written notice to all parents of the procedures for initiating a referral for a special education assessment. As determined in Factual Finding 1 and 2, the District has an established and appropriate child-find system.

14. Moreover, as determined in Factual Findings 8, 8a, 14, 14a and 17 and Legal Conclusion 8, the District had no obligation to initiate a referral for special education for Student during the relevant time period (December 2002 through the present). As determined in Factual Finding 6 the District had no knowledge of facts tending to establish that Student needed special education and related services and therefore no duty to refer Student for an assessment. While Student's performance declined precipitously during the fourth grade, as determined in Factual Finding 14, the District was first obligated to exhaust the resources of the regular education program before referring Student. (Ed. Code, § 56303.) Student's classroom teacher, Ms. Audet, used classroom interventions such as placing Student in front of the class and repeatedly conferring with parents, to enable Student to progress in the general education curriculum without special education. The District therefore had no duty to refer Student for an assessment during this time period. Finally, as determined in Factual Finding 17, the District had no duty to refer Student for an assessment from June 2004 to August 2004 or after August 2004 because Student's parents had already initiated a referral. Once Student's parents initiated a referral, the District's obligation was to assess Student in all areas of suspected disability. (Ed. Code, §56320.)

14a. Factual Findings 8a and 14a also support the determination that the District had no obligation to initiate a referral for special education for Student during the relevant time period. Factual Finding 14a also supports the determination that Student's performance declined precipitously during the fourth grade.

Issue 2: Did the District fail to consider a parent-obtained assessment at the October 2004 IEP team meeting and, if so, did this procedural violation result in a denial of a FAPE to Student?

15. As discussed in Legal Conclusion 7, the District was obligated to consider the private assessment conducted by Dr. Wright. As determined in Factual Finding 21, the District considered Dr. Wright's assessment at and before the IEP team meeting held in October 2004. Part of the reason the District assessed Student was Dr. Wright's assessment. Accordingly, the District did not commit the subject procedural violation and did not deny Student a FAPE.

15a. Factual Findings 21a and 21b also support the determination that the District considered Dr. Wright's assessment at the October 2004 meeting.

Issue 3: Did the District deny Student a FAPE from December 2002 to the present because it failed to find Student eligible for special education and related services under the eligibility category of SLD?

16. As discussed above in Legal Conclusion 9, 10, 11 and 12, to be eligible under the category of SLD, Student must establish that he has a severe discrepancy (22.5 points) between intellectual ability and academic achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematical reasoning. As determined in Factual Finding 23, 24, 25, 26, 27, 28, 29, and 30, Student does not have such a discrepancy in any of the above areas. Therefore, Student was not eligible for special education and related services under the category of SLD.

16a. Factual Findings 30a and 30b also support the determination that Student does not have the required discrepancy in any of the required areas.

16b. As discussed above in Legal Conclusion 12a, in determining whether a pupil is an individual with exceptional needs, an LEA is not permitted to use a single

measure or assessment as the sole criterion. As determined in Factual Findings 30c-30f, the District did not use a single measure or assessment as the sole criterion. The District used three different assessments to determine Student's cognitive ability, relied on two of them and then corroborated both its ability and its achievement data with observations and teacher reports.

17. Because it has been determined that Student does not have a severe discrepancy between ability and achievement, Student is not eligible for special education and related services. It is therefore not necessary to determine if he has a concomitant disorder of one of the basic psychological processes discussed in Legal Conclusion 9, nor is it necessary to determine if the discrepancy cannot be ameliorated through "other regular or categorical services" offered within the regular education program as discussed in Legal Conclusion 10.

18. Because it has been determined that Student was not eligible for special education and related services, as discussed in Legal Conclusion 1, Student was not entitled to a FAPE. Therefore, Student was not denied a FAPE from December 2002 to the present.

Issue 4: Did the District fail to assess Student in all areas of suspected disability in October 2004 and May 2005, when it failed to assess Student's auditory processing, hearing and behavior?

19. As determined in Factual Findings 31 through 37 and as discussed in Legal Conclusion 6, the District assessed Student in all areas of suspected disability, including auditory processing, hearing and behavior.

19a. As determined in Factual Findings 31-33a, Leslie Viall administered the TAPS-R, which assesses auditory processing.

19b. As determined in Factual Findings 34-35a, while Student listed an alleged failure to assess for hearing as an issue, he presented no evidence in support of his

claim that the District failed to screen Student's hearing. Substantial evidence shows the District did assess Student's hearing. Accordingly, as the party with the burden of proof, as discussed in Legal Conclusion 5, Student did not prevail on this issue.

19c. As determined in Factual Findings 36-37a, Ms. Viall's assessment in September 2004 included behavioral rating scales which were administered to Student's teacher and parent, and classroom observations of Student's behavior. Ms. Navarro's September 2004 assessment also addressed various behaviors exhibited by Student, including his problems completing homework, attention issues and focus. Accordingly, as the party with the burden of proof, as discussed in Legal Conclusion 5, Student did not prevail on this issue.

Issue 5: If Student prevails on any or all of Issues 1 through 4, above, is Student entitled to the following relief: (a) a private assistive technology assessment; (b) a private behavior observation; (c) auditory integration therapy (AIT); (d) a private speech and language assessment; (e) parent training to be provided by the private assessors and therapy providers; (f) a determination that Student is eligible for special education and related services as a pupil with an SLD; and, (g) tutoring?

20. Student did not prevail on any of Issues 1 through 4. Accordingly, Student is not entitled to any of the relief he seeks.

21. In light of the above factual findings and legal conclusions, all of Student's requests for relief are denied.

PREVAILING PARTY

22. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: *The District prevailed on all issues heard and decided.*

