

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2006040785

DECISION

Administrative Law Judge Clara L. Slifkin (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Los Angeles, California, on September 25 and 26, 2006.

Student's Mother (Parent) represented Petitioner (Student). Student was present at the hearing on September 25, 2006.

Donald Erwin, Assistant General Counsel, Office of General Counsel, Los Angeles Unified School District (District) represented Respondent. On September 25, 2006, Ms. Lisa Kendrick, a District Due Process Specialist, was present during the hearing. On September 26, 2006, Diana Massaria, a District Due Process Specialist, was present during the hearing.

On April 10, 2006, Student filed a Request for Mediation and Due Process Hearing. On May 26, 2006, District filed a Request for Continuance of Due Process Hearing and Student did not oppose continuance. On June 1, 2006, OAH continued the matter to June 19, 2006, for a trial setting conference, at which time the matter was set for

hearing on September 25, 2006. Oral and documentary evidence was taken and the matter was submitted on September 26, 2006.

ISSUES

1. Does Student continue to qualify for special education and related services?
2. If Student is eligible for special education services can District, at Parent's request, exit¹ Student from special education and related services?²

CONTENTIONS OF THE PARTIES

Student's Parent contends that he should be removed from the "IEP program," his special education program.³ When Parent signed the initial consent to have Student assessed for special education and related services, she believed that she had the right to

¹ The term "exit" means the local educational agency determines a child's continued eligibility for special education services, evaluates the child and finds the child is no longer a child with a disability. (20 U.S.C. § 1414 (c)(5).)

² Student's due process request stated: "Remove Student from the IEP program, we have explored other options for him." On September 12, 2006, the Pre-Hearing Conference Order issued by OAH included two issues: is Student in need of special education services; and does the March 9, 2006 IEP offer Student a FAPE. Parent did not participate in the PHC. On the first day of hearing, Parent clarified the issue as whether Student's Parent could "exit" him from special education. Therefore, the ALJ has clarified the issue accordingly.

³ Both federal and state law define "special education" in neutral terms, as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability.

remove him and decline all special education services. According to Parent, special education and related services have not improved Student's academic skills and his self esteem has suffered. Parent wishes to take "full responsibility" for her son's education. For the last two years, Parent has been taking Student to an after school tutoring program, SCORE, in order to improve his academic skills in math and reading.

District contends that Student continues to be eligible for special education and related services as a child with a specific learning disability and a speech and language impairment. According to District, despite the request of Student's Parent, it may not exit Student from special education because it has a legal obligation to provide him with a free and appropriate education while he attends public school within the District. Therefore, District asserts that even though Student's Parent has refused to sign the current individualized education program (IEP) and change of placement, District is required by law to offer and provide Student special education and related services in order to address his special needs.

FACTUAL FINDINGS

BACKGROUND FACTS

1. Student, who turned 14 years old on January 12, 2006, has been receiving special education and related services as a child with a specific learning disability, since March 2001. He resides in District and attends eighth grade at Holmes Middle School where he is enrolled in general education classes with resource services support (RSP). He was first determined to be eligible for special education and related services in second grade.

STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION AND RELATED SERVICES

2. A child with a specific learning disability (SLD) is entitled to special instruction and services or both if there is a disorder in one or more of the basic

psychological processes involved in understanding or using language, spoken or written, and a severe discrepancy between intellectual ability and achievement.

3. On March 9, 2006, the IEP team found that Student remained eligible for special education and related services based on SLD. Parent expressed in writing her desire for Student to be removed from special education services. Despite this request, the IEP team found that his auditory processing and attention deficits have negatively impacted his ability to be successful in a general education class. The team recommended that Student be enrolled in a special day class, but Parent did not consent to the IEP. Thus, Student continued in general education classes with RSP support.

4. On July 13, 2006, Parent signed a consent for Student's reassessment to determine if Student continues to qualify for special education services. On September 13, 2006, and September 18, 2006, Ms. Karen Dace administered a set of tests from the Woodcock-Johnson III Standard Tests of Achievement measuring oral language, reading, mathematics, written language, and general knowledge. On September 18, 2006, Ms. Dace prepared a written educational assessment.

5. Ms. Dace has a master's degree in Special Education and is a doctoral candidate in Special Education. She has performed over 100 educational assessments of students to determine their eligibility for special education. Ms. Dace found that compared to others of his age, Student's fluency with academic tasks and his ability to apply academic skills is low. The Woodcock-Johnson achievement test assessments demonstrated that the manifestations of Student's disability included low performance in reading, math calculation skills, written language, and written expression. His performance was very low in mathematics and reading comprehension. Student's standard scores fell in the low range of in Broad Reading (71) and in Broad Written Language (70); his standard score in Broad Math (68) fell in the very low range. At the hearing, Ms. Dace explained that Student's total achievement score of 59 indicated that Student was academically at a third grade level. Ms. Dace suggested that Student could benefit from special education

services including after school intervention, Saturday instruction, and intensive reading and math programs. Ms. Dace's educational assessment report indicated that compared to others of his age, Student's fluency with academic tasks and his ability to apply academic skills are very low. Thus, Student's scores and grade level, demonstrate a discrepancy between Student's ability and his general achievement.

6. On September 12, 2006, Vina Brault, Holmes Middle School Psychologist, performed a comprehensive psychoeducational reassessment to review Student's progress and determine if he continues to be eligible for special education services. Ms. Brault reviewed his educational history, prior psychoeducational assessment from March 24, 2004 and interviewed Student and his teachers. Ms. Brault administered a variety of tests to Student including Conners-Wells self-report Scale, Test of Auditory Perceptual Skills III, and Woodcock-Johnson Language Proficiency Battery, Revised. On September 18, 2006, Ms Brault prepared a psychoeducational assessment report.

7. The assessment report states that Student displays overall low average to average range. Student's comprehension and reasoning are weak in the area of listening and/or reading for critical information in order to be able to analyze data to draw conclusions. Student has psychological processing disorders in auditory processing and attention. The report states that this disability is evidenced by a significant discrepancy between ability and achievement in all academic areas. Student's final report card in seventh grade included the following grades: a C in Physical Education; Ds in Computer and English; and Fs in History, Math and Health. In her report, Ms. Brault finds that this discrepancy cannot be corrected through other general or categorical services within the general education instructional program. The report concludes that Student continues to be eligible for special education and related services under SLD, due to significant deficits in attention and auditory processing which includes auditory memory and cohesion. The report states Student has strengths in visual and visual-motor processing. In her report, Ms. Brault recommends that Student be in a special day class because he requires a

smaller group setting where teaching can be tailored to work with Student's strength in visual processing. In the smaller group setting, Student will be given extra repetition, clarification and adult reinforcement to improve his academic skills.

8. Ms. Brault has a master's degree in Psychology and has worked for District for 34 years assessing students at all age levels and abilities. She has performed hundreds of psychological assessments and participated in 80 to 100 IEPs. Ms. Brault found Student to be charming and cooperative and eager to do well. She explored Student's comments and association of special education with being labeled as "retarded." She explained Student has an auditory learning problem that impacts his academic skills. Since he scored in the 98th percentile in visual processing, he can develop learning strategies to help him build organizational skills that could have a positive impact on his academic performance. Examples include: proof reading his work; taking notes on three by five inch cards to help him organize his writing; using three by five inch cards for studying facts; making "to do" lists; using timers and taking short breaks when he works. This could be accomplished in a SDC setting.

9. District held an IEP meeting on September 21, 2006, to review the reassessments. The IEP team determined that Student is still eligible for special education and related services under SLD designation, due to significant deficits in attention and auditory processing which include auditory memory and cohesion, and a severe discrepancy between ability and achievement.

10. Student did not present an independent educational or psychoeducational assessment or other persuasive evidence that contradicts Ms. Dace's and Ms. Brault's opinions supporting District's contention that Student is still eligible for special education.⁴ Although Parent and Student assert generally that Student is able to do his

⁴ One the first day of trial, Parent indicated that Michael Whitsett, a tutor from SCORE would be a witness. Parent introduced and provided facts about Exhibit A, SCORE's

work at a higher level than the work provided to him, they presented no evidence to support this contention.

11. Student did not meet his burden of proof. District's recent psychoeducational and educational reassessment of Student established that he is still eligible for special instruction and related services. Student continues to qualify for special education and related services as a child with a SLD, due to auditory and attention processing deficits, and a severe discrepancy between ability and achievement.

CAN DISTRICT EXIT STUDENT FROM SPECIAL EDUCATION AND RELATED SERVICES?

12. The central dispute in this case is whether Parent can remove Student from special education and continue to educate him in the public school system, even though he is eligible for and requires special education services. Since Student is eligible for special education services, can District exit him because parent makes such a request?

13. Parent regrets she signed the original consent form that placed Student in the special education program. She thought the special education program would help Student academically, but, in her view, it only contributed to his lack of self-esteem and confidence. Parent disliked his fifth grade SDC class because the other children were severely disabled autistic children and the work he was given was significantly below fifth grade level. Although Student is now in an eighth grade general education class with RSP services, Parent still would like Student exited from special education. She did not consent to the March 2006 IEP, because she believes Student has regressed instead of making

testing of Student in reading, math concepts and skills, and problem solving. The ALJ gave Parent time to speak to Mr. Whitsett to find out his availability, so that he could testify and explain Student's test scores. According to Parent, Whitsett's supervisor would not allow him to testify because of "liability issues." Without this testimony, the ALJ admitted Exhibit A as administrative hearsay.

academic progress. Parent believes she is responsible for educating her child. As an example, she has enrolled Student in a one-to-one tutoring program at SCORE, where he has made some progress in math and reading. Parent is concerned because Student is stressed and stigmatized about being in a special education program.

14. Student testified and his testimony was responsive to questions and articulate. He did not like the SDC class in fifth grade, because the other children were severely handicapped and his school work was too simple. He believes that he is capable in many areas; he indicated that he should be at grade level, in eighth grade math. However, he has not been doing his homework because he does not understand it. After school tutoring at SCORE has helped him, but peer tutoring at school has not been helpful. When he does not understand his teacher's lesson, he is not comfortable asking questions in class because the questions come out "wrong." Student wants to exit special education because he feels that he has not been learning enough and he does not like being labeled as a special education student.

15. Despite the wishes of Parent and Student to exit special education, District cannot exit a Student who is eligible for special education services unless he is found to be ineligible, he has received a regular high school diploma, or he has reached the age of 22. Once Student was identified and assessed as eligible for special education and related services, District has to take affirmative steps to ensure that Student receives a free appropriate public education (FAPE).

16. District expert witnesses established that Student requires special education services and should be in a special day class, because he is not making progress in the general education class with RSP services. Parent has refused to sign the March 2006 IEP and give her consent to properly place Student. Even if Parent refuses to sign a consent form, once a parent has agreed to the provision of initial special education services, District has a duty to ensure that Student receives a FAPE and his unique needs are addressed.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The Student has the burden of proof as to the issue designated in this Decision. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (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, § 5600.)⁵ 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); 20 U.S.C. § 1402(9).) "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); 20 U.S.C. § 1402(29).) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22); 20 U.S.C. § 1402(26).)

3. Likewise, 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 from instruction. (Ed. Code, § 56031.) California Education Code section 56363, subdivision (a), provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction

⁵ All statutory citations to the Education Code are to the California law, unless otherwise noted.

and services are necessary for the pupil to benefit educationally from his or her instructional program.”

4. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

5. An individual with exceptional needs is one who has been identified by an IEP team as a person with an impairment which requires instruction, services, or both which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (a).) In general, a child with a disability is one with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury or other health impairments, or specific learning disabilities, who by reason thereof, needs special education and related services. (20 U.S.C. § 1401(A)(3)(i) and (ii); 34 C.F.R. § 300.7.)

6. A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations. That term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. In determining whether a child has a specific learning disability a local agency considers whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. §1401; 34

C.F.R. §§ 300.7(c)(10)(i) and (ii); Ed. Code, § 56337; and Cal. Code Regs., tit. 5, § 3030, subd. (j).)

7. A local educational agency must reevaluate a child with a disability if the child's parent or teacher requests an evaluation, every three years or if "conditions warrant a reevaluation." (34 C.F.R. § 300.536.) A district must evaluate an eligible student before making a determination that a student is no longer a child with a disability. (20 U.S.C. §1414 (c)(5).) Federal law grants states discretion to terminate eligibility prior to a student earning a regular high school diploma or reaching maximum age through his or her 22nd year. (Ed. Code, § 56026, subd.(c).)

8. Among the amendments to the IDEA, effective July 1, 2005, were provisions requiring parental consent for the provision of special education and related services. (20 U.S.C. § 1414(a)(1)(D); see also 34 C.F.R. § 300.505(a)(1).) California law has similar provisions. (See, e.g., Ed. Code, §§ 56321, subd. (d) [consent for initial assessment or evaluation may not be construed as consent for the initial placement or initial provision of special education and related services]; 56506, subd. (f) [school district shall obtain written parental consent before placing a pupil in a special education program].) But these statutes all involve the initial provision of special education and related services to an eligible child.

9. The law is quite different regarding the effect of a parent's refusal of consent after special education and related services have been provided to a child who remains eligible. The issues resolved in *Student v. Glendale Unified School District* are similar to this matter. ((2004) 41 IDELR 284.)⁶ Specifically, the mother of a child with a specific learning disability (and a speech and language disorder) asserted that the child was not

⁶ "[O]rders and decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority by parties and hearing officers in subsequent proceedings." (Cal. Code Regs., tit. 5, § 3085.)

eligible for special education and related services, refused to consent to the most recent IEP, and asked the school district to exit the child. The district responded by asserting both that the child remained eligible, and that it had a legal obligation to provide to the child a FAPE, which included special education and related services, regardless of the mother's refusal to consent. The hearing officer ruled in favor of the school district, ordering the parent to make the child available for reassessment.

DETERMINATION OF ISSUES

ISSUE 1: DOES STUDENT CONTINUE TO QUALIFY FOR SPECIAL EDUCATION AND RELATED SERVICES?

10. As discussed in Legal Conclusions 1 through 7, and Factual Findings 1 through 11, Student continues to qualify for special education and related services as a child with a SLD, due to auditory and attention processing deficits, and a severe discrepancy between achievement and intellectual ability. As a child with special needs, District is required to provide Student with a FAPE.

ISSUE 2: IF STUDENT IS ELIGIBLE FOR SPECIAL EDUCATION SERVICES CAN DISTRICT, AT PARENT'S REQUEST, EXIT STUDENT FROM SPECIAL EDUCATION AND RELATED SERVICES?

11. Based on Legal Conclusions 1, 2, 3, 5, and 9, and Factual Findings 12 through 16, because Student is eligible for special education services, District cannot exit Student from special education and related services.

ORDER

1. Student is eligible for special education services and District must offer Student FAPE.
2. District may not exit Student from special education and related services.

PREVAILING PARTY

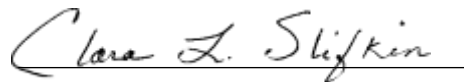
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

District prevailed on Issue 1 and Issue 2.

RIGHT TO APPEAL THIS DECISION

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

DATED: October 17, 2006.

A handwritten signature in cursive script, reading "Clara L. Slifkin", written over a horizontal line.

CLARA L. SLIFKIN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings