

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

In the Matter of:

OAH CASE NO. N2007080380

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on March 4, 5, 6, 18, and 24, 2008, in Van Nuys, California.

Student was represented by his parents (Mother and Father, collectively Parents). Parents appeared on behalf of Student on March 4 and 5, 2008. Mother appeared on behalf of Student on March 6, 2008. Father appeared on behalf of Student on March 18 and 24, 2008.¹ Dr. Aslan Aslanian, a Farsi interpreter, was present on March 4, 5, and 6,

¹ Father was present telephonically at the hearing on March 18, 2008, and the hearing proceeded on that date with his consent. Father's personal presence at hearing on March 18, 2008, was anticipated when OAH set the hearing date, as the date had previously been cleared with all parties. OAH gave timely notice to Parents of the March 18, 2008, hearing date in writing, in English and in Farsi. Nobody notified OAH prior to

to interpret the proceedings for Mother and Father. Fariba S. Ershadi, a Farsi interpreter, was present on March 18 and 24 to interpret the proceedings for Father.

Respondent Los Angeles Unified School District (District) was represented by My T. Huynh, Assistant General Counsel for the District. Victoria McKendall, District representative, was present on District's behalf on March 4, 2008. Susan Glickman, Administrative Coordinator, Due Process Unit for the District, was present on District's behalf on the morning of March 5, 2008. Diana Massaria, Due Process Specialist for the District, was present on District's behalf on the afternoon of March 5, and on March 18, 2008. Lisa Kendrick, Coordinator, Due Process Unit for the District, was present on District's behalf on March 6, 2008.

On August 13, 2007, Student filed his request for mediation and due process hearing (Complaint). On October 29, 2007, OAH granted Student's motion to amend his Complaint. On November 27, 2007, Student filed his First Amended Complaint with OAH. On January 11, 2008, OAH continued the matter pursuant to California Code of Judicial Ethics, canon 3B(8), on the grounds that Parents did not understand the hearing procedures and were not prepared to proceed on the original hearing date.²

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file closing briefs by no later than

the commencement of the hearing on March 18, 2008, that Father would be unable to personally attend the hearing on that day.

² Canon 3B8 of the California Code of Judicial Ethics applies to the conduct of ALJs. (Gov. Code, §§ 11475.20, 11475.40.)

5:00 p.m. on April 21, 2008. Student filed his closing brief on April 20, 2008.³ District timely filed its closing brief on April 21, 2008. On April 21, 2008, the matter was submitted.

ISSUE

Should Student be exited from special education because he does not qualify for special education and related services, and has never qualified for special education and related services while enrolled in the District?⁴

³ Student was granted permission to file his closing brief in Farsi. Upon receipt of Student's closing brief, OAH caused it to be translated into English.

⁴ The Prehearing Conference Order issued on February 19, 2008 (PHC Order) specified three issues for hearing, all related to the issues of eligibility and placement: (1) Whether Student should be exited from special education, since Student was not eligible as a Student with emotional disturbance (ED); (2) Whether District denied Student a free appropriate public education (FAPE) during the 2006-2007 and 2007-2008 school years by placing him in a special day class (SDC) when a regular education classroom was the least restrictive environment; and (3) Whether District denied Student a FAPE by placing him in an SDC when he was neither eligible for services as ED, nor did he have a behavioral problem that required an SDC placement. At hearing, the evidence demonstrated that Student's special education eligibility category was Other Health Impaired (OHI), not ED, and that District had never found him eligible under the ED category. Moreover, at hearing, the parties' arguments and evidence demonstrated that Student sought to be placed in a general education classroom instead of an SDC because he contended that he was entitled to be exited from special education.

REMEDIES SOUGHT

Is Student entitled to compensatory education and placement in general education in a school other than Canoga Park Elementary School (Canoga Park)?

CONTENTIONS OF THE PARTIES

Student and Parents contend Student should be exited from special education, because Student is, and was, capable of functioning in a general education class with additional, non-special education assistance, as needed. Parents contend that District found Student eligible for special education and placed him in a special day class for emotionally disturbed children (ED/SDC) because of cultural misunderstandings regarding the significance of Student's conduct. Parents assert that they consented to the District's initial provision of special education services only because they had been told that they could withdraw Student from special education at any time. Student further contends that the ED/SDC class has not been an appropriate placement for Student because he has not progressed in his education while in the class. Specifically, the ED/SDC class included children of different ages and children who were emotionally disturbed. Student did not receive the one-to-one assistance in the class that the District promised, such that Student continued to misbehave and continued to be categorized as OHI and eligible for special education.

District contends that Student has been, and continues to be, eligible for special education under the category of OHI. District asserts that Student's behaviors prevent him from benefiting from his education in a general education setting, without special

Consequently, the statement of issues has been modified from the PHC Order to reflect the evidence and argument presented at hearing.

education and related services. District also contends that the ED/SDC class was an appropriate placement for Student.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is an 11-year-old boy, who was born on October 8, 1996. He currently resides in the District, and is in the fifth grade at Canoga Park. All parties anticipate that Student will graduate from Canoga Park at the end of the 2007-2008 school year and proceed to middle school.

2. Student immigrated to the United States from Iran in 2005. In March 2005, when Student was eight years old and in the second grade, he enrolled at Woodlake Elementary School (Woodlake), his school of residence in the District. Within a short period of time after enrolling at Woodlake, Student began to have numerous behavioral difficulties at school. He shouted, pushed others, used inappropriate language, and did not follow directions. He did not show remorse for his conduct. Student's maladaptive behaviors prompted the District to consider whether Student was eligible for special education.

INITIAL DETERMINATION OF STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION

3. District assessed Student in approximately February 2006, when Student was nine years old and in the third grade at Woodlake. District convened a meeting of the Individualized Education Program (IEP) team on March 10, 2006, to consider Student's eligibility for special education. He was not found eligible for special education at that time. The team recommended accommodations, to include counseling with the assistant principal as needed, and positive reinforcement for following rules. The team also recommended that the teacher keep a daily behavioral log. Additionally, on May 8, 2006, he was moved to another classroom. Despite these efforts, Student's

negative behaviors of shouting, pushing others, using inappropriate language, and defying adults continued. The District convened another IEP meeting on June 2, 2006, to reevaluate Student's eligibility for special education.

4. The June 2, 2006, IEP meeting was attended by Woodlake's assistant principal, a special education teacher, a general education teacher, a school psychologist, the school nurse, and an interpreter. Father appeared by telephone for part of the meeting, and then appeared in person later in the meeting. The team noted that Student was Limited English Proficient, and his first language was Farsi. The team considered the assessments that District had performed, which included standardized and informal tests, interviews, observations, and teacher and parent information. The team examined Student's present levels of performance in the areas of general ability and processing, health, social, reading, writing, and math. Regarding the area of general ability and processing, the team noted that Student's ability to learn, apply knowledge, generalize, evaluate, and utilize abstract concepts appeared to be in the average range, and that he did not meet the eligibility criteria for special education in the category of specific learning disability. The team concluded that Student's non-verbal reasoning skills, gross motor skills, and numerical reasoning skills were areas of strength, and attention span, focusing, and impulsivity were areas of concern.

5. Based upon the team's evaluation of Student's health assessment, and present levels of performance in other areas, the team concluded that Student was eligible for special education in the category of OHI. A nurse reported on Student's health assessment. The assessment noted Student's diagnosis of attention deficit hyperactivity disorder (ADHD), and that he had been prescribed medication (Concerta) for his ADHD, but that Student had ceased taking the medication as of April. Student was in counseling with his family at Valley Coordinated Children's Services for his

behavior. His body mass index was above average, and he was referred to the clinic at Columbus Middle school for audiometric screening.

6. The IEP team reviewed a report from Valley Coordinated Children's Services (Children's Services).⁵ According to the report, Children's Services had been providing Student individual and family therapy and bi-weekly psychiatric services since February 9, 2006. As of February 15, 2006, medication had been prescribed to help reduce symptoms of hyperactivity and impulsivity as well as to improve Student's ability to focus and attend in the classroom. Children's Services recommended that Student continue outpatient therapy and psychiatric services in addition to DIS counseling at school, and that Student's progress be monitored with daily homework/behavior logs. The report noted that Student was not taking his medication daily.

7. With respect to Student's present levels of performance in the social area, the team noted Student's impulsivity, inappropriate language and behaviors, his failure to take responsibility for his actions and behavior, his use of foul language, and his occasional aggression toward peers. The team recommended parenting classes and counseling to develop a behavior plan at home, with consequences and rewards. The team recommended that Student be encouraged to participate in community activities to increase vocabulary skills, social skills, and self-image. The team recommended counseling as a designated instructional service (DIS counseling), at a frequency of one time per week for 30 minutes, for anger management and impulsivity strategies and to strengthen age-appropriate social skills. If Student's needs were not sufficiently met by

⁵ According to its website, Valley Coordinated Children's Services is a program operated by the Los Angeles County Department of Mental Health (DMH) and it provides mental health services to children and their families.

DIS counseling, the team recommended that Student be referred for an AB 3632 assessment.⁶

8. The team considered Student's present levels of performance in reading, writing, and math, based upon the results of the Woodcock-Johnson III administered to Student on March 1, 2006. He functioned in the below average range in broad reading scores. He scored below the average range in writing tasks. At times, he began to write without listening to the prompt, due to impulsiveness. His ADHD may have contributed to this conduct. The team concluded that due to Student's impulsivity, and behavioral needs as related to his disability, Student could not access grade level standards in reading and writing without special education support. Math appeared to be an area of strength, and Student functioned in the average range in broad mathematics. The team recommended that Student may need classroom math assignments shortened and extended time due to difficulties following classroom rules and sustaining an appropriate amount of attention.

9. The team noted that Student had made average academic progress since enrolling at Woodlake, and also recognized that that the accommodations and other measures that the school had implemented since March 10, 2006, had not improved Student's behaviors. The team determined that the medical diagnosis of ADHD impacted Student's ability to access the curriculum, and impacted learning and social skills due to impulsivity, hyperactivity, inattention, and focusing problems. The team recommended placement in a behavior-based, small, structured class. The team found

⁶ An AB 3632 assessment is an assessment performed by a community mental health service (such as Los Angeles County Department of Mental Health) to determine whether community mental health services are necessary for a student with a disability to benefit from special education. (Cal. Code Regs., tit. 2, § 60030 et seq.)

that Student's educational needs were not primarily due to social maladjustment, lack of instruction in reading or math, limited English proficiency, temporary physical disability, or environment, cultural, or economic factors.

10. The team recommended free parental support groups and classes that were available at Columbus Middle School, and that a behavior contract for home and school be implemented with clear boundaries and consequences. The team also recommended the development of a reward system for staying on task, following rules, and completing assignments. The team suggested use of Brain Quest cards to strengthen oral language skills and vocabulary as well as to improve Student's general knowledge. The team also suggested that Student use a study carrel, that the amount of work per page be limited, and that highlighters be used to indicate the required math operation. The team recommended that Student make flash cards to practice vocabulary words and spelling, and that Student participate in positive after-school activities, such as those at the YMCA or at local parks.

11. The team set goals and objectives in the areas of social, reading, writing, and behavioral support. The team determined that instructional accommodations should include extended time and small group support on all tests; supplemental reading material; a positive behavior support plan; clear rewards and consequences; and shortened classwork, homework, and projects as needed. The team decided that reading material would be modified as determined by the special education teacher. The team determined that Student would participate in state and District assessments with accommodations.

12. The team agreed that the most appropriate placement for Student was in an ED/SDC, which was not available at Woodlake. Consistent with the District's policy when placing a child at other than his home school to place the child in a nearby school which has space for the child, the team determined that the ED/SDC at Pomelo Drive

Elementary School (Pomelo) was an appropriate placement. The team agreed that District would provide transportation to and from Pomelo. The team also decided that Student would have a general education curriculum, and be mainstreamed for recess, lunch, art, music and assemblies and other extracurricular activities as determined by his SDC teacher. The team agreed that Student would be eligible for extended school year (ESY), based upon the continuing impact of his disability, pattern of regression, and difficulty retaining knowledge after vacations and school breaks. The team also recommended that Student be mainstreamed for math. Parents wanted Student mainstreamed for science and social studies, and the team agreed to defer that issue to the "classroom teacher." (The team did not specify whether the "classroom teacher" was the ED/SDC teacher, or a general education teacher in the class to which Student might be mainstreamed.)

13. The IEP included an English Language Learners (ELL) Master Plan, including an English Language Development goal and related objectives. The IEP team also developed a behavioral support plan (BSP), to address Student's "outburst/rage/explosive reactions" during which he swore, argued, and threw objects, which occurred five times per hour. The team found that this conduct impeded Student's learning. The team found that the predictors for this behavior were Student's internal physical/emotional state, verbal directives, and peer conflict. The team believed that such behavior was generated by a desire for peer and staff attention. The BSP included a variety of strategies to reinforce positive behaviors, as well as reactive strategies. The team also set a behavioral goal, and provided for weekly reports between teacher and parent.

14. Father signed and consented to the IEP. The IEP did not mention any representation to, or understanding by Parents, that they were entitled to remove

Student from special education at will and place him in a general education classroom in the District.

STUDENT'S EXPERIENCES AT POMELO DURING THE 2006-2007 SCHOOL YEAR

15. Student entered fourth grade at Pomelo in fall 2006, when he was 10 years old. He was placed in the ED/SDC, with one teacher and two assistants. He was mainstreamed for math, science, and social studies. One time a week, a social worker and the teacher worked on social skills with the class. The assistant principal, Gale Gundersen, also counseled Student individually about his behavior. Ms. Gundersen holds a master's degree in Special Education and a credential in learning handicaps, as well as a master's degree in Educational Administration.

16. Student's behaviors improved somewhat at the beginning of the school year, but they deteriorated over the course of the year. During the school year Student was violent, disobedient, and used foul and inappropriate language. He was impulsive, and had trouble sitting in his seat in class. He was physically aggressive in class toward other students, both boys and girls. On many occasions, for no reason, he would hit the child sitting next to him when he was in the general education classroom. He punched children on the schoolyard. He had a confrontation with another student, during which Student physically picked up the other student and threw him down. Father was meeting with school personnel every week because of Student's misbehavior. At one point, Student was suspended for multiple days. He was the only child out of a student population of 760 who was suspended during the 2006-2007 school year. Student demonstrated an unhealthy interest in gangs. Due to his deteriorating behaviors, he gradually became unable to function in the general education classroom. By the end of the school year, he was acting belligerently to adults, and was disrespectful to Ms. Gundersen.

17. Student improved in some academic areas during the course of the school year. He became a better reader, and his math skills improved. However, after the first few months of the school year, he ceased doing homework assignments.

18. District convened the annual IEP meeting on May 17, 2007, to review Student's progress. Student's parents, Ms. Gundersen (Pomelo's assistant principal), Lisa Siff (Student's special education teacher), Marc Graff (Student's general education teacher in math and social studies), two social workers, and a program specialist attended the meeting. One of the social workers, Maryan Hakimzadeh, a Los Angeles County social worker, served as an interpreter for the meeting.

19. The team reviewed Student's health assessment. The nurse's report reflected a May 1, 2007 telephone conversation with Mother, which was interpreted by a Farsi interpreter. Mother reported that Student had not taken his medications for about one year, and was in good health. The nurse also noted Student's diagnosis of ADHD, and that she had difficulty obtaining information from Mother due to the language difference.

20. In reviewing Student's present level of performance in the area of social/emotional, the team considered the report of Tali Sperber, a social worker in the DIS counseling program. Ms. Sperber did not testify at hearing. In her report to the IEP team, Ms. Sperber noted that Student was a "charming, sweet boy" who at times wanted to please adults. He responded well to therapy and techniques during the counseling sessions, but outside of sessions he had difficulty applying anger management techniques and was often oppositional with adults. He was willfully disobedient at times. Ms. Sperber recommended that Student's goals remain substantially the same, with slight adjustments.

21. The team also reviewed Student's present levels of performance in language arts, math, behavior, and vocational. Student did not meet any of the target

scores in language arts on the Open Court Assessment Unit 3. Student performed in the below-average range on the reading, written language, and oral language portions of the Kaufman Test of Educational Achievement, Second Edition (KTEA). He required assistance in writing assignments. He had difficulty comprehending reading and required assistance in understanding grade level stories. He did not take the time and effort to complete his work.

22. In reviewing Student's present level of performance in math, the team noted that Student achieved a score in the "Approaching Proficiency Range" in the Math Periodic Assessment. On the KTEA, Student's math skills fell within the average range in the areas of math computation and math concepts and application. The team recorded that Student volunteered in his general education math class, and appeared to have mastered basic math facts. However, the team noted he was frequently off-task, yelling in class, and initiating conversations with his classmates. He tried to copy the answers from other children's papers, and he did not take the time to work through math problems. The team decided he could not be mainstreamed without an adult accompanying him because of his behavior, and that he will talk back to any such adult.

23. The team recorded Student's present level of performance in the area of behavior. The team noted that Student could be very sweet and helpful, responsive to rewards, and sociable. He read to first grade students, and all involved enjoyed that activity. However, Student also displayed many inappropriate and dangerous behaviors, both in the classroom and on the school yard. He was unable to control his use of expletives and sexualized behaviors. Student became easily upset when he did not get his way, and would then yell at adults, turn over desks, throw chairs, run away and climb on trees and structures. He had been in several physical altercations, as a result of which an adult was required to always be near him when he was on the school yard. Student constantly brought inappropriate items to school. He brought a paint ball, which he

used to deface the boys' bathroom. On other occasions he brought a metal piece from his skateboard, and a laser which he aimed at a teacher's eye. Multiple parents complained about his physical and verbal behaviors towards other children. Student talked about gangs, and continuously displayed gang-like behavior, such as wearing his pants down around his hips and writing graffiti. The team concluded that Student's impulsivity and acting-out behaviors made him a danger to himself and others. The team recommended accommodations to include adult prompting, a rewards system, verbal praise, a safe place to calm down, breaks, and food.

24. In the vocational area, the team noted Student's artistic ability. However, he did not do school work or homework. He did not return his daily behavioral reports which were to be reviewed and signed by Parents. The team concluded that, in each of the areas it reviewed, Student's behavioral and attentional issues caused him to have much difficulty accessing the core curriculum without support.

25. The team reviewed Student's goals, and determined that he had met the reading goal, but had not met the objectives or the goal in social/emotional. He met one of two writing objectives, but not the goal, and met all objectives in behavioral support, but not the goal. He did not achieve the behavioral support goal because of poor behavior, and he failed to meet the social/emotional goal because he could not generalize out of counseling sessions, and had difficulty using anger management techniques.

26. The team reiterated Student's eligibility as OHI, and noted that his behavioral and attentional issues impacted his ability to access the core curriculum. His misbehavior was also a safety issue, and he often refused to follow adult directives.

27. The team set annual goals and objectives in the areas of social/emotional, reading, writing, vocational, behavioral support, and math. The team recommended supports and accommodations, to include small group or individual instruction, breaks

as needed, preferential seating, adult monitoring on the yard, graphic organizers, step-by-step instructions, graph paper, short assignments, use of a timer, reinforcers, presentation of material using different modalities, and the rewording and repeating of instructions. The team recommended that Student participate in state and District-wide assessments, with accommodations. The team again decided to place Student in an ED/SDC, with the District to provide transportation, and offered ESY. Since the District was closing the ED/SDC at Pomelo, the team determined that the ED/SDC class at Canoga Park was an appropriate placement, as it was the nearest ED/SDC class with space.

28. The IEP notes reflect that due to inappropriate, off-task behaviors, Student was often required to be removed from his general education classroom to his ED/SDC class, because his conduct was disruptive to his peers in his general education classes. His participation in mainstreaming was briefly halted altogether because he had an altercation with another student in the general education class. Additionally, his lunchtime had to be switched at some point to avoid his becoming involved in fights.

29. The IEP team noted that Student continued to engage in the following behaviors: using foul language, talking about gangs and writing gang signs, not listening to adults, fighting with other students, refusing to work, refusing to do homework, refusing to follow directions, and leaving the room without permission. The team concluded that Student had been overly disruptive in the general education core classes, such that instructional time was lost, as well as the learning time of his peers. The team recommended that Student be mainstreamed only for the arts, recess, and lunch, as behavior permitted. If his behavior improved, the team recommended that he be phased into mainstream core classes such as math and science. The general education teacher reported that Student initially had behaved well and completed classwork and homework. Since January or February 2007, however, Student's classroom

and yard behavior had deteriorated, and he was no longer completing classwork and homework. Parents expressed the desire for Student to spend more time in general education, but the teacher observed that, due to Student's low skills and extreme behavior challenges, Student would have difficulty accessing the curriculum in a mainstream setting.

30. The team recommended that Student receive DIS counseling one time per week for 30 minutes. Parents expressed interest in the status of an AB 3632 referral, which was in the process of being completed. The team considered the ELL Master Plan, and set a goal and objectives for English language development. The team also considered Student's BSP. The team described Student's behavior as outburst/rage/explosive reactions, during which he engaged in fighting, name-calling, screaming, and threatening harm. The team found that these behaviors impeded learning, and occurred approximately four times per day, for approximately 15 minutes. The team considered various triggers for the behavior, including internal physical/emotional state, peer conflicts, events from previous environments, and verbal directives, and noted that Student lacked conflict resolution skills. The team set forth a variety of behavioral strategies and supports, including preferred seating; study carrels; verbal praise; peer models; and teaching Student better communication skills, anger management, and new social skills. The team decided that Student must be taught replacement behaviors, and that such behaviors must be reinforced. The team recommended that reinforcements include praise and rewards. A behavioral goal was set, and the team agreed that teacher and parent would communicate daily by phone and written notes.

31. Father disagreed with the placement at Canoga Park. The IEP reflects that Father felt that Canoga Park was an undesirable school in an undeniable neighborhood,

and that Parents did not consent to the IEP due to their disagreement with the instructional setting.

AB 3632 REFERRAL AND STUDENT'S RECEIPT OF PRIVATE MENTAL HEALTH SERVICES

32. District proceeded with an AB 3632 referral after the May 17, 2007, IEP and the AB 3632 assessment process occurred over the summer of 2007. On June 16, 2007, Student and Parents began private psychosocial and psychiatric treatment at Kaiser Permanente (Kaiser). Parents advised Kaiser personnel that they were requesting services because Student had behavioral problems and a history of attention difficulties, which were impacting Student academically and socially, and were jeopardizing his ability to attend school. Student and Parents received mental health services from Kaiser during the summer of 2007 and throughout the 2007-2008 school year. Nima Akhavan, M.D., a child psychiatrist, and Sergio Diaz, a licensed clinical social worker, were involved in treating Student at Kaiser. As part of his treatment, Student began to take medication for his ADHD.

IEP MEETING OF OCTOBER 4, 2007

33. Despite Parents' objections to his placement at Canoga Park, Student entered the ED/SDC class at Canoga Park in September 2007, when he was in the fifth grade and almost 10 years old. Cheri Pratt was Student's teacher in the ED/SDC class. Ms. Pratt holds a master's degree in Special Education, as well as special education teaching credentials. She has taught full-time in the District for over 14 years, and has served as a substitute teacher in the District for an additional seven years. The ED/SDC class had a total of six students (all boys) and two adults in addition to Ms. Pratt. Four of the students were in fifth grade, one was in fourth grade, and one was in third grade. Student took reading, math, and social studies in the ED/SDC class, all of which were

taught in conformity with the general education fifth-grade curriculum. Student was mainstreamed for fifth-grade science and sometimes physical education, and he participated in graduation preparation with the general education students.

34. Toward the beginning of the 2007-2008 school year, on October 4, 2007, District convened an IEP meeting to discuss the AB 3632 referral and assessment and to amend the May 17, 2007, IEP in accordance with the assessment results. Father, Jane Wilson (Canoga Park's assistant principal in charge of instructional support), Ms. Pratt (Student's special education teacher), two psychiatric social workers, and Farah Pezeshki, Ph.D., a representative of DMH (Los Angeles County Department of Mental Health), attended the meeting. Dr. Pezeshki also served as the interpreter for the meeting. The team noted Student's eligibility for special education services as a student with OHI, as behavioral and attentional issues impacted Student's ability to access the core curriculum.

35. Dr. Pezeshki reported the results of the DMH assessment to the IEP team. Dr. Pezeshki noted that Student's current level of social and emotional functioning included oppositional-defiant behaviors, poor peer relationships, and poor attention span. Dr. Pezeshki concluded that Student qualified for AB 3632 services. Dr. Pezeshki recommended that AB 3632 services be provided on an outpatient basis, to include individual therapy for a minimum of 200 minutes per month, not to exceed 250 minutes per month, and family therapy for a minimum of 100 minutes per month, not to exceed 150 minutes per month, with medication evaluation and follow-up by a psychiatrist if medications were prescribed. The team agreed to offer 200 minutes per month of AB 3632 counseling as a related service, and set counseling goals and objectives designed to increase Student's attention span, increase Student's compliance with authority figures, and improve Student's peer relationships. DMH recommended that the

treatment provider and Parents review Student's progress toward these goals in ongoing family therapy sessions.

36. At the meeting, Father declined the proposed DMH services. He stated that Student was receiving therapy at Kaiser, and that there was no interpreter or bio-feedback program at the San Fernando Valley Community Mental Health Center, who was the proposed provider for DPH services. Therefore, Father believed the proposed DMH services could not help. At the meeting, Father presented a letter dated October 2, 2007, from Mr. Diaz, a social worker at Kaiser who was treating Student. The letter referred to the treatment that Student had been receiving at Kaiser, including treatment by Dr. Akhavan. The letter revealed that Student had been diagnosed with ADHD, and parent-child relational problems. The letter stated that Student had been prescribed medication for his attention problems, and that he and Parents would be receiving family therapy. Therapy would also include working on improving Student's self-esteem. In the letter, Mr. Diaz recommended that Student be placed in the general education setting, and receive extra help when he is struggling academically. Mr. Diaz concluded that the interventions outlined in the letter would improve Student's behavior and he could succeed at school.

STUDENT'S EXPERIENCES AT CANOGA PARK DURING THE 2007-2008 SCHOOL YEAR

37. Student's academic performance and behaviors improved during the 2007-2008 school year. At first, he used profanity and was aggressive towards other children, but as the school year progressed he followed rules more consistently. His behavioral difficulties were more likely to occur during unstructured times, such as at recess and at lunch. At those times in particular, he spoke rudely to assistants, cursed at them, and tried to intimidate them. His behavior improved in Ms. Pratt's presence. In

general, he tended to be impulsive, verbally aggressive towards others, and would lie or make things up to get others into trouble.

38. Student has responded well to a rewards system that Ms. Pratt has implemented. He received an award from the school for his improvement in behavior, and he progressed academically. He needed supervision however, especially during unstructured times. He required much personal attention in class, which he received in the ED/SDC. He is very sensitive to noises and other aspects of his environment. In a general education setting, with 25 other children, his behaviors and need for attention would disrupt the class and impede his and other students' ability to learn.

LEGAL CONCLUSIONS

1. 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, 56-57 [126 S.Ct. 528].)

WHETHER STUDENT SHOULD BE EXITED FROM SPECIAL EDUCATION

2. Student contends that he should be exited from special education, because he does not need, and has not needed, special education services to access his education. He contends that he was placed in special education because his behaviors were misunderstood by the District, due to cultural differences. Parents assert that they consented to placement in special education because they were told that they could exit Student from special education at any time. Student contends that his poor behaviors at school after he was found eligible for special education were due to a school psychologist telling Parents that Student did not require private psychological services and medication, and by the failure of the District to control Student by providing one-to-one assistance as promised. Student contends that he can succeed in school as long as he continues to receive private psychological and psychiatric therapy and continues

to take his medication. As discussed below, Student failed to demonstrate that he is not, and was not, eligible for special education, and that there are grounds to exit him from special education.

3. 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 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 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).)

4. 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 are also referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

5. In *Board of Education of the Hendrick Hudson Central Sch. Dist., et al. v. Rowley* (1982) 488 U.S. 176 [102 S.Ct. 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 substantive requirements 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 pp. 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 p.201.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.)

6. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services for an assortment of reasons, including OHI. (20 U.S.C. § 1401(3)(A)(i) & (ii); Cal. Code Regs., tit. 5, § 3030.) A student is not eligible for special education if the determinant factor for finding eligibility is lack of appropriate instruction in reading, lack of instruction in mathematics, or limited English proficiency. (20 U.S.C. § 1414(b)(5); Ed. Code, § 56329, subd. (a)(2).)

7. A child meets eligibility criteria for OHI if the child has limited strength, vitality or alertness, due to chronic or acute health problems, which adversely affects the child's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) A student who has been diagnosed as having ADHD and whose educational performance is adversely affected by ADHD, and who demonstrates a need for special education and related services by meeting the eligibility requirements for OHI is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

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. After the assessments have been administered, the IEP team meets to determine whether the student is eligible for special education and related services. If the team, with the parent's input, finds the child is eligible, the team determines the student's educational needs, and identifies the student's present levels of performance, and the services and accommodations that the student requires. (20 U.S.C. § 1414 (b)(4),(c); Ed. Code, § 56323.) An IEP is evaluated in light of information available to the IEP team 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* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

10. 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).)

11. Once a student has 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.)⁷ 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).)⁸

12. As is demonstrated by Findings of Fact 1 through 38, and Legal Conclusions 1 through 11, at all relevant times Student has been qualified for special education services as a Student with OHI. Student has had a medical diagnosis of ADHD since before the IEP team found him eligible for special education, and he has been prescribed medication for this condition. His behaviors at school that arise from his ADHD have impaired and continue to impair his ability to access the general education curriculum. At first, during the 2005-2006 school year, District attempted to accommodate Student's behaviors in the general education setting. When these efforts were unsuccessful, towards the end of the 2005-2006 school year District considered

⁷ The United States Department of Education recently issued a Notice of Proposed Rulemaking, seeking public comment on a proposal to amend 34 Code of Federal Regulations part 300.9, to permit parents to unilaterally withdraw their children from special education. (73 Fed.Reg. 27690-27692 (May 13, 2008).) At this time, however, the law remains that parents cannot unilaterally remove their children from special education.

⁸ Parents did not consent to the May 17, 2007, IEP, on the grounds that they did not want Student to attend Canoga Park. They also did not consent to the receipt of DMH services offered in the October 4, 2007, IEP. Parents did not reject all special education services, however, and Student continued to receive special education services at all relevant times. Therefore, District was not required by Education Code section 56346, subdivision (d), to initiate the due process hearing complaint in this matter.

Student as a possible candidate for special education and related services.

Subsequently, three different IEP teams from three different schools, Woodlake, Pomelo, and Canoga Park, have independently found Student eligible for special education. Each of these IEP teams has found that Student's behavioral and attentional issues severely impaired his ability to access the core curriculum without special education support, and that an ED/SDC class was an appropriate placement. The ED/SDC class is not restricted to children who are eligible for special education and related services because of ED, but, as in this case, may also be an appropriate placement for children who are eligible for special education under other categories and who also have behavioral challenges.

13. The findings of the IEP teams were supported by all of the District witnesses. In particular, Mr. Graff, Student's math and social studies teacher in the general education setting at Pomelo, testified that Student's behaviors while he was at Pomelo impaired Student's ability to function in the general education classroom. Mr. Graff testified that Student required special education services at that time. Mr. Graff's testimony was credible, because of his first-hand experience with Student in the general education setting. His testimony was supported by the testimony of Ms. Gundersen, the assistant principal at Pomelo when Student was enrolled there. Ms. Gundersen testified that Student's behaviors at Pomelo were severe, and that he required a small group setting such as the ED/SDC. Ms. Gundersen's testimony was credible because of her background in special education, her first-hand experiences with Student and her extensive knowledge of his behaviors compared with those of other students on campus.

14. Ms. Pratt, Student's current special education teacher at Canoga Park, also testified that Student required special education and related services to access the curriculum. Ms. Pratt testified that Student required much personal attention in class, and close supervision during unstructured times. She testified that Student would be

disruptive in a full-time general education setting, because he would be very sensitive to the number of children and the noise in the general education classroom. Ms. Pratt was credible, because of her training in special education, and first-hand experience teaching Student in the ED/SDC class.

15. Student called Nima Akhavan, M.D., the child psychiatrist who has been treating Student privately at Kaiser during the 2007-2008 school year, as a witness. Dr. Akhavan testified that Student's behavior and academics had significantly improved during the course of treatment due to therapy, medication, and Student's school program. Dr. Akhavan was unable to state the degree to which each of these components contributed to Student's improvement. He based his opinion on his discussions with Student and Parents. He had never attended an IEP meeting, or visited Student's school placement. He deferred to Student's teachers regarding Student's educational program.

16. Student also called as a witness Sergio Diaz, a clinical social worker at Kaiser who is also involved in Student's treatment there. Mr. Diaz testified that Student's academics and behavior had improved during the time he was being treated at Kaiser. Like Dr. Akhavan, Mr. Diaz was unable to measure how much of Student's improvement was due to Student's school program versus his treatment at Kaiser and his medication. Mr. Diaz had never visited Student's school, nor had he talked to his teachers or participated in an IEP meeting. He testified that he wrote the letter of October 2, 2007, in which he recommended that Student be placed in a general education setting with non-special education support services if necessary, only because Parents requested that he write such a letter. As a social worker, he wanted to advocate for Parents, and he also had a general philosophy that, with enough support, students can succeed academically, but he deferred to the school as to what was best for Student. Mr. Diaz

testified that he could offer no opinion as to whether Student should remain in special education.

17. At hearing, Student presented no evidence to dispute the validity of any of the assessments relied upon by the IEP teams to find him eligible for special education, or to find him eligible for the receipt of mental health services from DMH. Student presented no evidence of any other assessment of Student, or any evidence that another assessment would produce any different results than the assessment results obtained by District and by DMH.⁹ Further, Student presented no persuasive evidence to dispute the determination of three different IEP teams, and the testimony of District's well-qualified percipient witnesses at trial, that Student was eligible for special education as a student with OHI. In this regard, Parents testified that Student did not, and does not, belong in special education. Student's parents; however, demonstrated no expertise or background in general education, special education, or ADHD. Mr. Diaz's letter of October 2, 2007, and his testimony, is the only objective evidence that could be construed as suggesting that Student does not require special education. However, in view of the paucity of information that Mr. Diaz had regarding Student's special education program and Student's behavior at school, Mr. Diaz's opinion lacks foundation and is not persuasive.

⁹ At hearing and in the closing brief Student requested that the ALJ order that an IEE be performed. Since Student produced no evidence disputing the validity of, or the results of, either the District's assessments or DMH's assessment, there is no basis for ordering an IEE, either as a remedy or pursuant to Education Code section 56505.1, subdivision (e). Nothing in this Decision forecloses Student from requesting an IEE from the District pursuant to Education Code section 56329, subdivision (b).

18. Furthermore, Student's contentions that he should be exited from special education because (a) Parents were told that they could exit Student from special education at any time; (b) A school psychologist had advised Parents that Student did not need counseling or medication; and (c) District did not provide one-to-one assistance as promised and failed to control Student, are unpersuasive or not relevant. Student presented no documents or objective evidence that Parents were told that they could exit Student from special education at any time, that a school psychologist had advised them that Student did not need counseling or medication, or that the District had promised to provide a one-to-one aide to Student. Student did not identify the individuals who made these representations. Nor do these alleged promises and representations appear in any of the IEPs. Indeed, the IEPs of June 2006 and May 2007 reflect that Student had not taken medication for some time prior to the finding that he was eligible for special education. Ms. Gundersen contradicted Parents' testimony that Student would have a designated one-to-one aide at all times. None of these contentions, even if had been proven, alter the evidence that Student is, and has been at all relevant times, eligible for special education and related services as a Student with OHI.

19. Student's contention that his behavioral difficulties stemmed from cultural misunderstandings was also unsupported by the evidence and unpersuasive. Student's severe and aggressive behaviors, such as hitting and pushing other students, impulsivity, defying adult directions, and attempting to intimidate peers and adults on campus, were not simply culturally-based and thus misunderstood by the District. Rather, the evidence demonstrated that Student's behavioral struggles, which have continued despite approximately two years of DIS counseling, a BSP, private therapy, and medication, stem from his disability.

20. In conclusion, Parents cannot unilaterally exit Student from special education as long as he attends public school in the District. Parents have failed to demonstrate that Student is not, or has not been, eligible for special education and related services. The determination as to whether a child is eligible for and continues to receive special education and related services is a decision that is made by the IEP team. Since June 2006, all IEP teams have determined that Student should continue to receive special education and related services. Their findings are supported by the DMH conclusion after assessment that Student qualifies for mental health services under AB 3632 because he needs mental health services to benefit from his special education. Under these circumstances, Student is, and at all relevant times has been, appropriately receiving special education and related services, and he should continue to do so. He should not be exited from special education at this time.

ORDER

Student's claim for relief is denied.

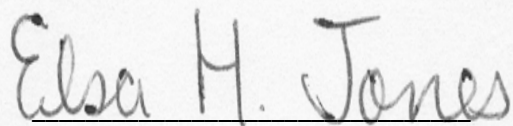
PREVAILING PARTY

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. District prevailed on all issues that were heard and decided in this case.

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: May 16, 2008

A handwritten signature in cursive script that reads "Elsa H. Jones". The signature is written in dark ink on a light-colored, slightly textured background.

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings

Special Education Division