

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 2006020813

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on April 11 and 12, 2007, and June 1, 2007, in Van Nuys, California.

Petitioner-Student (Student) was represented by her father (Father).

Respondent Los Angeles Unified School District (District) was represented by Ronda L.Chow, Attorney at Law, of Lozano Smith. Tonya Gregory, Due Process Specialist for District, was also present on District's behalf.

On February 27, 2006, Student filed her request for mediation and due process hearing (Complaint). On May 8, 2006, OAH granted District's unopposed motion for continuance. Sworn testimony and documentary evidence were received at hearing. At the conclusion of the hearing, the parties stipulated on the record that closing briefs would be filed by June 12, 2007, and to waive the 45-day period for decision provided in Education Code section 56505, subdivision (f)(3). The parties further stipulated that the decision would be issued on July 12, 2007. Student filed her closing brief on June

8, 2007. District filed its closing brief on June 12, 2007. On June 12, 2007, the matter was submitted.

ISSUES

1. Is Student no longer eligible for special education services under the category of Specific Learning Disability (SLD), such that she may be exited from special education?¹

2. May Father unilaterally withdraw Student from special education and still have her attend a District public school, even if the IEP team continues to find her eligible for special education under the category of SLD?²

¹ To “exit” a child from special education means that the school district ceases to provide special education and related services to a child.

² In her Complaint, Student requested that she be placed in classes to “catch her up” to grade level, without the label of special education. Prior to the prehearing conference, District filed a motion to dismiss, on the grounds that Student was not entitled to the relief she alleged in the Complaint: special education and related services without Student being categorized as a special education student. At the hearing on the motion, Father, on behalf of Student, clarified that Student sought to withdraw from special education, such that she would no longer be identified as a special education student and would no longer receive special education and related services. Based upon this clarification, District’s motion was denied without prejudice. Consequently, the issues were clarified at hearing to dismiss any request for special education services contained in the Complaint. The issues have also been refined for proper analysis.

CONTENTIONS OF THE PARTIES

Student contends that Father is entitled to unilaterally withdraw Student from special education, regardless of whether the IEP team continues to find her eligible for special education as a Student with SLD, because Father no longer consents to her receiving special education instruction and related services. Father consented to District performing an initial assessment, and to the District's provision of special education services based upon the initial assessment, only because he had been told that he could withdraw his consent at any time. Student further contends that that District should exit her from special education, because she does not have SLD and is not eligible. Student contends that she has not benefited from the special education services that she has received, and that she has been socially ostracized due to her status as a special education student.

District contends that Student has been, and continues to be, eligible for special education under the category of SLD. As a result, District has a legal obligation to provide Student with a free appropriate public education (FAPE), while she attends public school in the District. District contends that Father cannot withdraw Student from special education based solely upon Father's revocation of consent for special education instruction and services.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a 12-year-old girl, who was born on December 15, 1994. She currently resides in the District, and attends Mt. Gleason Middle School (Mt. Gleason), located in the District. At the time of the hearing, she was in the sixth grade at Mt. Gleason. At all relevant times, Father was Student's custodial parent.

2. Student attended Pinewood Elementary School (Pinewood), located in the District, from kindergarten (the 2000-2001 school year) through fifth grade (the

2005-2006 school year). During the 2001-2002 school year, when Student was in first grade, she began to have academic difficulties. Father contended that Student's teacher was unable or unwilling to teach Student so that she could succeed academically. He complained to the Pinewood administration, and, by approximately April of her first-grade year, when Student was seven years old, Student was moved to another classroom and was taught there by a different teacher.

DETERMINATION OF STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION

District's Initial Assessment and Determination of Eligibility

3. A child has SLD if the child has an auditory processing disorder, or a disorder in sensory motor skills, and has a severe discrepancy between intellectual ability and achievement. A determination of the existence of SLD is based upon a variety of measures, including standardized tests, information provided by the student's parents and teachers, evidence of the child's classroom performance, and other relevant information. A child with SLD is eligible for special education if, as a result of the SLD, the child needs special education and related services to benefit from instruction.

4. Student continued to struggle during first grade. By second grade, during the 2002-2003 school year, she received interventions in the general education environment. These included modified assignments, one-to-one assistance, teacher prompting, and additional instruction. The interventions were not entirely successful in improving Student's poor academic progress. She continued to have difficulty reading, she reversed letters, she did not seem to remember concepts, and she seemed inattentive. District obtained Father's consent to assess Student to determine whether she was eligible for special education. On February 4, 2003, and February 11, 2003, Karissa Reese, the school psychologist, and a nurse assessed Student. Ms. Reese has been a school psychologist with District for nine years. She received her B.A. and M.A. degrees in psychology from California State University, Northridge. At all relevant

times, she has held a Pupil Personnel Service Credential, which qualifies her to conduct a psychoeducational assessment and interpret the results. Ms. Reese wrote a report dated February 18, 2003, detailing the results of the psychoeducational assessment.

5. Ms. Reese reported that Student's hearing and vision were within the normal range. She reported on Student's classroom behavior, as noted by her own observations and those of Student's teacher. She noted that Student did well in small groups, and could read quietly during independent reading. Student participated in class discussions, shared, was friendly, and had a positive attitude. She was well-behaved. She had difficulty completing assignments and copying from the board, and appeared easily distracted. She was slow to complete assignments, and appeared to cry more than other students.

6. Ms. Reese reported that Student seemed motivated to perform well during the assessment, but Student had difficulty focusing on tasks that Student perceived were too difficult. Based on the Kaufman Test of Educational Achievement (K-TEA), Ms. Reese found that math was one of Student's strengths. Her math application skills were in the average range and her math computation skills were in the low average range. Her reading comprehension skills and spelling were in the below average range, and her reading decoding skills were in the well below average range.

7. Ms. Reese's report noted that Student's teacher rated Student's behavior as "at risk" or significantly different from other students her age in the areas of depression, attention problems, learning problems, withdrawal, and atypicality. She also rated Student's adaptive skills as "at-risk" in the areas of study skills, social skills, and adaptability. Student's score on the Conners' attention-deficit/hyperactivity disorder (ADHD) index suggested that Student was at-risk for ADHD. The Conners' Rating Scale completed by Student's father, however, did not rate any behaviors as significantly different from that of other students in any area. Ms. Reese reported that Student may experience greater expectations and frustrations in school as compared to

home. Therefore, in the report, Ms. Reese recommended school-based support.

8. Ms. Reese noted that Student's expressive and receptive language skills appeared age appropriate, overall. Student's gross motor skills also appeared to be age- appropriate, but her fine motor skills appeared to be slightly delayed. Student obtained a standard score of 85 on the VMI (Visual-Motor Integration) test, which placed her in the low average to below average range. Ms. Reese suggested that this score may indicate that Student would have difficulty copying information from the board and completing written assignments. In the area of visual processing, Student demonstrated at least average skills.

9. On the Process Assessment of the Learner subtests, Student demonstrated average skills in remembering sentences and comprehending orally presented information, and emerging adequate to adequate skills in rapidly naming letters and words. Student demonstrated emerging adequate to adequate skills when asked to break words down into their syllables or phonemes. She scored in the deficit range on the Rimes (breaking syllables apart), Word Choice (visual recognition of words), and Pseudoword Decoding subtests. Based on these results, Mr. Reese concluded that Student was having difficult understanding the phonological aspects of language, and she was deficient in actually applying phonological skills to unknown words. She also had difficulty sounding out nonsense words correctly, and she had difficulty recognizing correctly spelled words. These deficits were negatively impacting her ability to read.

10. On the RAN subtest (rapid automatic naming), she tested in the "at risk" level on the Digits and Words & Digits subtests, which tested how rapidly she could name numbers and words and digits. Good skills in this area are associated with reading fluency and the ability to define, spell, and pronounce a word. Student also had difficulty when she had to switch between words and numbers, and tended to make more errors the faster she worked. This suggested to Ms. Reese that Student

may require more time to process information when she must switch between different pieces of information.

11. In the area of auditory processing, Student had difficulty remembering words presented in a series, and her skills rated in the well-below average range. In the area of memory, she demonstrated well below average skills in remembering auditory sequential information, and below average skills in remembering visual information. In the area of attention, student appeared to have difficulty remaining on-task, especially in the academic setting, and when the tasks were difficult for her. Ms. Reese suggested that Student's attention difficulties may be a result of her auditory processing deficits and difficulty with academic skills, since she was fairly attentive in one-on-one situations and in the home environment. Ms. Reese concluded that Student's primary learning modality appeared to be visual. Student appeared to have an auditory processing and memory disorder, and possibly an attention disorder, all of which was impacting her reading and writing.

12. Based upon standardized, criterion-referenced and informal tests, interviews, observations, and parent and teacher information, Mr. Reese concluded that Student's ability to learn, apply knowledge, generalize, utilize abstract concepts, and evaluate appeared to be in the average range. On the Cognitive Assessment System (CAS), Student demonstrated average skills integrating information that is presented separately into a conceptual whole, such as the integration of words into ideas. She demonstrated low average skills with tasks that required sustained and effortful attention. She demonstrated below average skills in her ability to solve problems when a solution was not immediately apparent, and with information that must be placed in a series to be processed. Ms. Reese determined that Student was of average cognitive ability, but she was achieving significantly below expectations for age, grade level, and intellectual potential. She concluded that Student appeared to meet the criteria for eligibility for special education services as a student with a specific learning disability.

13. On February 25, 2003, the District convened an Individualized Education Program (IEP) meeting to discuss the results of the psychoeducational assessment. Father, a District administrator, a special education teacher, a general education teacher, Ms. Reese, and the school nurse attended the meeting. The team considered Student's present levels of performance in the areas of cognitive/processing, social/emotional, motor skills, math, and reading, based upon Ms. Reese's report and Student's assessment results. The team determined that Student was eligible for special education as a student with SLD, in that a severe discrepancy existed between Student's ability and achievement in basic reading skills and written expression, as a result of disorders in auditory processing and sensory motor skills. The team agreed that this discrepancy was not primarily due to any other factors. The team determined that the auditory processing deficiency impacted Student's ability to access the curriculum. The team set annual goals and objectives in reading, written language, and vocational skills and recommended a general education curriculum, with resource specialist services (RSP) for help in reading and writing skills for four hours per week. The team specified the instructional and testing accommodations Student would receive. Father signed the IEP, which signified his consent to the IEP and his participation in the IEP meeting.

14. Father presented no evidence to dispute the validity of Student's psychoeducational assessment or Ms. Reese's conclusions and recommendations. Father presented no evidence to dispute the IEP team's determination that Student was eligible for special education as a student with SLD.³

³ Any such challenges might have been barred by the three-year statute of limitations of Education Code section 56043, subdivision (r), which was in effect on February 27, 2006, when Student filed her Complaint. Section 56043 was amended effective October 1, 2006, to provide for a two-year statute of limitations. In this regard, Father's contention that he only consented to the initial provision of services

Student's Continuing Eligibility for Special Education as a Student with SLD

15. A child may be exited from special education if the district has reassessed the child and determined that the child is no longer eligible for special education. A child may also be exited from special education if the child has graduated from high school with a regular diploma, or has reached the age of 22.⁴

16. In 2003, District implemented Student's special education program as a student with SLD. Between 2003 and 2006, District convened annual IEP meetings, as well as occasional meetings to amend the IEP. At each annual meeting, the respective IEP teams found Student eligible for special education as a student with SLD.

17. The District performed two subsequent psychoeducational assessments that also reflected Student's eligibility for special education as a student with SLD. Ms. Reese performed a triennial assessment of Student on February 21, 2006, and generated a report on that same date. Ms. Reese had intended to perform a full psychoeducational assessment to review Student's eligibility for special education, but Father refused to consent to the assessment. Therefore, Ms. Reese limited her triennial assessment of February 21, 2006, to a review of Student's records and an evaluation of Student's current classroom performance. Ms. Reese used the following instruments and measures in assessing Student:

because he had been told that he could withdraw his consent at any time does not serve to toll the statute of limitations. Father did not present evidence other than his own testimony to support this contention, nor did he present evidence such as the name of the person who made this representation to him, when it was made, or when and how he first discovered it was untrue.

⁴ Since Student is only 12 years old and still in middle school, the exit criteria of high school graduation and age are not applicable.

Review of records

Classroom observation

Teacher Comments

OCR scores⁵

CAT-6, California Standards Test⁶

Review of previous psychoeducational assessment

18. Ms. Reese's triennial assessment report noted that Student's previous health assessment, completed in February 2003, revealed no significant health concerns, and her vision and hearing were in the normal range. Ms. Reese reported that Student's academic difficulties began in first grade (during the 2001-2002 school year), and that her teacher was changed in April 2002. During first grade, Student had been referred to after-school intervention and to a school-based counseling program. Student did not attend all of the intervention sessions. Ms. Reese reported that Student continued to struggle during second grade (the 2002-2003 school year). She received 25 hours of intervention after school, and made unsatisfactory progress. She received 120 hours of intervention during summer 2003, and received a grade of "2," indicating that she had attained partial proficiency. On the California Standards Test (CST) during second grade, Student performed in the below basic range (below grade-level standards) for both English language arts and math. On the CAT-6, her reading

⁵ OCR refers to the Open Court Reading program, a phonics-based reading program.

⁶ The CAT-6 refers to the California Achievement Test, 6th edition, which is a norm-referenced component of California's standardized assessment system.

skills were at the 59th percentile, language skills at the 10th percentile, math skills at the 11th percentile, and spelling skills at the 26th percentile.

19. Ms. Reese's triennial assessment report summarized Student's academic history through fifth grade. Ms. Reese also noted that Student's current fifth grade teacher stated that Student demonstrated weakness with spelling, writing and multiplication, and strengths in listening and reading comprehension. Ms. Reese noted that Student had been referred to after-school intervention in fifth grade because of low academic progress. Ms. Reese also summarized the results of her previous psychoeducational assessment of Student in February 2003.

20. Ms. Reese's report described her own classroom observations of Student, Student's academic achievement, her adaptive behavior, her social/emotional status, her language/communication and motor/perceptual abilities, and general ability/cognition. Ms. Reese concluded that Student was of average cognitive ability, and was achieving significantly below expectations for age, grade level, and intellectual potential. Student's primary learning modality appeared to be visual. Based on available school data, including teacher comments, Ms. Reese concluded that Student appeared to have a processing disorder in the areas of auditory processing and memory, which was impacting her academic growth. Although Student had received resource support and 324 hours of intervention, she continued to perform below grade level, and she continued to struggle in the areas of reading, writing, and math. She appeared to meet eligibility criteria for special education services as a child with SLD. Ms. Reese recommended that Student continue to receive special education support, that information be presented in smaller segments, that Student's teacher use visual cues with auditory information, that reading instruction include teaching of strategies to decode unfamiliar words, that Student work on memory strategies, and that Student continue to have peer support in the classroom, since it appeared that Student was more likely to ask a peer for assistance rather than an adult.

21. The District convened an IEP meeting on February 22, 2006, which was attended by Father, an administrator, a special education teacher, a general education teacher, and Ms. Reese. The team reviewed Student's present levels of performance in the areas of reading, written language, math, general ability, and social/emotional. These were based on state and District assessment results, the general education teacher's feedback in the academic areas of reading, written language, and math, classroom performance, teacher observation, and review of records.⁷ The team determined that Student had improved in reading but still struggled significantly in math and written language. The IEP team determined that Student continued to be eligible for special education as a student with SLD. The team recommended placement in the general education classroom, with RSP support. The team set goals and objectives in written language, math, and vocational education.

22. Father refused to consent to the February 22, 2006 IEP. Father disagreed with Student being labeled as learning disabled, and felt that Student's academic issues stemmed from the lack of proper instruction by her initial first grade teacher.

23. At hearing, Father presented no evidence to dispute the validity of Student's triennial assessment or Ms. Reese's conclusions and recommendations. Father presented no evidence to dispute the IEP team's determination that Student was eligible for special education as a student with SLD.

24. District, with Father's consent, performed a third psychoeducational assessment of Student over three days in March 2007, while Student's Complaint was

⁷ The IEP does not refer specifically to Ms. Reese's triennial assessment report. The materials that the IEP team considered, however, such as Student's CST scores, OCR scores, Student's records, and teacher feedback, were generally the same materials considered by Ms. Reese in performing her assessment.

pending.⁸ The assessment was largely performed by Susan Moore, the school psychologist. James Otto, an RSP teacher at Mt. Gleason, administered the Woodcock-Johnson III Tests of Achievement (W-J III). Ms. Moore has a B.A. degree in social work, and an M.S. in Counseling. She has Pupil Personnel Credentials in School counseling and in school psychology. She has been a school psychologist for District since 1992. Ms. Moore was qualified to assess Student and to interpret the test results. Mr. Otto received his B.A. degree from the University of California, Berkeley, in History. At all relevant times, he has held a specialist credential in mild to moderate learning disabilities, and he has been Student's RSP teacher during the time she has attended Mt. Gleason. He was trained and qualified to administer the W-J III and to interpret the results.

25. Ms. Moore assessed student using the following instruments:

Wide Range Assessment of Memory and Learning (WRAML)

⁸ Father contended at hearing that he only agreed to this assessment because he had been advised that District would exit Student from special education if he consented to the assessment. Father did not state who made this representation to him, or when it was made. He called no witnesses, other than himself, to testify to the validity of this assertion. He provided no documentary or other objective evidence of this representation. Father's contention that his consent to the assessment was obtained under false pretenses is unpersuasive. Father also testified that he told Student that she need not make an appropriate effort on the assessments, as they did not matter. There was insufficient evidence to support this assertion. Ms. Moore and Mr. Otto, who performed the assessments, both testified that Student appeared to make honest efforts to properly complete the assessments.

Test of Auditory Processing Skills (TAPS-3)

Test of Visual-Perceptual Skills—Upper Level—Revised
(TVPS-R)

Cognitive Assessment System (CAS)

Test of Written Language (TOWL-3)

Beery-Buktenica Developmental Test of Visual-Motor
Integration (VMI)

Conners' Parent Rating Scale

Sentence Completion Test

26. Ms. Moore wrote a report of the assessment, dated March 29, 2007. The report provided background information, including that Student's vision was 20/40, based upon a vision check performed by the school nurse. Student passed the audio screening. The report also mentioned that Student had filed the Complaint.

27. Ms. Moore's report described Student's academic history, noting her academic struggles since first grade, and her history of special education at Pinewood. Ms. Moore recorded that Student was referred to an after-school intervention program in fifth grade due to low academic progress, that Student attended school in the Rowland Unified School District from October 2006 to December 2006, and re-entered the District in January 2007 when she re-enrolled at Mt. Gleason. Ms. Moore noted that Student's current classroom grades ranged from "C" to "F" in English and Math, and that Student's teacher had commented that Student did not complete assignments, had excessive absences or tardies, talked too much, needed to participate in class activities, and did not return notices that were sent home. Ms. Moore also summarized Ms. Reese's assessment report dated February 21, 2006.

28. Ms. Moore reported on her observations of Student in class and during the testing. Ms. Moore found that Student was talkative and easily distracted in the classroom. During the testing, Ms. Moore observed that Student processed visual information very slowly. Ms. Moore also observed that when Student realized some tests were timed she appeared to respond more rapidly.

29. Ms. Moore reported on Mr. Otto's administration of the W-J III and his evaluation of Student's academic achievement in a manner consistent with Mr. Otto's report, which is described below.

30. Ms. Moore discussed Student's general ability, cognition, and processing. Based upon standardized, criterion-reference, and informal tests, interviews, observations, teacher and parent information, and prior assessments, she concluded that Student's ability to learn, apply knowledge, generalize, utilize abstract concepts, and evaluate appeared to be in the average range. Student demonstrated strengths on the CAS in nonverbal matrices and verbal-spatial relations, and low-average skills in successive processing (word series and sentence repetition). Timed subtests were difficult for her. She scored lowest on the Planning subtests. She demonstrated average skills on most subtests of the TVPS-R, but her skills on the Visual Discrimination and Visual Figure-Ground subtests fell into a deficit area. She processed very slowly on the Visual Discrimination subtest. Auditory processing and memory skills fell within a deficit range. Student struggled with listening to a sentence and attempting to repeat it word for word. She was also challenged by repeating groups of numbers and letters. Her strongest area within auditory processing was Cohesion, which tested auditory comprehension and reasoning. Her Cohesion index standard score was 100, which corresponds to the 50th percentile.

31. Ms. Moore reported that Student's visual-motor integration skills fell within the average range, as Student attained a standard score of 94 on the Beery VMI. Ms. Moore noted that Student reversed "b" and "d." Gross-motor skills appeared to be

within normal limits. Ms. Moore also reported that Student's expressive and receptive language skills appeared to be within normal limits. She reported that Student's scores on the TOWL-3 subtests ranged from average to poor, and Student's overall quotient score of 83 placed her in a low-average range in written language skills. Student scored within the average range on the following subtests: Vocabulary, Logical Sentences, and Sentence Combining. She scored in the below average range in Spelling and Contextual Conventions. She fell within the poor range in Style and Contextual Language, which includes quality of vocabulary, sentence construction, and grammar.

32. Student's teachers reported to Ms. Moore that Student occasionally worked to her potential, but she was slow to grasp new concepts, tended to forget material the next day, and often tested poorly. Student only completed her science and math assignments and homework ten percent of the time. The teachers reported that her attention in class varied, but she was easily distracted in most classes. She was described as generally pleasant, and very helpful and willing to learn. Her recent attendance had improved drastically, but teachers were still concerned that she was missing too much school. Teachers also were concerned that Student was achieving well below grade level, did not do homework, and did not seem to have much parental support for school work. She occasionally had uncontrolled behavior outbursts.

33. Ms. Moore reported that two teachers completed the Conners' Teacher Rating Scale-Revised (S), and that both sets of responses were similar. They revealed markedly atypical scores for Cognitive Problems/Inattention; slightly atypical to markedly atypical scores for hyperactivity, and markedly atypical scores on the ADHD Index. Student scored in the average range on the Conners' Parent Rating Scale-Revised (S), which was completed by Father. Student's scores were within the average range on the Conners-Wells' Adolescent Self-Report Scale (S), except that her ADHD index score was mildly atypical. The BASC scales were completed by Student, Mr. Otto,

and Father, and no scores were in the clinically significant or at-risk range.

34. Ms. Moore considered Student's social emotional status to determine whether Student would benefit from DIS counseling. Student's teachers reported that Student had difficulty dealing with frustration in the classroom, especially when she felt overwhelmed by the work presented, and appeared to express some insecurity regarding her academic skills. She cried when experiencing difficulty completing a task and expressed some peer concerns.

35. Ms. Moore concluded that Student's primary learning modality appeared to be visual processing, with processing deficits in auditory memory and attention. Ms. Moore noted that these areas of concern had been present since Student's first IEP dated February 23, 2003, when Student was first identified as eligible for special education as a student with SLD. Ms. Moore reported that Student struggled with math, spelling, and writing skills, and that social-emotional concerns still existed. Ms. Moore concluded that Student continued to be eligible for special education services as a student with SLD. She recommended that an IEP meeting be held, to consider Student's eligibility for special education services, and to consider additional supports to help Student. She recommended DIS counseling, and that the team emphasize Student's use of the binder reminder to assist with homework completion and communication between home and school. Ms. Moore further recommended that Student join a Girl Scout troop, participate in activities with Father, and socialize with friends at their homes. She recommended that Student participate in tutoring, especially in math, and that her teachers break down lengthy instructions into shorter segments and keep instructions concrete. Ms. Moore also recommended that teachers use a multi-modal approach when presenting new material, that they incorporate visual cues with auditory instructions, and that they check for comprehension.

36. Mr. Otto administered the W-J III Tests of Achievement (Form B), including all tests in the Standard Battery, and three tests in the Extended Battery

(Word Attack, Picture Vocabulary, and Oral Comprehension.) He reported that Student's English oral language skills were average, her fluency with academic tasks were average, and her academic skills and her ability to apply those skills were within the low average range. Her performance was average in broad reading, basic reading skills, and written expression, low average in mathematics and written language, and low in math calculation skills. Her math calculation skills were significantly lower than would be predicted by her English oral language ability.

37. At hearing, Father presented no evidence, such as expert testimony or any other assessment, to challenge the validity of the psychoeducational assessment performed by Ms. Moore and Mr. Otto, or their conclusions and recommendations.

38. Student's classroom performance at Pinewood and at Mt. Gleason reflects her struggles in reading, writing, and math language. Student's third through fifth grade report cards from Pinewood show largely grades of "2" in reading, writing, and math. On these report cards, a grade of "2" means "partially proficient." Student's report card for the beginning of sixth grade at Mt. Gleason during the 2006-2007 school year show that Student was failing all subjects except physical education. As is further described below, Student left the District briefly during her sixth grade year. Her report cards from Mt. Gleason since her re-enrollment in the District in January 2007 show "D's" or "F's" in English, science, and math.

39. Father failed to establish that Student is no longer eligible for special education as a Student with SLD, and that the District should exit her from special education. Student has received 324 hours of general education interventions, in addition to special education supports, and she is still performing below grade level in math, written language, and spelling. Father presented no evidence that Student's continuous academic struggles were due to factors other than her auditory processing disorder, such as lack of appropriate instruction, poor school attendance, or physical disabilities. Father produced no evidence to challenge the validity of the assessments

performed by Ms. Reese, Ms. Moore, and Mr. Otto, which established that Student has an auditory processing disorder, that results in a severe discrepancy between intellectual ability and achievement, and that Student requires special education services to access her education. Father produced no evidence to challenge the consistent determinations of the IEP teams that Student is eligible for special education as a student with SLD.

40. In this regard, Student's contention that her continuing academic struggles stem not from SLD but from the failure of her first grade teacher to properly teach her is unpersuasive. Father is not a teacher, and has no formal training in education. Student offered no evidence other than Father's testimony that Student's unidentified first grade teacher completely failed to educate Student, and no opinion, other than Father's own, that such alleged lack of education has caused Student's persistent academic difficulties and tainted the assessments. In contrast, several of Student's teachers, and two District school psychologists, demonstrated that, if Student were not SLD, she would have made up any lack of education in first grade by this point in her education. Under these circumstances, Father has failed to demonstrate that Student is not eligible for special education.

FATHER'S REVOCATION OF CONSENT FOR STUDENT TO CONTINUE IN SPECIAL EDUCATION

41. A school district must obtain parental consent prior to initially providing special education services, and the lack of such consent may not be overridden by way of a due process hearing. Under current law, no parental consent is necessary for a district to continue to provide special education services. A parent may not unilaterally withdraw a child from special education while the student attends a public school in the district, if the IEP team determines that the child is eligible for special education.

42. Father consented to all of Student's IEPs until the November 30, 2005 IEP. A letter from Father is attached to this IEP. The letter states that Student's academic

difficulties stemmed from Student not being properly taught in first grade, because the teacher was unwilling or unable to teach her. At the meeting, Father expressed his disagreement with Student being labeled as a special education student, and stated he did not want her pulled out of class for RSP services. The team agreed that the RSP teacher would consult with the general education teacher regarding Student's progress with math and written language. Father did not consent to this IEP.

43. The District convened another IEP meeting on June 6, 2006, while Student's Complaint was pending, and prior to her promotion to middle school from Pinewood to Mt. Gleason. The meeting was attended by Father, an administrator, a special education teacher, and a general education teacher. The team reviewed Student's present levels of performance in reading, written language, math, and vocational education, and set goals and objectives in written language, math, and vocational education. The team specified classroom accommodations. The team again determined that Student was eligible for special education as a student with SLD, and that she required more intensive instruction than the general education setting could provide. The team recommended that Student be placed in the general education setting with RSP support in language arts for 250 minutes per week, to be delivered in a collaborative/co-teaching model in a core English class, and RSP support in mathematics for 250 minutes per week, also to be delivered in a collaborative/co-teaching model.⁹ The services would be rendered at Mt. Gleason, her middle school of residence. Father did not consent to the IEP. Father did not want Student to be in

⁹ The collaborative, co-teaching model consists of a classroom that includes both general education and special education students, and both a general education and RSP teacher to assist in academic subjects. The RSP teacher is available to assist any child in the class who needs assistance, but the RSP teacher's first priority is to assist those special education children in the class who may need help.

special education, and referred to his previously expressed concerns about Student's eligibility for, and placement in, special education.

44. In fall 2006, when Student was 11 years old and in sixth grade, Student transferred from Mt. Gleason to Rowland Elementary School (Rowland) in the Rowland Unified School District. She was never formally exited from special education by District, and she remained eligible for special education as a child with SLD. Father enrolled Student at Rowland as a self-help measure to remove Student from the District's special education program. Student attended school at Rowland for 20 days, where she was enrolled as a general education student. There was no evidence that, while Student attended Rowland, Rowland had received any records from the District that reflected Student's status in the District as a special education student. Student's first trimester report card showed grades of "C" in Reading, "D" in Writing, "D-" in Mathematics, "D" in Science, and "D+" in History/Social Studies.¹⁰ Student was in attendance at Rowland for 20 days during the period from October to December 2006. In January 2007, Student re-enrolled at Mt. Gleason for the remainder of her sixth grade year.

45. At the time of the hearing, Student was enrolled in a sixth grade general education classroom at Mt. Gleason, which was taught collaboratively by a general education and special education teacher. She received no special education services or accommodations in this setting, due to Father's refusal to consent to Student's June

¹⁰ Student contended that the grades were passing grades, and showed that she could progress academically without special education. This contention is unpersuasive, for an assortment of reasons. Grades are only one factor to consider in determining whether a child has SLD and requires special education services. Moreover, the grades Student received from Rowland were barely passing grades. Her report card from Rowland also stated, "[Student] is struggling in several subject areas."

2006 IEP. However, the RSP teacher could have assisted her, as he would any other general education student, if he was not assisting the other special education students in the classroom at the time.

46. As is discussed above, Father presented to evidence to challenge the determination of any of Student's IEP teams that Student continues to be eligible for special education as a student with SLD. Consequently, Father cannot unilaterally remove her from special education as long as she attends public school in the District. Father contends that his parental rights include the right to determine the course of Student's education. The law imposes many limitations on a parent's ability to determine the course of a child's education in public school, however. The IDEA and the California Education Code require that whether a child continues to receive special education services from a school district is a decision that is made by the IEP team as a whole, and not unilaterally by a parent.

47. Father also contends that, since he, and not District, will ultimately be responsible for Student if Student is not properly educated, he should be able to remove her from special education if it is not helping her. Father's premise that Student is not benefiting from special education is not persuasive. Student is not performing particularly well academically at this time. However, Student has not been receiving special education services since fifth grade. Father's contention that Student has struggled academically while in special education, and therefore she should be exited from special education, is without foundation.

LEGAL CONCLUSIONS

A. APPLICABLE LAW

1. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, 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.) 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. § 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. § 1402(29).)

2. 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.) 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. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

3. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reasons of mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional distress, orthopedic impairments, autistic-like behaviors, traumatic brain injury, other health impairments, or SLD. (20 U.S.C. § 1401 (3)(A)(i) & (ii); Cal. Code Regs., tit. 5, § 3030.)

4. A child meets eligibility criteria for SLD if the child: (1) 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 (2) has a severe discrepancy between intellectual ability and achievement, based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement

tests.” (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).)¹¹One measure of the severity of the discrepancy is numerically quantified in the regulation. When standardized tests are considered to be invalid for a specific child, the discrepancy shall be measured by alternative means. If standardized tests do not reveal a severe discrepancy between intellectual ability and achievement, the IEP team may still find that a severe discrepancy exists as a result of a disorder in a basic psychological process based on: (1) data obtained from standardized assessment instruments; (2) information provided by the parent; (3) information provided by the child’s present teacher; (4) evidence of the child’s performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; (5) consideration of the pupil’s age, particularly for young children, and (6) any additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).) The decision as to whether a severe discrepancy exists shall take into account all relevant material which is available pertaining to the student, and shall be made by the IEP team, including assessment personnel. The discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit.5, § 3030, subd. (j)(4) & (5).) The recently amended version of the IDEA, which became effective on July 1, 2005, provides that a school district is not required to take into consideration whether a student has a severe discrepancy between achievement and intellectual

¹¹ New federal regulations in support of the re-authorized IDEA became effective on October 13, 2006, several months after Student filed her Complaint. Among other things, the new regulations are numbered differently than the old regulations. The citations herein are to the new regulations, because the applicable statute is the re- authorized IDEA. Nevertheless, to the extent that the regulations cited have significantly and relevantly amended the previous regulations, such amendments are noted.

ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. (20 U.S.C. § 1414(b)(6).) The California Education Code was amended in 2005 to comport with the amended IDEA in this respect. (Ed. Code, § 56337, subd. (b).)

5. The basic psychological processes referred to include attention, visual or auditory processing, sensory-motor skills, and cognitive abilities, including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (Ed. Code, § 56337, subd. (a).)

6. An IEP team may determine that a child has SLD if the child does not achieve adequately for the child's age or to meet State-approved grade-level standards" in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. (34 C.F.R. § 300.309(a).)

7. SLD does not include problems that are primarily the result of visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage. (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).) Further, a child is not eligible for special education if the determining factor for such eligibility is lack of appropriate instruction in reading, lack of instruction in mathematics, or limited-English proficiency. (Ed. Code, § 56329, subd. (a)(2).)

8. Before any action is taken with respect to the initial placement of an individual in a special education program, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as

the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).)

9. A school district must generally obtain informed parental consent before conducting an initial assessment to determine whether the child is eligible for special education. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321(c) & (d).) Informed consent means that the parent has been fully advised of all information relevant to the activity for which consent is sought, that the parent understands and agrees in writing to the activity for which the consent is sought, and the consent describes that activity and lists any required records that are to be released, and to whom they will be released. Further, the consenting parent understands that consent is voluntary, and may be revoked at any time. (34 C.F.R. § 300.9(c)(1); Ed. Code, § 56021.1) A district must make reasonable efforts to obtain informed consent, but, if parent refuses, a school district can request a due process hearing to attempt to override the parent's lack of consent to an initial assessment. (34 C.F.R. § 300.300(a)(3)(i); Ed. Code, § 56321, subd. (c).)¹²

10. A school district must also obtain informed parental consent prior to the initiation of special education services to the child. (34 C.F.R. § 300.300(b); Ed. Code, § 56346, subd.(a).) Unlike with an initial assessment, a school district may not attempt to override a parent's refusal to consent to the initial provision of services by requesting a due process hearing. (20 U.S.C. § 1414(a)(1)(D)(ii) (II); 34 C.F.R. § 300.300(b)(3); Ed. Code,

¹² The amended regulations to the IDEA, which became effective on October 13, 2006, provide that the school district may not file a due process complaint to override a failure of consent to initial evaluation by a parent when the student is being home-schooled or when the parent has placed the student in private school. (34 C.F.R. § 300.300 (c)(4)(i).) This amendment is not applicable to this case, since Student has been enrolled in public school at all relevant times.

§ 56346, subd. (b).)

11. To exit a child from special education, a school district must reassess a child to determine that the child is no longer eligible for special education services, unless the child has graduated from high school with a regular diploma, or has reached the age of 22, at which time the child is no longer eligible for special education services. (Ed. Code, § 56381, subds. (h) & (i); Ed. Code, § 56026, subds. (c)(4)(A), (B) & (C).)

12. Once a student been receiving special education services, the parent cannot unilaterally withdraw the child from special education. This is so despite the provisions of 34 Code of Federal Regulations, part 300.9(c)(1), and Education Code section 56021.1, which state that a parent can revoke informed consent "at any time." (Office of Special Education Programs, interpretative letter, 18 IDELR 534, September 20, 1991.)¹³ If a parent refuses all special education services after having consented to those services in the past, the school district is to file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)¹⁴

¹³ The United States Department of Education has recently stated that it is considering whether a parent should have a right to withdraw a child from special education, and that it anticipates publishing a notice of proposed rulemaking to seek public comment on this issue. (71 Fed.Reg. 46633 (August 14, 2006).) At this time, however, the law remains that a parent cannot unilaterally remove the child from special education.

¹⁴ Contrary to the directive of Education Code section 56346, subdivision (d), District did not initiate the due process hearing complaint in this matter. District offered no reason as to why it did not file its own complaint to resolve the issue of Father's revocation of his consent to Student's receipt of special education services. Student has not objected to District's failure to take the initiative on this issue.

13. The United States Supreme Court has held that the petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

B. DETERMINATION OF ISSUES

Is Student no longer eligible for special education services under the category of SLD, such that she may be exited from special education?

14. Based on Legal Conclusions 1 through 11, and 13, and Factual Findings 1 through 47, Father has failed to establish that Student is no longer eligible for special education services under the category of SLD. Student has a documented history of an auditory processing disorder, with deficits in auditory memory and attention. District's assessments and Student's academic history demonstrate that Student's auditory processing disorder results in a severe discrepancy between her intellectual ability and achievement, and that Student requires special education services to access her education. Father did not produce evidence to challenge the validity of Student's assessments and the IEP teams' eligibility determinations. Under these circumstances, Student may not be exited from special education.

May Father unilaterally withdraw Student from special education and still have her attend a District public school, even if the IEP team continues to find her eligible for special education under the category of SLD?

15. Based upon Legal Conclusions 1 through 13, and Factual Findings 1 through 47, Father cannot unilaterally withdraw Student from special education and place her in a general education program in a District public school. As was stated in the determination of Issue No. 1, Father has failed to demonstrate that Student is no longer eligible for special education and related services as a Student with SLD. The determination as to whether a child continues to receive special education is a decision that is made by the IEP team. Under these circumstances, Father cannot unilaterally remove Student from special education.

ORDER

Student's claim for relief is denied.

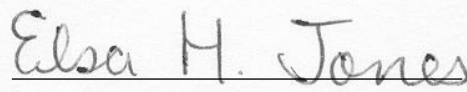
PREVAILING PARTY

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 District prevailed on all issues that were heard and decided.

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: July 11, 2007


ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division