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

In the Matter of: STUDENT, Petitioner, v. SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, Respondent.	OAH CASE NO. N2006020562

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, heard this matter on June 19, 20, 21, 22, and 23, 2006, in Encinitas, California.

Ellen Dowd, Attorney at Law, represented Petitioner Student (Student). Student's Mother (Mother) was present throughout the entire hearing.

Joel Mason of Stutz, Artiano, Shinoff & Holtz represented Respondent San Dieguito Union High School District (District). District representatives Gina Serna, Coordinator of Special Education, and Jackie Harrigan, Student Services Specialist, were also present during portions of the hearing.

On March 13, 2006, Student filed the request for due process hearing at issue in this case. The record was opened on June 19, 2006. Testimony was taken and evidence was offered and received through June 23, 2006. The record remained open at the request of the parties to submit written argument by July 3, 2006. OAH received written argument from Student and District, the record was closed, and the matter was submitted on July 3, 2006.

ISSUES[1]

1. For the 2004-2005 and 2005-2006 school years did the District fail to:

A. Determine Student qualifed for special education under Specific Learning Disability (SLD) criteria?

B. Assess Student for visual motor integration?

C. consider outside assessments and reports that indicated Student exhibited both visual and auditory processing deficits?

2. For the 2004-2005 and 2005-2006 school years did the District deny Student a free appropriate public education (FAPE) by:

A. preventing parents from meaningfully participating in the Individual Education Program (IEP) team meetings on September 27, 2004, December 10, 2004, and December 1, 2005**,** by failing to consider parents' concerns?

B. failing to take into account all of the extra outside services that assisted Student to maintain her grades?

C. improperly negotiating with Student's parents to raise Student's grades during the 2004-2005 school year?

D. failing to properly notice an IEP team meeting after January, 2006, when Student's outside visual report dated December 5, 2005, and auditory processing report dated January 5, 2006, were available?

E. recommending Student be placed on anti-anxiety medication at the December 1, 2005, IEP team meeting?[2]

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 21, 2006, at the time the due process hearing request was filed, Student was 14 years old and in the eighth grade at The Winston School, a nonpublic school

[1] The issues have been reworded for clarification of decision writing. All issues raised by Petitioner at the prehearing conference are addressed in this decision.
[2] Student withdrew the issue relating to anti-anxiety medication in Petitioner's Closing Brief received on July 3, 2006, by OAH.

located in Del Mar, California. During the entire time period at issue, Student resided with her parents within the geographical boundaries of the District.

2. Student has never been found eligible for special education. She is not currently attending any District school.

Evaluations and Eligibility Review for Student before Attending District's School

3. Student attended seventh grade at District's Carmel Valley Middle School for the 2004-2005 school year. Before attending District's middle school, and during the 2003-2004 school year, Student attended sixth grade at an elementary school in the Del Mar Union School District (Del Mar). In May of 2004, Student was referred to Del Mar's school psychologist Richard Griswold, Ph.D., for a psychoeducational assessment to determine eligibility for special education. At the time of the assessment, Parents had concerns regarding Student's auditory perceptual abilities, the amount of time Student spent on homework, and Student's short-term memory.

4. Dr. Griswold prepared a written report of his findings following his assessment of Student on May 25 and 26, 2004. Student had a full scale IQ score of 103 on the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV). Student's cognitive ability was best represented by this full scale IQ of 103 which falls in the average range of scores between 90 and 110. She scored 93 on the Auditory Perceptual Quotient on the Test of Auditory-Perceptual Skills–Revised (TAPS-R) which is within the average range.

5. Certain test results, however, fell in the below-average range for Student, including auditory perceptual skills related to short-term memory for words in isolation, and verbally presented sequential directions. Other similar subtests (including Sentence Memory, which fell in the low end of the average range, and Letter/Number Memory, which fell in the below-average range), contained in the Wide Range Assessment of Memory and Learning (WRAML) had similar short-term memory results. In short, Student had an auditory perceptual weakness related to sequential information, but this weakness did not appear to qualify Student for special education. To assist Student in her area of weakness, a variety of recommendations that might be implemented in a general education environment were suggested.

6. Del Mar held an initial IEP team meeting on June 8, 2004, to review the initial assessments and determine Student's eligibility for special education. The team noted there was no significant discrepancy between Student's cognitive and achievement scores though Student did exhibit auditory perceptual weaknesses. As a result, Student was found not eligible under the criteria for SLD. The team recommended an additional speech and language assessment of Student to assess language comprehension and auditory processing skills.

7. At the conclusion of this meeting, Student's Mother provided her written consent to a special education evaluation plan to assess the area of Language/Speech/Communication Development to be conducted by a speech and language pathologist. The plan specified a variety of tests including the Test of Problem Solving (TOPS), the Comprehensive Assessment of Spoken Language (CASL), and the Comprehensive Test of Phonological Processing (C-TOPP). Because this IEP meeting was held at the end of the sixth grade school year, the speech-language evaluation was not performed by Del Mar.

8. Student began the seventh grade at a District campus. District elected to conduct each of the assessments that had been agreed to by Del Mar and Mother. She was not found eligible for special education due to a speech and language deficit.[3]

The September 27, 2004, IEP Team Meeting

9. The District convened an IEP team meeting for Student on September 27, 2004. The purpose of this meeting was to review the results of the speech-language evaluation. Mother and Student's Father (Father) both attended this meeting. They expressed their concern regarding the amount of time it took for Student to learn and understand new concepts. They also expressed their concern that, although testing did not reveal any significant discrepancies between ability and achievement, testing did indicate weaknesses in the areas of auditory memory, processing, visual motor integration, and listening comprehension.

10. District's evaluation included the CASL, the TOPS, and the C-TOPP. Student demonstrated average to above-average skills for vocabulary, expressive language, receptive language, pragmatics and problem solving, and phonological processing. Although Student had relative weaknesses, identified by average scores on the sentence comprehension and paragraph comprehension subtests of the CASL, many of her other scores were in the above-average and superior range. District's evaluation also noted some teachers indicated Student sometimes drifts off in class, but once Student was refocused, she was able to process and understand the material.

11. At the conclusion of the meeting, Student was determined not eligible for special education based on the assessments of Student. However, in view of the concerns Parents had for Student, the team recommended general education tutoring and that District and Parents prepare a Student Success Services (SSS) Plan for Student. The purpose of an SSS is to identify and provide support and intervention services for students and their families. Parents signed the SSS Plan on October 4, 2004. This plan noted areas of weakness for Student including: auditory and visual short term memory; visual motor integration; confidence/attitude toward school; and academic fluency. The plan also noted the concerns of Student's parents regarding the amount of time, from three to four hours per night, that Student worked on homework and the impact this effort had on Student's

[3] At the due process hearing, Student did not challenge the adequacy of the speech-language assessment by District.

confidence and attitude toward school. On December 10, 2004, members of a multidisciplinary 504 team met to discuss Student's needs for a 504 plan. Mother attended this meeting and acknowledged receiving a copy of the Due Process Procedural Safeguards/Grievance Procedures for this initial section 504 meeting.

District's Attempt to Evaluate Student during the 2004-2005 School Year

12. In March 2005, Parents again expressed concerns about Student's grades and the amount of time Student needed to complete her homework, even while being assisted by Parents. Parents then requested District to evaluate Student in several areas of suspected disability to determine her eligibility for special education.

13. District prepared an assessment plan dated March 10, 2005, and submitted it to Parents for their input and consent. This assessment plan proposed to assess Student in a number of areas including: academic achievement using the Wechsler Individual Achievement Test (WIAT); psycho-motor development/perceptual functioning using the Bender-Gestalt; cognitive functioning using the Cognitive Assessment System (CAS) and the Comprehensive Test of Non-Verbal Intelligence (C-TONI); social/emotional adaptive behavior using the Achenbach and the House-Tree-Person (HTP); and health using a hearing screening, a vision screening, and a health and development history. On March 12, 2005, Mother provided her written consent to assessment by signing the parent acknowledgment box on the assessment plan. However, Mother added auditory processing as another area of suspected disability that Parents wanted evaluated.

14. Parents did not make Student available for assessment as agreed on March 12, 2005. Rather, Parents withdrew their consent to the assessment plan by an e-mail and letter dated March 30, 2005, to Michael Grove (Grove), who was then Assistant Principal at Carmel Valley Middle School. Grove then telephoned Parents to find out why they withdrew their consent to the evaluation plan. Student's Father told him they had decided to pursue another option for Student. Neither Mother nor Father told Grove anything else about Parents' decision to withdraw their consent to the assessment plan–

Student's Grades and Standardized Testing during Seventh Grade (2004-2005)

15. Student received a report card from District at the middle and the end of the seventh grade. She also received a progress report midway through each grading period. The report cards contained letter grades which were placed on Student's official school transcript. The progress reports also contained letter grades, but these grades were only intended as an unofficial interim statement of Student's current grade status; progress report grades were not recorded on any official transcript for Student.

16. Student received lower grades in the second half of seventh grade than in the first half. For the first half of the seventh grade, Student's grades on the first unofficial Progress Report for the period August 30 to October 29, 2004, included five As and one B, yielding a Scholarship Grade Point Average (GPA) of 3.83. Student's Report Card for the

first half of the year, for the period from August 30, 2004, to January 26, 2005, included two As and four Bs, yielding a Scholarship GPA of 3.33.

17. For the second half of the seventh grade, Student's grades on the first unofficial Progress Report for the period January 31, 2005, to April 1, 2005, included three Bs, two Cs, and one F, yielding a Scholarship GPA of 2.17. Student's Report Card for the second half of the year, for the period from January 31, 2005, to June 17, 2005, August 30, 2004, included three Bs and three Cs, yielding a Scholarship GPA of 2.50.

18. Near the end of the seventh grade, Student had some incomplete work due to absences and Student's participation in the school talent show. If the missing work was not handed in before the last week of school, the work could not be graded and that would result in a lower grade for Student. Student did submit the completed work in time to be graded. There was no evidence that any teacher negotiated with Parents to change any grade for Student at any time during the seventh grade.

19. Student's marks of three Bs and three Cs translate into average achievement in three courses and above average achievement in three courses. When compared to the cognitive scores Student earned on the WISC-IV and the CAS, which found average IQ scores of 103 and 104, Student had performed at or above her ability in all her classes by the end of the seventh grade.

20. Student also participated in California's Standardized Testing and Reporting (STAR) Program in the spring of 2005 while she was in the seventh grade at Carmel Valley Middle School. The STAR student report for Student reported her scores in the areas of English-Language Arts and Mathematics. For English-Language Arts, Student earned a scaled score of 409 out of 600, placing her in the performance level identified as Advanced.[4] For Mathematics, Student earned a scaled score of 340, placing her in the performance level identified as Basic,[5] just below Proficient level.

Parents' Placement of Student at The Winston School

21. By the end of the seventh grade, Parents were concerned that Student's grades were lower than they were at the beginning of the year. Parents were also concerned that Student felt increased anxiety from the extensive amount of time Student spent on her work with decreasing grades during the year. Parents unilaterally decided to place Student at The Winston School, a nonpublic school located in Del Mar, California, for the eighth grade (2005-2006 school year.)

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[4] For English-Language Arts, the STAR Student Report identified the following five ranges for scaled scores and performance levels: 150-262 was Far Below Basic; 263-299 was Below Basic; 300-349 was Basic; 350-400 was Proficient; and 401-600 was Advanced.

[5] For Mathematics, the STAR Student Report identified the following five ranges for scores and performance levels: 150-256 was Far Below Basic; 257-299 was Below Basic; 300-349 was Basic; 350-413 was Proficient; and 414-600 was Advanced.

22. By letter dated August 23, 2005, Parents notified Grove, who was then Principal of Carmel Valley Middle School, of their intent to place Student in a nonpublic school. In this letter, Parents also notified Grove they would seek reimbursement from District.

23. After Grove received this notice, he arranged for an IEP team meeting for Student. Mother received written notice of the IEP team meeting scheduled for September 20, 2005.

24. At the hearing Mother presented a Winston School Enrolment Contract for 2005-2006 dated September 18, 2005, and represented this was the only enrollment document signed for Student. Mother stated she signed this document before receiving any response to her August 23, 2005, letter to Grove. Mother denied paying any money to The Winston School before this date, saying she asked the school if they would hold a spot for Student. However, there is a statement dated April 7, 2006, from the Winston School showing tuition charged for the 2005-2006 school year on July 26, 2005, with a partial payment of tuition in the amount of $7,025.00 paid on July 29, 2005, and the balance paid on February 15, 2006.

The September 20, 2005, IEP Team Meeting

25. Members of the IEP team met again on September 20, 2005, for the purpose of discussing Student's eligibility for special education. Mother attended this meeting and advised that she did not want to send Student back to District's Carmel Valley Middle School because of her concern about Student's anxiety.

26. At the IEP meeting on September 20, 2005, Mother signed an assessment plan providing for assessments to be conducted for the purpose of determining whether Student qualified for special education and to evaluate Student's anxiety.

Multidisciplinary Evaluation by School Psychologist David B. Clark, Ph.D.

27. David B. Clark, Ph.D., has been a school psychologist for 32 years. He has been employed by District for the past 25 years. Dr. Clark holds a Master's degree in educational psychology and a Ph.D. in clinical psychology. He has taught psychoeducational testing at the college level at several schools including Chapman University, National University, LaVerne University, and University of California at San Diego. During the course of his career with District he estimates he has attended over 3,000 IEP team meetings. Dr. Clark conducted an assessment of Student in October 2005.

28. Dr. Clark conducted his assessment of Student pursuant to the September 20, 2005 assessment plan. Among the areas to be assessed was Student's psycho-motor development/perceptual functioning. The file available to Dr. Clark included Dr. Griswold's psychoeducational and the District's speech-language report. Dr. Clark chose to give Student the Bender-Gestalt test rather than the Visual Motor Integration (VMI) test because

of the extensive visual motor workup done by Dr. Griswold in May 2004 showing Student's visual-motor integration skills within the average range when compared to same age peers. Moreover, the team was interested in new areas of assessment including emotional aspects, agreed to by Mother. At the time, the IEP team wanted Dr. Clark to assess more of Student's emotional state, especially with respect to anxiety, as agreed to by Mother.

29. Regarding visual motor testing, Dr. Clark administered the Bender-Gestalt test which is used for students aged to 11 years 9 mos. If a Student is between the ages of 11 years 9 months and 14 years of age, the test is called the Watkins Bender, which goes up to age 14, even though it is still generally referred to as the Bender-Gestalt. The first part of the Bender-Gestalt test can be used in the visual motor area to determine if a student can recopy a target. The second part of the Bender-Gestalt involves making projective determinations from the drawings. One of the determinations is called perseveration, which may indicate difficulty with planning or poor concentration.

30. Dr. Clark tested Student for three and a half hours and Student was tired at the time of the Bender test. He noted she wanted to play, she hurried through the test, and was reckless in completing this test. He cautioned not to over score the importance of this Bender test.

31. Dr. Clark also administered the Das-Naglieri Cognitive Assessment System (CAS). This test is designed to measure intelligence as a group of cognitive processes. The test is based on the *PASS* theory of intelligence which theorizes that human cognitive functioning includes Planning, Attention, Simultaneous processing and Successive processing (Das, Naglieri & Kirby, 1994). Dr. Clark used the CAS instead of the WISC-IV because Dr. Griswold had used the WISC-IV with Student during the previous year. The publishers of the WISC-IV direct that it not be administered twice within the same year.

32. Dr. Clark prepared a Psychoeducational Multidisciplinary Team Report dated October 18, 2005 (Clark Report). Student earned a full scale score of 104 on the CAS, which falls within the average range classification. Student also earned a standard score within the average range on each of the four areas of cognitive functioning measured by the CAS subtests. Student earned a standard score of 106 on the Planning subtests; a standard score of 91 on the Attention subtests; a standard score of 109 on the Simultaneous processing subtests; and a standard score of 105 on the Successive processing subtests. Student's full scale score of 104 on the CAS was consistent with the full scale score of 103 on the WISC-IV as determined by Dr. Griswold's report from May 2004. Dr. Clark testified he reviewed the Griswold Report after he tested Student, not before.

33. In discussing Student's eligibility for special education under the category of SLD, the Clark Report stated that Student "may not meet the criteria for a specific learning disability." The report noted Student had some low-average discrepancy between cognitive ability and broad academic skill. However, no attention or motor integration difficulties were apparent during testing. The report also noted Student had some Word Memory and

Interpretation of Directions delays, but her Auditory Perceptual Quotient on the TAPS-R, administered by Dr. Griswold in May of 2004, was average with a standard score of 93.

34. Student challenged the accuracy of the Clark Report because of several errors in the identification information on the first page of the report. For example, there was a typographical transposition of two letters in Student's last name. However, Parents have the same last name as Student and their name was spelled correctly nine lines below Student's name. At the time of the evaluation Student was attending the Winston School but on the report the attending school was incorrectly identified as Torrey Pines High School.

35. Student also pointed out that the amount of time between Student's date of birth and the date of evaluation was 13 years 10 months, but the Clark Report incorrectly calculated a chronological age of 13 years 8 months. Dr. Clark readily admitted to numerous typographical errors in his report. In spite of the typographical errors, the Clark Report was reliable and a valid assessment of Student.

The December 1, 2005, IEP Team Meeting

36. Members of the IEP team met on December 1, 2005, for a continued review of eligibility. Those present at the meeting included Mother and her counsel Ms. Dowd; Dr. Clark; Gina Serna, Special Education Director for District; Mr. Yee, Assistant Principal; Marty Gigler, Case Manager; and Paula Gonzales, Speech-Language Pathologist. As noted on the summary page of the IEP meeting notes, Jeff Kozlowski (Kozlowski), Student's case manager at the Winston School, attended the meeting via speakerphone, reporting for all of her teachers. The purpose of this meeting was to review the results of the October assessments.–

37. Dr. Clark, after listening to information presented by other members of the IEP team, changed his tentative conclusion that Student "may not" be eligible under SLD to his final conclusion that as of December 1, 2005, Student was not eligible for special education under the category of SLD. There was no evidence that anyone communicated to Dr. Clark, at any time before or after he wrote his report, that he should find Student not eligible for special education. There was no evidence that anyone asked Dr. Clark to conclude that Student was not eligible for special education under any eligibility category. At this IEP team meeting, as part of his job in evaluating student**,** Dr. Clark inquired whether Student was on medication because if Student had been on medication, it could have affected the testing of Student. In addition, if Student was not on medication, Dr. Clark wanted to know if Student's Parents had considered it with their physician. Dr. Clark did not recommend Mother place Student on medication. Dr. Clark, as a matter of regular practice, would bring up with parents who believed their child was very anxious about school, the suggestion that the family discuss with their physician whether medication might help. Dr. Clark also asked if Student had agoraphobia because of Mother's alluding to Student's fear of being at the middle school with large numbers of students, but he did not recommend Student be placed on any medication.

38. At the conclusion of this meeting the IEP team did not make a determination as to whether Student was eligible for special education. Rather, the IEP team members agreed, and the last sentence of the IEP Team Meeting Notes confirmed, that the team would reconvene when the outstanding optometrist and audiologist assessments-were completed.

Testimony by David Bohline, Ph.D., Regarding Student's Ability and Achievement

39. David Bohline, Ph.D., is a licensed clinical psychologist who was called to testify on behalf of District. He holds a Master's degree in School Psychology and a doctorate in Psychology. He was employed as a full time school psychologist from 1977 to 1993. His experience as a school psychologist in California began in 1980 and includes employment with Capistrano Unified School District, Fallbrook Elementary School District and San Marcos Unified School District. He has also been in private practice providing clinical and school psychological services from 1983 to the present. He is credentialed to teach at the community college level and has been an instructor at Iowa Lakes Community College and U.S. International University. For the past eight years Dr. Bohline has supervised a minimum of two interns each year at San Marcos Unified School District. Some of the interns are clinical psychology students and some are school psychology students

40. Dr. Bohline noted Student's IQ of 103, as found by Dr. Griswold in the Griswold Report, and 104, as found by Dr. Clark in the Clark Report. Scores on the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), identified as the gold standard by Dr. Bohline, are described as follows: scores in the range from 90-110 are described as average; scores from 110-120 are described as above average; scores from 139- 140 are described as superior and scores above 140 are described as gifted. Thus, the two IQs found by the Griswold Report and the Clark Report were average IQs for Student.

41. Dr. Bohline reviewed the Clark Report and the numerous typographical errors identified by Student in this report. Dr. Bohline concluded such errors did not affect the validity of the assessment done by Dr. Clark.

42. Bohline noted Student's pattern of achievement was strong until the second half of the seventh grade and then faltered substantially. Regarding the single F grade in Art on Student's progress report dated October 24, 2004, Bohline was told by District director Gina Serna that several students did not get a certain Art project in on time and this was a "warning shot" to get the project in. Since Student's final grade in Art was a C, not an F, Dr. Bohline concluded that this suggests it was unlikely a processing disorder that caused the F grade.

43. Moreover, regarding the dip in grades during the seventh grade, Bohline stated in the majority of cases a processing disorder occurs early on in a student's academic career before the seventh grade. As a result, strong academic achievement early on indicates if there were processing difficulties for a student, they were not strong enough for an adverse impact. Dr. Bohline's testimony was credible. He acknowledged Student's grades declined

during the seventh grade. He noted Student's standardized test results were in the 70th percentile and higher, certainly above average performance, notwithstanding some processing difficulties.

Developmental Vision Evaluation by Gregory J. Hayes, O.D.

44. On November 28-29 and December 15, 2005, Gregory J. Hayes, O.D. (Hayes), conducted a developmental vision assessment for District. The purpose of this assessment was to determine if visual efficiency and/or visual processing problems were contributing to Student's performance at school. Hayes prepared a Developmental Vision Evaluation (Hayes Report) of his findings. The Hayes Report showed Student's visual acuity, with contact lenses, was between 20/20 at near and 20/25 at far. Student had well-developed ocular motility, Student's accommodation was sufficient with respect to facility and stamina, but she had insufficient accommodative amplitude.

45. Certain test results showed Student had deficits in visual information processing. Student's visual memory and visual form constancy results showed a performance level in the 12th and 13th percentiles. From these results, Hayes concluded Student had a visual perceptual dysfunction. Student's score on the Beery Visual Motor Integration test showed a performance level at the 27th percentile with an age equivalent of 11.3 years. From this result, Hayes concluded Student had a visual motor integration dysfunction.

Audiological Evaluation by Maria K. Abramson, M.S., CCC-A

46. On January 5, 2006, Maria K. Abramson, M.S., CCC-A (Abramson) conducted an auditory processing evaluation upon the referral from District. Abramson prepared a written report of her January 5, 2006, evaluation including history, test results, summary and impressions, recommendations, accommodations and strategies, and environmental suggestions for Student (Abramson Report). Based on information from Student's mother, the history portion of the Abramson Report incorrectly stated that Student "was failing in public school."–

47. Student's test results were described in the Abramson Report. Abramson determined Student's hearing in both ears was within normal limits.

48. Abramson administered tests for auditory processing from the bottom up and from the top down. The bottom up theory tests whether the brain, at the top of the processing path, is receiving the auditory signal in its integrity from the ear, at the bottom. The central auditory processing system of the brain cannot process an auditory signal if the peripheral auditory processing system of the ear is not functioning properly. Assessment using purely non-linguistic stimuli (tones) provides information about purely auditory processing from the ear up to the brain.

49. The top down auditory processing reflects how the brain, at the top of the processing path, is processing or interpreting the signal it receives from the peripheral auditory system. This tests speech perception from a linguistic basis. According to Abramson, the District's September 2004 speech-language assessment was a top down evaluation. As such, it did not assess in all areas in which Student may have been experiencing difficulties because she did not address the other direction from the bottom up, something that an audiologist could do. Student had difficulties from the bottom up with accurate word recognition when the acoustic signal had any distortion.

50. The dichotic digits test measures the central auditory nervous system's ability to process less-linguistically loaded stimuli (digits rather than words or sentences). On the dichotic digits testing, Student obtained scores of 100 percent in both the left and right ears.

51. The Abramson Report summarized that Student had a weakness when processing linguistic information. Abramson found what she described as a one year developmental delay when processing linguistic information. When processing less linguistic information, such as digits, Student's scores were age appropriate. Abramson was careful to state that Student did not have an auditory processing disorder; rather, she had an auditory processing weakness which was measured as approximately a one-year processing delay for linguistic information.

52. Abramson explained that if you are looking solely at an auditory processing weakness, some children who are smart can compensate, so if the course content is not too difficult they can compensate. As academics become more difficult, compensation for the weakness becomes more difficult. Overcoming an auditory processing weakness depends on the educational setting and the complexity of the information presented since, as it gets more complex, it is harder to compensate. As a student moves into middle school, where the curriculum is a little tougher, an auditory processing weakness may affect grades when the student cannot compensate for what the student is missing.

53. At the time of her evaluation, Abramson knew Student had received some interventions, including the FastForWord, FastForWord 2, and the Earobics programs in 2nd through 6th Grades. Abramson believed these interventions would tend to remediate auditory processing difficulties.

54. From her evaluation, Abramson did not conclude Student had a central auditory processing disability. Student's test scores indicated Student had a developmental delay of about one year with regard to processing language. In considering what to do with this one-year delay, Abramson explained, theoretically, a person's central auditory system should be fully matured by age 12 years 0 months. Student's auditory processing system may or may not continue to develop and mature. That is why it is important to modify the environment so that Student hears a good signal.

55. Abramson agreed that every one of the recommendations in her report could be achieved in the general education environment in a public school. She explained that her recommendations could be done if there was a quiet environment and Student had a clear acoustic signal.

Attempts to Consider Evaluations of Student during the 2005-2006 School Year

56. After the December 2005 IEP team meeting the IEP team did not meet again to review the remaining assessment data and to make a final determination of Student's eligibility for special education.

57. Marty Gigler (Gigler) is a special education teacher at Carmel Valley middle school for seven years and was a case manager for Student. In late February 2006, Gigler received copies of the written reports prepared by Hayes for his November-December evaluation of Student and by Abramson for her January evaluation of Student. Gigler telephoned Parents on February 23 and 28, 2006, in an attempt to schedule an IEP team meeting to review these reports. On February 28, 2006, Gigler left three possible dates for a reconvened meeting on the answering machine of Parents. Parents responded to Gigler's message by stating they were not able to attend an IEP meeting on any of the three dates. Rather, Parents stated they would discuss the issues at a resolution session scheduled in early March because of the request for a due process hearing they filed.

LEGAL CONCLUSIONS

Applicable Law

1. Under the amended Individuals with Disabilities Education Act (IDEA) and State law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code §§ 56000[6]) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9).)

2. "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363(a).)

3. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d

[6] All statutory citations to the Education Code are to California law.

1141, 1149.)[7] It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), 811 F.2d 1307, 1314.)

4. The analysis of whether a student has been provided a FAPE includes a determination of whether the proposed placement was substantively appropriate and whether appropriate procedural steps were followed. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-207 (*Rowley*).)

5. Parents of children with disabilities are provided procedural protections under the IDEA. (20 U.S.C. § 1400, *et seq*.) The Supreme Court noted in *Rowley* that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." (*Rowley supra*, 458 U.S. at 205-206.) Moreover, a parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education.

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

7. At the time of the September 27, 2004, IEP meeting, the law governing SLD eligibility under Education Code section 56337 provided that the following three requirements must be met in order to satisfy eligibility criteria for a specific learning disability: (a) A severe discrepancy exists between the intellectual ability and achievements in one or more of the following academic areas: (1) Oral expression; (2) Listening comprehension; (3) Written expression; (4) Basic reading skills; (5) Reading comprehension; (6) Mathematics calculation; (7) Mathematics reasoning; (b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages; and (c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program.

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[7] Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

8. At the time of the September 20 and December 1, 2005, IEP team meetings, the law governing SLD eligibility under the IDEA and State law had been amended. Effective July 1, 2005, 20 U.S.C. Section 1414(b)(6) was amended to read:

> (A) Notwithstanding section 607(b) [20 U.S.C. § 1406(b)], when determining whether a child has a specific learning disability as defined in section 602 [20 U.S.C. § 1401], a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.
>
> (B) In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

9. California Code of Regulations, title 5, section, subsection 3030, subdivision (j), sets forth the eligibility criteria for students with a specific learning disability as follows.

> A pupil 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 has a severe discrepancy between intellectual ability and achievement in one or more of the academic areas specified in Section 56337(a) of the Education Code. For the purpose of Section 3030(j):
>
> (1) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression;
>
> (2) Intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning;
>
> (3) The level of achievement includes the pupil's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests;

(4) The decision as to whether or not a severe discrepancy exists shall be made by the individualized education program team, including assessment personnel in accordance with Section 56341(d), which takes into account all relevant material which is available on the pupil. No single score or product of scores, test or procedure shall be used as the sole criterion for the decisions of the individualized education program team as to the pupil's eligibility for special education. In determining the existence of a severe discrepancy, the individualized education program team shall use the following procedures:

(A) When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score points, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples, as appropriate;

(B) When standardized tests are considered to be invalid for a specific pupil, the discrepancy shall be measured by alternative means as specified on the assessment plan;

(C) If the standardized tests do not reveal a severe discrepancy as defined in subparagraphs (A) or (B) above, the individualized education program team may find that a severe discrepancy does exist, provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes. The report shall include a statement of the area, the degree, and the basis and method used in determining the discrepancy. The report shall contain information considered by the team which shall include, but not be limited to:

1. Data obtained from standardized assessment instruments;
2. Information provided by the parent;
3. Information provided by the pupil's present teacher;
4. Evidence of the pupil'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.

(5) The discrepancy shall not be primarily the result of limited school experience or poor school attendance.

10. Student has the burden of proof as to the issues designated in the Issues section of this Decision. (*Schaffer v. Weast* (2005) 543 U.S. ____ [126 S. Ct. 528, 163 L.Ed.2d 387].)

Determination of Issues

1. For the 2004-2005 and 2005-2006 school years did the District fail to:

A. determine Student qualifed for special education under Specific Learning Disability (SLD) criteria?

1. Pursuant to Factual Findings 4-6 and 11-12, Student was not eligible for special education services under SLD for the 2004-2005 school year. Student did not have a significant discrepancy between her intellectual ability and her achievement.

2. Pursuant to Factual Findings 15-20, Student's achievement was actually at or above her ability as measured by class room teachers and standardized testing. Although testing revealed Student had relative weaknesses in certain areas, in spite of her weaknesses, Student was learning in the general education classrooms and was benefiting from the regular instructional program provided by District.

3. Parents pointed to the decline in Student's overall grades during the 2004-2005 school year as evidence of a learning disability and a need for special education services. In particular, Student's report card grades dropped from all As and Bs in the first half of seventh grade, to all to Bs and Cs in the second half of the year. In spite of this personal decline in grades, Student's performance in the second half of the year was still determined to be average to above-average based on teacher issued grades of Bs and Cs. And though Student was not in the top 15 percent of all students nationally with As and Bs, her performance on standardized testing placed her in the top 25 percent of all students nationally, a ranking which is well above average.

4. Pursuant to Factual Findings 25-26, 36-38, and 56-57, there were two IEP meetings for Student during the 2005-2006 school year. The purpose of each of these meetings was to determine eligibility for special education. Although individual members of the IEP team had opinions as to whether Student was eligible for special education, neither of these meetings resulted in a determination by the IEP team that Student was, or was not, eligible.

5. Pursuant to Factual Findings 25 and 26, the September 20, 2005, meeting resulted in an assessment plan for the purpose of determining eligibility. Pursuant to Factual Finding 38, the December 1, 2005, IEP team meeting had to be reconvened in the future because certain assessments of Student had not been completed. No determination of eligibility could be made at either of these meetings because the necessary assessments were not available for team consideration.

6. Pursuant to Factual Findings 56 and 57, no further meetings were held by the IEP team after December 1, 2005, until this due process hearing. As a result, no final determination by the entire IEP team was ever made regarding Student's eligibility.

B. assess Student for visual motor integration?

7. Pursuant to Factual Finding 28, the test of visual motor integration was done in May 2004 and reported on in the Griswold Report during the previous school year, when Student was in another school district. Pursuant to Factual Finding 28, Dr. Clark was directed by Mother to consider more emotional issues in his evaluation of Student conducted in October 2004 during the first half of the seventh grade.

8. Moreover, pursuant to Factual Findings 12-14, District was prevented from assessing Student in any area of suspected disability during the second half of the seventh grade when Parents withdrew their consent to the assessment plan for Student in March of 2005. Without parental consent, District was precluded from conducting any assessments of Student in the second half of the 2004-2005 school year.

9. Pursuant to Factual Findings 44-55, Student was seen for visual and auditory processing evaluations in accordance with the assessment plan agreed to on September 20, 2005. However, as of December 1, 2005, those evaluations in the Hayes Report and the Abramson Report were not completed. Pursuant to Factual Finding 57, these reports were eventually provided to District in late February 2005. Although District attempted to arrange a meeting for the entire IEP team to review and consider these evaluations, Parents' decision to proceed by way of resolution session and due process hearing has prevented the entire IEP team from meeting to consider these assessments.

C. consider outside assessments and reports that indicated Student exhibited both visual and auditory processing deficits?

10. Pursuant to Factual Findings 9-11, District team members considered all the assessments and reports for Student presented at the September 27, 2004, meeting including the Griswold Report. However, the weaknesses identified for Student were considered but found not to impact Student's performance. Student was able to learn in the general education environment without special education services. There was no evidence that District refused to consider any assessment or report for Student provided by Parents.

11. Pursuant to Factual Findings 44-55, Student was seen for visual and auditory processing evaluations in accordance with the assessment plan agreed to on September 20, 2005. However, as of December 1, 2005, those assessments in the Hayes Report and the Abramson Report were not completed. Pursuant to Factual Finding 57, these reports were eventually provided to District in late February, 2005. Although District attempted to arrange a meeting for the entire IEP team to review and consider these evaluations, Parents' decision to proceed by way of resolution session and due process hearing has prevented the entire IEP team from meeting to consider these assessments.

2. For the 2004-2005 and 2005-2006 school years did the District deny Student a FAPE by:

A. preventing parents from meaningfully participating in the Individual Education Program (IEP) team meetings on September 27, 2004, December 10, 2004, and December 1, 2005, by failing to consider parents' concerns?

12. Pursuant to Factual Findings 9-11, Mother and Father participated in the September 27, 2004, IEP team meeting in a meaningful way. Although the team ultimately determined Student was not eligible for special education services, Parents concerns were certainly considered by the team. An SSS plan was put into place within a week of the meeting. This plan covered each of the areas of concern raised by Parents at the meeting.

13. As a result of Parents voicing their concerns at this September 27, 2004, meeting, Student's placement in the general education classroom was supported in a variety of ways as identified in the SSS plan to assist with her relative weaknesses as urged by Parents.

14. Pursuant to Factual Finding 11, the meeting that took place on December 10, 2004, was not an IEP team meeting but rather an initial meeting of a multidisciplinary 504 team to consider whether a section 504 plan should be put in place for Student. There was no violation of the IDEA at this section 504 team meeting.

15. Pursuant to Factual Findings 36 and 38, the purpose of the December 1, 2005, team meeting was to consider the evaluations of Student which were to be done under the assessment plan from September 2005. These evaluations were being conducted at the

request of Parents. The meeting was continued only because the concerns of Parents would not be discussed without the outstanding reports for vision and auditory processing as requested by Parents.

16. Student presented no evidence that Student's Parents were denied the right to participate in a meaningful way in any of the IEP team meetings for Student. Pursuant to Factual Findings 9-11, 36 and 38, and the resulting attempts by District to evaluate Student at Parents' request during the seventh and eighth grades, District did not deny a FAPE to Student.

B. failing to take into account all of the extra outside services that assisted Student to maintain her grades?

17. Pursuant to Factual Finding 11, District team members considered the extra outside services that assisted Student. However, pursuant to Factual Findings 15-20, Student was able to learn in the general education environment and her achievement showed performance at or above her measured cognitive ability.

18. Parents voiced concerns over the amount of time Parents helped Student to complete her homework among other things. District acknowledged that additional help for students was not unusual and recommended tutoring. Parent help with homework could be expected as a student moves into more difficult class work in the seventh grade.

19. Pursuant to Factual Findings 25-26, 36-38, and 56-57, there were two IEP meetings for Student during the 2005-2006 school year. The purpose of each of these meetings was to determine eligibility for special education. However, neither of these meetings resulted in a determination by the IEP team that Student was, or was not, eligible.

C. improperly negotiating with Student's parents to raise Student's grades during the 2004-2005 school year?

20. Pursuant to Factual Finding 18, Student completed missing work and was given credit for doing so. There was no evidence that anyone improperly negotiated to raise Student's grades. Thus, to the extent there was no evidence of improper negotiations for grades, District did not deny a FAPE.

D. failing to properly notice an IEP team meeting after January, 2006, when Student's outside visual report dated December 5, 2005, and auditory processing report dated January 5, 2006, were available?

21. Pursuant to Factual Findings 44-55, Student was seen for visual and auditory processing evaluations in accordance with the assessment plan agreed to on September 20, 2005. However, as of December 1, 2005, those assessments in the Hayes Report and the Abramson Report were not completed. Pursuant to Factual Finding 56-57, these reports were eventually provided to District in late February 2005. Although District attempted to

arrange a meeting for the entire IEP team to review and consider these evaluations, Parents' decision to proceed by way of resolution session and due process hearing has prevented the entire IEP team from meeting to consider these assessments.

E. recommending Student be placed on anti-anxiety medication at the December 1, 2005, IEP team meeting?[8]

22. Pursuant to Factual Finding 37, Dr. Clark inquired whether Student was on medication, and whether Parents had considered medication with their physician. There was no evidence Dr. Clark recommended Student be placed on anti-anxiety medication at the December 1, 2005, IEP team meeting. Moreover, Student withdrew this issue in her closing brief.

23. To the extent there was no evidence Dr. Clark recommended anti-anxiety medication for Student, District did not deny a FAPE to Student in December 2005.

ORDER

1. For the 2004-2005 and 2005-2006 school years, District properly assessed Student and properly determined Student was not eligible for special education under the criteria for Specific Learning Disability.

2. For the 2004-2005 and 2005-2006 school years, District did not deny a FAPE to Student.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues heard and decided.

[8] Student withdrew the issue relating to anti-anxiety medication in Petitioner's Closing Brief received on July 3, 2006, by OAH.

RIGHT TO APPEAL THIS DECISION

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

Dated: October 12, 2006

ROBERT D. IAFE
Administrative Law Judge
Office of Administrative Hearings
Special Education Division