

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

In the Matter of:

STUDENT,

Petitioner,

v.

TRACY JOINT UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2007070307

DECISION

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on September 11-14 and September 17, 2007, in Tracy, California.

Attorneys Annie Cox and Margaret Broussard represented Petitioner Student. Student's mother and father attended the hearing on her behalf.

Attorney Eliza McArthur represented Respondent Tracy Joint Unified School District (District). Nancy Hopple, Director of Special Education, attended the hearing on the District's behalf.

OAH received Student's request for due process hearing (Complaint) on July 11, 2007. On August 2, 2007, OAH received copies of the parties' correspondence indicating that the parties agreed to waive the resolution session. On August 3, 2007, OAH granted a continuance of the hearing, and rescheduled the hearing to convene beginning on September 11, 2007.

At the hearing, the ALJ received sworn testimony and documentary evidence. Upon receipt of oral closing arguments on September 27, 2007, the record was closed and the matter was submitted.

ISSUES

1. During the 2005-2006 school year and 2006 extended school year (ESY), was Student eligible for special education under the categories of emotional disturbance (ED) and/or specific learning disability (SLD)?
2. If Student was eligible for special education during the 2005-2006 school year and 2006 ESY, did the District deny her a free appropriate public education (FAPE) by:
 - A. failing to provide her with special education and related services; or
 - B. failing to refer her for mental health services pursuant to Government Code Chapter 26.5?
3. During the 2006-2007 school year and 2007 ESY, was Student eligible for special education under the categories of ED and/or SLD?
4. If Student was eligible for special education during the 2006-2007 school year and 2007 ESY, did the District deny her a FAPE by:
 - A. failing to provide her with special education and related services;
 - B. failing to refer her for mental health services pursuant to Government Code Chapter 26.5;
 - C. failing to conduct a complete assessment in all areas of suspected disability, including social-emotional, psychoeducational, and possibly speech-language; or
 - D. failing to obtain parental permission prior to assessing Student in or about November 2006?

REQUESTED REMEDIES

Student has identified the following proposed resolutions: (1) compensatory education in reading, writing, listening, speaking, and math; (2) reimbursement in the amount of \$3,000 for the independent educational evaluation (IEE) by Craig Garabedian; (3) reimbursement in the amounts of \$125 for testing at the Tutoring Club and \$95 for testing at the Sylvan Learning Center; and an order that (4) Student be determined eligible for special education under the categories of ED and/or SLD; (5) the District convene an individualized education program (IEP) meeting for Student to develop an appropriate educational program for Student; (6) the District refer Student to San Joaquin County Mental Health Services for a mental health assessment pursuant to Government Code Chapter 26.5/AB 3632; (7) the

District provide Student individual Cognitive Behavioral Therapy by a credentialed therapist for one hour per week; and (8) the District conduct a complete speech-language assessment of Student and offer speech-language services.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is an eleven-year-old girl who resides with her family within the boundaries of the District. She attends a general education sixth grade class within the District, and has never been found eligible for special education.

Factual Background

2. In fall 2001, Student began attending kindergarten at the District's Wanda Hirsch Elementary School, but after a few weeks her parents transferred her to a private school, West Valley Christian Academy (West Valley). Student remained at West Valley for the rest of kindergarten and first grade.

3. Student's kindergarten teacher expressed concern that Student did not speak in class during the school day. In 2002, in response to that concern Student's mother took Student to Kaiser Permanente for an evaluation. Student was referred to Dr. Ramineni Rao, a child and adolescent psychiatrist at Kaiser Permanente. Based upon Student's shyness and failure to speak in class, Dr. Rao diagnosed Student with Selective Mutism, an anxiety disorder characterized by a persistent inability or refusal to speak in some social situations but not in others.

4. During the 2002-2003 school year, Student's first grade teacher also expressed concern that Student did not communicate verbally in class. At the end of Student's first grade year at West Valley, her teacher recommended that Student be retained in first grade. Student's mother testified that the first grade teacher also recommended that Student transfer to public school, because West Valley did not have a program to address special needs.

5. At the beginning of the 2003-2004 school year, Student enrolled at the District's Gladys Poet Christian Elementary School (Poet Christian), where she has remained to the present. For the 2003-2004 school year, Student attended a general education second grade class. During that school year, she received grades of primarily 2s and 3s, with a few 1s on math standards.¹ For behavioral areas in which the pupils received grades of

¹ The District report cards graded the pupil on how he or she performed on each grade level standard in Language Arts and Mathematics. The grading ranged from a low of 1 to a high of 4. A grade of 2 indicated that the pupil was approaching the grade level standard. For the first and second trimesters, a grade of 3 indicated that the pupil was on target for meeting the grade level standard; for the end of the school year, a grade of 3 indicated that the pupil was at the grade level standard.

Excellent, Satisfactory, or Needs Improvement, Student received Satisfactory grades in almost all areas, with the notable exception of a Needs Improvement in “Participates in class activities.” For the second trimester, her teacher wrote the comment that “With [Student] not talking at school, it is difficult to assess her progress.”

6. In September 2003, February 2004, and April 2004, the student success team (SST) convened to discuss Student’s progress. Student’s mother requested that Student be retained for a school year, but the other members of the SST disagreed. The April 2004 SST notes indicate that Student would be “attending summer school for math.” In spring 2004, Student began receiving informal resource specialist program (RSP) sessions in a small group setting, along with other general education students. In summer 2004, Student began attending summer school at Poet Christian, but did not complete the summer school session.

7. For the 2004-2005 school year, Student attended a general education third grade class taught by Kimberly Rieman. Student also continued to receive informal RSP services, as a general education student. For this school year, Student’s report card reflected grades of mostly 3s, with a few 2s, a few 4s, and a single grade of 1. At a May 2005 SST meeting, Student’s mother expressed concerns about Student’s progress and requested that Student be retained in third grade. The District members of the SST disagreed and noted that Student was performing well in school. For the 2005 summer, Student attended Sylvan Learning Center for two hours per week, at her parents' expense.

8. For the 2005-2006 school year, Student attended a general education fourth grade class taught by Shadee Bishop. On September 20, 2005, the SST team convened again and agreed to refer Student for a comprehensive special education assessment. Student’s mother signed an Individual Assessment Plan. Pursuant to this assessment plan, speech-language pathologist Diane Edwards assessed Student in the areas of language, speech, and communication development. Also pursuant to the plan, school psychologist Tracy Patzer and RSP teacher Mike Corsaro conducted a psychoeducational assessment of Student, including classroom observation, review of records, and testing of cognitive ability, academic achievement, psycho-motor development, and social/emotional/behavioral functioning. The specific tests utilized included the Achenbach Child Behavior Checklists (CBCL), the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Woodcock-Johnson-III Tests of Achievement (W-J-III), the Test of Phonological Processing (CTOPP), the Tests of Auditory Perceptual Skills (TAPS) and the Developmental Test of Visual-Motor Integration (VMI-4). Ms. Patzer gave the CBCL to Student’s mother and teacher, but did not obtain a self-report from Student because Student did not meet the minimum age requirement for the CBCL’s self-report.

9. The District assessors found that Student’s performance on the WISC-IV indicated a full-scale intelligence quotient (IQ) of 92. In comparison, Student’s academic achievement scores on the W-J-III ranged from a standard score of 110 on both the Letter-Word Identification and Writing Samples subtests, to a low of 85 on the Applied Problems subtest. Among the assessors’ conclusions were that Student did not have a severe discrepancy between ability and achievement, and did not have a processing disorder. In the

social/emotional area, the CBCLs did not reflect any behaviors in the clinical range, and the school psychologist did not observe any significant behaviors of concern. Student's mother reported concerns in the area of attention problems and withdrawn/depressed behaviors, which scored in the "borderline" range on the CBCL.

10. On November 8, 2005, the IEP team convened to discuss the results of the assessments. Both Student's mother and father attended the IEP meeting. Ms. Patzer and Mr. Corsaro reported their results and stated that Student did not meet the eligibility criteria for SLD. Ms. Edwards reported her results and stated that Student did not meet the eligibility criteria for speech-language impairment. The IEP team members agreed that Student was not eligible for special education at that time. The IEP notes state in part that Student "is achieving within her estimated ability."

11. Student's fourth grade report card reflected grades of mostly 2s and 3s. Ms. Bishop's written comments for the second trimester note that Student "is struggling a little with math," but also state that her "behavior is always exemplary." For the third trimester, Ms. Bishop commented that "she seems to be opening up more in class."

12. For the 2006-2007 school year, Student attended a general education fifth grade class taught by Linda Stiborek. Student also continued to receive informal RSP services, including sessions in which Student was pulled out of class to work with the RSP teacher in a small group as part of the Excel program. In September 2006, Kaiser Permanente conducted an evaluation, at the request of Student's parents, to determine whether Student met the criteria for Attention Deficit Disorder (ADD) or Attention Deficit/Hyperactivity Disorder (ADHD). As part of this evaluation, Ms. Bishop, Ms. Rieman, Student's mother, and Student's father each completed questionnaires regarding Student's behavior and functioning. Thereafter, the clinician at Kaiser Permanente determined that Student did not meet the criteria for a diagnosis of ADD or ADHD.

13. In a letter dated November 26, 2006, Student's mother wrote to Mr. Corsaro, the RSP teacher, requesting "a full evaluation in all [areas] that my child [Student] is struggling in. Such as Math, English, Spelling, Comprehension, Reading, Etc. to see if she has some kind of learning disability." The SST convened on November 28, 2006.² District staff told Student's mother that there was no need to conduct a comprehensive reassessment because in some areas, such as cognitive ability, Student had not changed since the 2005 assessment. However, the SST members agreed to refer Student for assessment solely in the area of academic achievement. On November 30, 2006, Student's mother signed her consent to the academic assessment. On January 11, 2007, Mr. Corsaro administered the Woodcock-Johnson III Tests of Achievement (W-J-III) to Student. On February 8, 2007, the IEP team convened to discuss the results of the testing. The team also discussed how Student was

² Although the SST form is dated September 28, 2006, the meeting actually took place on November 28, 2006. The meeting had been originally scheduled to convene on September 28, 2006, but was postponed because Mr. Corsaro was ill and could not attend.

performing in her fifth grade class. Student's fifth grade teacher, Linda Stiborek, reported on Student's second trimester grades through January 2007. These grades were extremely low, although Ms. Stiborek explained that the grades were not final because the trimester was ongoing. After reviewing the assessment results and other information, the IEP team members agreed that Student was not eligible for special education.

14. Thereafter, Student's parents sought an IEE from psychologist Craig Garabedian. Mr. Garabedian conducted an assessment of Student on May 24, 2007, and found in part that Student had severe anxiety, deficient visual-spatial reasoning, extremely low adaptive skills, attention deficits, and deficits in math and written expression. Mr. Garabedian concluded that Student met the special education eligibility criteria under the category of ED, because she exhibited inappropriate behavior or feelings under normal circumstances in several situations, over a long period of time and to a marked degree, which adversely affected her educational performance. Mr. Garabedian also concluded that Student met the eligibility criteria for SLD, due to processing disorders in attention and visual-spatial reasoning, and a severe discrepancy between a full-scale IQ of 88 on the Differential Ability Scale – 2nd Edition (DAS-II) and a standard score of 77 on the W-J-III math calculation cluster.

15. Student's fifth-grade report card reflected lower grades than Student had received the previous school year. On specific grade-level standards, Student received grades of 1s, 2s, and 3s. In fifth grade, Student also began receiving letter grades; in academic subjects, she received grades mostly in the C and D ranges, with a few grades in the B range. The written comments state that Student had a grade point average (GPA) of 2.5 for the second trimester, and 2.0 for the third trimester.

16. On July 11, 2007, OAH received Student's due process request. Initially, Student's parents did not share Mr. Garabedian's IEE report with the District. On August 22, 2007, following an inquiry from Student's sixth grade teacher, Christine Vierra, about Student's functioning, Student's parents sent Ms. Vierra a copy of Mr. Garabedian's report. In September 2007, the District sent a proposed assessment plan to Student's parents. For the 2007-2008 school year, Student is attending Ms. Vierra's general education sixth grade class.

ED Eligibility for 2005-2006 School Year

17. To meet the criteria for ED, a pupil must exhibit at least one of five specific characteristics over a long period of time and to a marked degree, which adversely affects his or her educational performance. The third characteristic, at issue here, is that the pupil exhibited inappropriate types of behaviors or feelings under normal circumstances in several situations. To be eligible for special education, the pupil must both meet the criteria for ED and require special education and/or related services because of his or her disability.

18. Student relies on the testimony and report of Mr. Garabedian to establish that she exhibited inappropriate types of behaviors or feelings under normal circumstances in

several situations, due to her consistent failure to speak aloud in front of her class. Because Mr. Garabedian did not meet Student until May 2007, his opinions about her functioning during the 2005-2006 school year carry less weight than his opinions about how she functioned during the 2006-2007 school year. In any event, even if the evidence established that Student met this characteristic during the 2005-2006 school year, her grades, test scores, and classroom performance during this school year demonstrated that she did not need special education or related services. Ms. Bishop established that Student performed within the average range in fourth grade, as reflected by her standards-based report card grades of mostly 2s and 3s. Testimony from Dr. Miller and Student's general education teachers established that report card grades of 2s and 3s are average grades that are typical among elementary school students. Ms. Bishop and Ms. Patzer established that Student was able to stay on task and complete her academic work in her fourth grade classroom. Likewise, Student's October 2005 test scores indicated that she was functioning in the average range; in particular, all of her W-J-III scores were in the average range, from a low of 85 on the Applied Problems subtest to highs of 110 on both the Letter-Word Identification and Writing Samples subtests. Given that she was able to learn her academic subjects and function within the average range in her fourth grade class, it is apparent that Student's difficulties that year could be addressed in the regular education program with modifications. Consequently, Student did not prove that she needed special education or related services due to ED during the 2005-2006 school year.

SLD Eligibility for 2005-2006 School Year

19. A pupil may be determined to have an SLD under the "severe discrepancy" model if he or she meets the following requirements.³ First, the child must have a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language, and this disorder must not be primarily the result of an environmental, cultural, or economic disadvantage. Second, the child must have a severe discrepancy between intellectual ability and achievement in the areas of oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematics reasoning. A difference equal to or greater than 1.5 standard deviations, adjusted by one standard error of measurement, indicates a severe discrepancy when corroborated by other assessment data. Additionally, for the child to be eligible, the discrepancy cannot be capable of amelioration through "other regular or categorical services" offered within the regular instructional program, and the child must need instruction, services, or both which cannot be provided with modification of the regular school program.

20. As described in Factual Finding 7, on the District's October 2005 psychoeducational assessment, Student scored a full-scale IQ of 92 on the WISC-IV, while

³ An LEA is not required to take into consideration whether a pupil has a severe discrepancy, and may instead determine whether a student has an SLD using the response to intervention (RTI) model. However, in the present case, the District used the severe discrepancy model, and SLD eligibility based upon RTI was not at issue in this case.

her lowest achievement score was an 85 on the W-J-III Applied Problems subtest. Testimony from Mr. Corsaro and Ms. Patzer established that these scores did not create a severe discrepancy between intellectual ability and academic achievement. Student does not argue otherwise. While Mr. Garabedian testified that Student qualified under the category of SLD during the 2006-2007 school year, he also explained that he did not have sufficient information to determine whether Student qualified as SLD during the 2005-2006 school year.⁴ Based upon all of the above, there was no evidence that Student was eligible under the category of SLD during the 2005-2006 school year.

ED Eligibility for 2006-2007 School Year

21. As noted above, the first question is whether Student exhibited inappropriate types of behaviors or feelings under normal circumstances in several situations over a long period of time and to a marked degree, which adversely affected her educational performance. There is no dispute that Student would not speak in front of her entire fifth grade class. She would not read aloud or answer a question in front of the whole class, although she would speak when working in a small group. She would participate in small group projects and would stand in front of the class during her group's presentation, but she would not speak during the presentation. She would occasionally ask her fifth grade teacher a question in private, but would never ask a question in front of the class or raise her hand to ask the teacher for help. To accommodate Student's condition, her fifth grade teacher allowed Student to deliver her oral presentations one-to-one, instead of in front of the whole class. As noted in Factual Findings 3, 4, and 5, Student's behavior of refusing to speak in front of her class had occurred over a long period of time.

22. While Student did not speak in front of her whole class, she regularly spoke aloud to her friends at school, primarily during lunch and recess. She also regularly spoke aloud at home to her parents and siblings, and spoke to her grandmother. However, Student's mother established that Student did not speak to any other adults in social settings or in the community; she did not speak to her aunts, uncles, or other adult relatives, or to her parents' friends, or to her doctor during medical appointments, or to waiters in restaurants. Dr. Rao confirmed that Student refused to speak during her medical examinations. Hence, Student exhibited this behavior in several situations.

23. Mr. Garabedian testified that Student exhibited inappropriate types of behavior or feelings under normal circumstances, which met the ED criteria. In May 2007, Mr. Garabedian conducted an IEE of Student that included reviewing school records, interviewing Student and her mother, and administering several standardized tests and rating scales. The specific tests utilized included the DAS-II; Universal Nonverbal Intelligence Test (UNIT), the WJ-III, the Trail Making Test (TMT), the Wisconsin Card Sorting Test (WCST), the Grooved Pegboard Test, the Test of Variables of Attention (TOVA), the Behavior Assessment System for Children – 2nd Edition (BASC-2), and the Adaptive

⁴ Moreover, Student's closing brief does not address the issue of SLD eligibility for the 2005-2006 school year.

Behavior Assessment Scale – 2nd Edition (ABAS-II). Mr. Garabedian explained that the results of several tests showed how Student’s anxiety negatively affected her performance. Based upon the results of the IEE, Mr. Garabedian determined that Student does not speak in normal circumstances, such as in class at school, due to her debilitating anxiety, and that these feelings and behaviors interfere with her academic learning.

24. Mr. Garabedian was a knowledgeable witness who gave credible, persuasive testimony regarding Student’s ED. Mr. Garabedian is both a licensed educational psychologist and a credentialed school psychologist who has a Diplomate in school neuropsychology from the American Board of School Neuropsychology. His expertise is based upon both his educational background and his years of experience as a school psychologist and an educational psychologist in private practice. Moreover, because of his position as the director of special education of the Roseville Joint Union High School District, Mr. Garabedian appeared to be a particularly neutral and unbiased witness with a thorough understanding of the ED eligibility criteria.

25. Notably, Mr. Garabedian’s administration of the ABAS-II resulted in an inaccurately low scoring of Student’s adaptive skills. Her score on the ABAS-II was in the 2nd percentile, which is inconsistent with Student’s low average cognitive ability. Student’s score on the ABAS-II was based upon her mother’s responses on a parent rating scale. It is certainly possible that, as Student posits, the inaccurate score occurred because her mother had difficulty understanding some of the wording and questions on the form.⁵ In any event, considering Mr. Garabedian’s report and testimony as a whole, it does not appear that the low score on the ABAS-II constituted the basis for his findings regarding Student’s ED, nor rendered those findings invalid.

26. The District’s expert witness, Dr. Miller, had never assessed or met Student, but was a credible, candid witness who provided informative testimony regarding Mr. Garabedian’s IEE and the District’s past assessments of Student. Even so, after careful review, the ALJ concludes that the concerns Dr. Miller raised regarding the IEE did not override the persuasiveness of the IEE’s underlying findings. In particular, Dr. Miller testified that Mr. Garabedian’s IEE was incomplete because it lacked any observation of Student in an educational setting, and lacked direct input from Student’s teachers. Mr. Garabedian acknowledged that an observation of Student at school would have been useful, but established that he was able to reach his conclusions without it. Similarly, while interviewing Student’s teachers would have been informative, Mr. Garabedian was able to obtain sufficient information about Student’s school functioning from other sources, such as a thorough review of Student’s report cards and other educational records.

27. Student’s fifth grade teacher, Ms. Stiborek, and other general education teachers testified to the effect that Student’s refusal to talk seemed atypical and uncommon, but not necessarily inappropriate. While these witnesses presented as truthful, sincere, and qualified in their jobs as general education elementary school teachers, none had any

⁵ Student’s mother testified that she did not complete high school.

particular expertise regarding anxiety disorders or ED. Moreover, it is understandable that Student's teachers might not fully appreciate the nature of Student's inappropriate behaviors or feelings, given that Student did not verbalize her feelings, act out, or otherwise draw attention to her problems. As Mr. Garabedian described regarding the fourth grade teacher's responses to the CBCL rating scale, because many of the items ask whether a pupil has made various negative comments, a child who does not speak receives the same rating as a child who is doing well.

28. Thus, in light of all of the above, the evidence established that Student exhibited inappropriate types of behaviors or feelings under normal circumstances in several situations over a long period of time. Student's refusal to speak in class was consistent, unwavering, and remarkable, and therefore met the requirement that the behaviors be exhibited to a marked degree. Furthermore, the evidence established that Student's inappropriate types of behaviors or feelings adversely affected her educational performance. Because of her refusal to speak, Student would not ask the teacher for help when she needed it.⁶ As Ms. Stiborek wrote in a September 2006 Teacher Report Form, Student's "reluctance to speak in class makes it hard to know when she needs help."

29. Since Student met the criteria for ED, the next question is whether she required special education and/or related services because of that disability. Unlike during the prior school year, in the 2006-2007 school year Student's needs could not be addressed in the regular education program with modifications. Although Student's outward behavior remained the same in fifth grade, her grades and test scores were notably lower than they had been in fourth grade. As described in Factual Finding 11, Student's fifth-grade report card reflected standards-based grades of 1s, 2s, and 3s, with letter grades mostly in the C and D ranges. Similarly, Student's May 2007 W-J-III scores from the IEE had dropped significantly when compared to her previous W-J-III scores. In particular, her May 2007 standard score on the W-J-III broad math composite dropped to 78, compared to previous District assessments reflecting broad math scores of 90 and 94, and her broad written language score had dropped to 89, compared to previous broad written language scores of 105 and 102.

30. While the District could not have known of the May 2007 test scores before the end of the 2006-2007 school year, the IEP team was aware of Student's poor grades as of February 8, 2007. During the meeting on that date, Ms. Stiborek showed the IEP team Student's grades as of mid-January 2007. At that point, Student was receiving F grades on her tests in math, science, and social studies, grades ranging from D+ to F on the classwork assignments in those subjects. Her math and science grade averages were boosted only by her homework grades, which were in the A range; however, homework grades were based solely on completion, not on content, and thus did not reflect whether a pupil was struggling to learn the material or otherwise had academic difficulties.

⁶ Furthermore, the California Content Standards for fifth grade include standards for listening and speaking; Student's refusal to speak affected her ability to meet those standards.

31. While a pupil's poor grades may be caused by a variety of factors, in the present case the obvious and most likely cause was Student's disability. Student had good attendance and tried to do well in school. As reflected in the California Content Standards, Student had greater academic demands placed upon her in fifth grade than she had in fourth grade, which may account for why her need for special education due to her disability changed over the school years at issue. In light of all of the above, Student required special education and/or related services by reason of her disability during the 2006-2007 school year, and the District was aware of this need as of February 8, 2007.

SLD Eligibility for 2006-2007 School Year

32. The standards for eligibility due to an SLD using the severe discrepancy model are described above in Factual Finding 19. When standardized tests are considered valid for a student, the method for demonstrating whether a severe discrepancy exists involves the following steps: (1) computing into common standard scores, using a mean of 100 and standard deviation of 15, the achievement score and the ability test score to be compared; (2) computing the difference between these common standard scores; and (3) 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 that may include other tests, scales, instruments, observations and work samples, as appropriate.

33. The calculation of this formula has commonly involved interpreting the required difference for a severe discrepancy between ability and achievement standard scores to be at least 22.5 points (1.5 multiplied by 15), adjusted by one standard error of measurement. Under this interpretation, the computed difference must be at least 22.5 points, adjusted by the standard of error of measurement not to exceed 4 common standard points.

34. The parties concur, and credible witness testimony established, that standardized tests are considered valid for Student. On the District's January 2007 administration of the W-J-III, Student's standard scores included 74 on the math fluency subtest, 89 on the math calculation subtest, 84 on the math calculation cluster, and 94 on the broad math cluster. The District did not administer another IQ test in 2007, and instead relied upon Student's 2005 IQ score of 92 on the WISC-IV. The District determined at the February 2007 IEP that Student's January 2007 scores on the W-J-III did not establish a severe discrepancy. Student does not argue that any of the January 2007 W-J-III scores established a severe discrepancy. There is no evidence indicating that these test results were invalid.

35. Student contends that she has a severe discrepancy between cognitive ability and academic achievement based upon her full-scale IQ of 88 on the DAS-II and a standard

score of 77 on the W-J-III math calculation cluster in Mr. Garabedian's May 2007 IEE. Using a simple discrepancy calculation, the computed difference between the two scores is only 11 points, which is less than the required 22.5 points adjusted by the standard of error of measurement not to exceed 4 common standard points. Likewise, application of the correlation coefficient between the two scores does not produce a severe discrepancy.⁷ Respondent's Exhibit NN and testimony from Ms. Hopple established that the correlation coefficient between the DAS-II General Composite Ability (GCA) score and the W-J-III math calculation cluster was .71, which requires a 17-point criterion value, adjusted by the standard of error of measurement not to exceed 4 common standard points, to constitute a severe discrepancy. Because the difference between Student's DAS-II GCA score and W-J-III math calculation cluster was only 11 points, the scores did not indicate a severe discrepancy between cognitive ability and academic achievement.

36. Mr. Garabedian testified that the difference between the two scores constituted a severe discrepancy using the regression model. The regression model is an alternative method for determining the existence of a severe discrepancy in low-functioning pupils; because the standard deviation is smaller when the pupil's IQ score is further from the mean, use of the regression model allows calculation of a severe discrepancy for students with low IQ scores. However, credible testimony from Dr. Miller, Ms. Hopple and Ms. Patzer established that the regression model is generally used to determine a severe discrepancy only when the pupil's IQ falls outside of the average range of 85 to 115. While Mr. Garabedian was a very knowledgeable witness, the totality of the evidence on this point did not prove that the regression model is applicable in California for calculating a severe discrepancy for a pupil, such as Student, whose IQ is within the average range. This topic is controversial among school psychologists in California. Student points to other states that have approved use of the regression model; nevertheless, there is no persuasive evidence or legal authority to establish that use of the regression model for students with IQs in the average range is applicable in California, pursuant to California Code of Regulations, title 5, section 3030, subdivision (j).⁸

37. In her closing brief, Student argued that, when the correlation coefficient is applied, a severe discrepancy exists between her DAS-II GCA score (88) and her W-J-III broad math score (78) from the May 2007 IEE. Using a simple computed difference model, the two scores are only 10 points apart and thus do not produce a severe discrepancy. Student points to the brief testimony from Ms. Hopple that the correlation coefficient for the DAS-II GCA and the W-J-III broad math score is .82, and therefore, to constitute a severe discrepancy, application of this correlation coefficient requires a 14-point criterion value, adjusted by the standard of error of measurement not to exceed 4 points. Using this correlation coefficient, a 10-point difference would constitute a severe discrepancy if

⁷ Ms. Hopple, Ms. Patzer, and Dr. Miller explained that, if the cognitive ability test and academic achievement test have different publishers and are not correlated, the correlation coefficient of the two tests should be utilized to determine the standard criterion for calculation of the discrepancy.

⁸ Likewise, the ALJ is unaware of, and Student does not cite, any California case law or administrative decision utilizing the regression model to determine the existence of a severe discrepancy.

adjusted by the maximum of 4 points as the standard error of measurement. There was no evidence regarding whether the applicable standard error of measurement is 4 points or less than 4 points in this instance; if it is anything less than 4 points, then the 10-point difference between the two scores is not sufficient to constitute a severe discrepancy. Moreover, no witnesses testified regarding whether this broad math score constituted a severe discrepancy when compared to the DAS-II GCA score. Given these uncertainties, the evidence did not establish that the difference between the May 2007 W-J-III broad math score and DAS-II GCA score constituted a severe discrepancy between ability and achievement.

38. In light of the above finding that Student did not have a severe discrepancy between intellectual ability and academic achievement during the 2006-2007 school year, this Decision need not reach the question of whether Student had a disorder in one or more of the basic psychological processes.

Failure to Provide Student with Special Education and Related Services

39. An LEA is obligated to offer a FAPE to individuals with exceptional needs who are eligible for special education. Because the District should have found Student eligible for special education as of February 8, 2007, the District's failure to offer special education or related services denied Student a FAPE from February 8, 2007, through the end of the 2006-2007 regular school year. There was no evidence that Student required ESY services.

Chapter 26.5 Mental Health Services for the 2006-2007 School Year

40. A local educational agency (LEA), IEP team, or parent may initiate a referral for assessment of the social and emotional status of a pupil, as part of special education assessment procedures. Based on the results of assessments completed pursuant to those procedures, an IEP team may refer a pupil who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services to a community mental health service if the pupil meets specified criteria. Among those criteria is the requirement that the LEA has provided appropriate counseling and guidance services, psychological services, parent counseling and training to the pupil, or behavioral intervention, as specified in the IEP, and the IEP team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the IEP team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

41. While Dr. Rao and Mr. Garabedian made general recommendations that Student receive mental health services, there was insufficient evidence to determine whether counseling, guidance services, psychological services, or behavioral intervention services provided by the LEA would have been inadequate and inappropriate to meet Student's educational needs instead. There was no evidence regarding what counseling, guidance services, or other services were available to Student within the District, and thus the evidence

did not establish whether such services would have met Student's educational needs. Thus, the evidence did not establish that Student needed mental health services from a community mental health service pursuant to Chapter 26.5 of the Government Code, and Student did not prove that the District's failure to refer her for Chapter 26.5 mental health services constituted a denial of FAPE.

Failure to Assess in All Areas Related to Suspected Disability

42. The District was obligated to assess Student in all areas related to her suspected disability. The January 2007 assessment consisted solely of one academic test, and did not assess Student's social/emotional/behavioral functioning or cognitive ability. Since social/emotional/behavioral functioning was an area of suspected disability for Student, the District failed to assess Student in all areas of suspected disability. Additionally, Dr. Miller and Mr. Garabedian established that an assessment for an SLD should use a cognitive ability score obtained within the same time frame as the academic assessment, not one obtained more than one year prior. Hence, the District also failed to assess Student in the area of cognitive ability. However, Dr. Miller and Mr. Garabedian also established that the October 2005 and May 2007 cognitive ability scores were very close to one another, which indicated that Student's cognitive ability had not changed. As a result, the failure to assess Student's cognitive ability in January 2007 did not actually prejudice Student or affect the outcome of the assessment.

Failure to Obtain Parental Permission to Assess Student in November 2006

43. An LEA proposing to conduct an initial assessment to determine if a child qualifies as an individual with exceptional needs must obtain informed consent from the parent of the child before conducting the assessment. Here, there is no question that, on November 30, 2006, Student's mother signed her consent to the District's proposal to conduct academic testing. Moreover, the testimony of Student's mother and her November 26, 2006 request for a special education evaluation confirmed that Student's parents consented to this testing. Based on this consent, in January 2007, the District assessed Student in the area of academic achievement, using the W-J-III. Accordingly, in November 2006, the District obtained parental permission to assess Student.⁹

Requested Remedies

44. Compensatory education may be awarded to remedy a denial a FAPE. This Decision has determined that the District denied Student a FAPE from February 8, 2007, through the end of the 2006-2007 regular school year, due to the District's failure to identify Student as eligible under the category of ED, and resulting failure to offer Student special

⁹ The document incorrectly stated that "this testing is not for the purpose of Special Education evaluation." Any allegations related to the appropriateness of the assessment plan are outside the scope of the issue identified in Student's Complaint and Prehearing Conference Statement, and the ALJ's September 5, 2007 Order Following Prehearing Conference, and are therefore not addressed in this Decision.

education or related services. As a remedy for this denial, the District shall provide Student with a total of 30 hours of compensatory education. The areas to be addressed should generally cover math, reading, writing, listening, and speaking. The District is permitted to utilize qualified District employees to deliver these compensatory hours. In calculating the number of hours that will adequately compensate Student for the denial of FAPE, the ALJ considers the relatively short time the denial of FAPE occurred, and the context of Student's full-time attendance in a sixth-grade class this year. Because Student's needs were relatively mild, it is reasonable that Student may have received one to two hours per week of special education services. Given that the period of denial was approximately 16 weeks, 30 hours is sufficient to compensate Student for the denial.¹⁰ This award sufficiently remedies the failure to offer special education and services, and thus constitutes the total award of compensatory education; Student's requests for any additional compensatory education are denied. Considering the compensatory education awarded above, and also for the reasons identified in Factual Findings 41, this Decision does not award Student's requested remedy of cognitive behavioral therapy.

45. In light of this Decision's determination that the failure to refer Student for mental health services pursuant to Chapter 26.5 did not deny Student a FAPE, the request for a Chapter 26.5 mental health referral is denied.

46. When a parent disagrees with an assessment obtained by a public educational agency, the parent has the right to obtain an IEE from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. In the present case, Student seeks reimbursement in the amount of \$3,000 for the IEE conducted by Mr. Garabedian in May 2007. This Decision has determined that the District's January 2007 assessment was not appropriate because it did not assess Student in all areas of suspected disability. Mr. Garabedian was a qualified assessor who conducted an appropriate IEE. Student established that her parents paid Mr. Garabedian \$3,000 to conduct the IEE. The District shall therefore reimburse Student's parents in the amount of \$3,000 for the IEE.

47. The evidence did not establish a basis for awarding Student reimbursement in the amounts of \$125 for testing at the Tutoring Club or \$95 for testing at the Sylvan Learning Center. The evidence did not establish that this testing constituted an appropriate IEE. This Decision has already awarded reimbursement for Mr. Garabedian's IEE, and Student did not establish that reimbursement for additional testing was warranted.

48. Student also requests an order that the District convene an IEP team to develop an appropriate educational program for Student. However, because eligibility for the 2007-2008 school year was not at issue in this case, this Decision does not issue any orders regarding Student's eligibility for the current school year. However, should the IEP team

¹⁰ For several reasons, the testimony of Christine Evangelho regarding the number of private tutoring hours she recommended was inapplicable to the question of how many hours of compensatory education Student should receive. Ms. Evangelho did not have any particular expertise in ED or other special education issues.

determine Student eligible for the 2007-2008 school year, the team should consider that the 30 hours of compensatory education awarded herein should be delivered in addition to whatever program is offered for the current school year.

49. There was insufficient evidence to warrant ordering the District to conduct a complete speech-language assessment of Student. For example, Mr. Garabedian reported that Student's "language capabilities appear to be age-appropriate and include at least average vocabulary development, listening comprehension, oral expression, phonemic awareness, and rapid naming capabilities." Student's request that the District conduct a complete speech-language assessment and offer speech-language services is denied.

LEGAL CONCLUSIONS

Applicable Law

1. In an administrative proceeding, the burden of proof is on the petitioner. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041).)

During the 2005-2006 school year and 2006 ESY, was Student eligible for special education under the categories of ED or SLD?

3. Under the Individuals with Disabilities in Education Improvement Act of 2004 (IDEA) and state law, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code, § 56026, subd. (a).) For purposes of special education eligibility, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(2006); 34 C.F.R. § 300.7(a)(1999).) Likewise, California law defines "individuals with exceptional needs" as those persons who are identified as a "child with a disability," as defined above, and that their impairment as described in that section "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, §§ 56026, subd. (b), 56031.) California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby

entitle the pupil to special education if required by the degree of the pupil's impairment.

4. For a student to qualify to receive special education services under the category of serious emotional disturbance, he or she must exhibit one or more of the following characteristics over a long period of time, to a marked degree, and such that it affects a student's academic performance: (1) An inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) A general pervasive mood of unhappiness or depression; and (5) A tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (i); 34 C.F.R. § 300.8(c)(4)(2006); 34 C.F.R. § 300.7(c)(4).)

5. An SLD is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 U.S.C. § 1401(30)(A); Ed. Code, § 56337, subd. (a).) SLD does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. (20 U.S.C. § 1401(30)(C); Ed. Code, § 56337, subd. (a).)

6. The standards for determining whether a child has an SLD using the severe discrepancy method are described in California Code of Regulations, title 5, section 3030, subdivision (j). Under that section, a child has an SLD if the child has a disorder in one or more basic psychological processes (such as attention, visual processing, auditory processing, sensory-motor skills, or cognitive abilities including association, conceptualization, and expression), and has a severe discrepancy between intellectual ability and achievement in the areas of oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, or mathematics reasoning. (Cal. Code Regs., tit. 5, § 3030, subd. (j).) A difference equal to or greater than 1.5 standard deviations, adjusted by one standard error of measurement, indicates a severe discrepancy when corroborated by other assessment data.

7. When standardized tests are considered valid for a student, the method for demonstrating whether a severe discrepancy exists involves the following steps: (1) computing into common standard scores, using a mean of 100 and standard deviation of 15, the achievement score and the ability test score to be compared; (2) computing the difference between these common standard scores; and (3) 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 that may include other tests, scales, instruments, observations and work samples, as appropriate. (Cal. Code Regs., tit. 5, § 3030, subd. (j).)

8. No single procedure may be used as the sole criterion for determining whether a child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320; see Cal. Code Regs., tit. 5, § 3030, subd. (j)(4).)

9. Based on Factual Findings 8-11 and 17-20, and Legal Conclusions 1-8, Student was not eligible for special education under either the ED or SLD categories for the 2005-2006 school year. Student did not prove that she required special education or services that could not be provided with modification of the regular school program during this school year, and thus was not eligible under the category of ED. Student did not have a severe discrepancy between cognitive ability and academic achievement that rendered her eligible for special education, and thus was not eligible under the category of SLD.

If Student was eligible for special education during the 2005-2006 school year and 2006 ESY, did the District deny her a FAPE by: (A) failing to provide her with special education and related services; and (B) failing to refer her for mental health services pursuant to Government Code Chapter 26.5?

10. Because this Decision does not find Student eligible for special education during the 2005-2006 school year, including the ESY, this Decision does not reach the question of whether the District denied Student a FAPE during that year.

During the 2006-2007 school year and 2007 ESY, was Student eligible for special education under the categories of ED and/or SLD?

11. Based on Factual Findings 12-15 and 21-31, and Legal Conclusions 1-4, Student exhibited inappropriate types of behaviors or feelings under normal circumstances in several situations over a long period of time and to a marked degree, which adversely affected her educational performance. Student required special education and/or related services because of her disability, and the District was aware of this need at least as of February 8, 2007. Therefore, Student was eligible under the category of ED from February 8, 2007, through the end of the 2006-2007 regular education school year.

12. Based on Factual Findings 12-15 and 32-38, and Legal Conclusions 1-3 and 5-8, Student did not have a severe discrepancy between cognitive ability and academic achievement, and thus was not eligible under the category of SLD.

If Student was eligible for special education during the 2006-2007 school year and 2007 ESY, did the District deny her a FAPE by failing to provide her with special education and related services?

13. A FAPE is available to all children with disabilities residing in the state between the ages of 3 and 21. (20 U.S.C. § 1412(a)(1)(A).) Children with disabilities have the right to participate in a FAPE, and special education instruction and services for these persons are needed to ensure the right to an appropriate educational opportunity to meet their unique needs. (Ed. Code, § 56000.) FAPE consists of special education and related services

that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).)

14. Based on 12-15, 21-31, and 39, and Legal Conclusions 1-4 and 13, the District denied Student a FAPE from the period of February 8, 2007, through the end of the 2006-2007 regular school year. Student was eligible for special education due to her qualifying disability of ED during that time.

If Student was eligible for special education during the 2006-2007 school year and 2007 ESY, did the District deny her a FAPE by failing to refer her for mental health services pursuant to Government Code Chapter 26.5?

15. An LEA, IEP team, or parent may initiate a referral for assessment of the social and emotional status of a pupil, as part of special education assessment procedures. (Gov. Code, § 7576.) Based on the results of assessments completed pursuant to those procedures, an IEP team may refer a pupil who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services to a community mental health service if the pupil meets specified criteria. Among those criteria is the requirement that the LEA has provided appropriate counseling and guidance services, psychological services, parent counseling and training to the pupil, or behavioral intervention, as specified in the IEP, and the IEP team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the IEP team has documented which of these services were considered and why they were determined to be inadequate or inappropriate. (*Id.*)

16. Based on Factual Findings 40-41, and Legal Conclusions 1 and 15, the District did not deny Student a FAPE by failing to refer her for mental health services pursuant to Government Code Chapter 26.5. There was insufficient evidence to determine whether Student needed mental health services from a community mental health service pursuant to Chapter 26.5 of the Government Code, and Student did not prove that the District's failure to refer her for Chapter 26.5 mental health services constituted a denial of FAPE.

If Student was eligible for special education during the 2006-2007 school year and 2007 ESY, did the District deny her a FAPE by failing to conduct a complete assessment in all areas of suspected disability, including social-emotional, psychoeducational, and possibly speech-language?

17. A pupil must be assessed in all areas related to his or her suspected disability. (Ed. Code, § 56320, subd. (f); 20 U.S.C. § 1414 (b)(3).) A reassessment shall be conducted if the LEA determines that the educational or related services needs of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (Ed. Code, § 56381, subd. (a)(1); 20 U.S.C. § 1414(a)(2)(A).)

18. Based on Factual Findings 13 and 42, and Legal Conclusions 1, 13, 14, and 17, the District denied Student a FAPE during the 2006-2007 school year by failing to assess her in the areas of social/emotional functioning and cognitive ability.

If Student was eligible for special education during the 2006-2007 school year and 2007 ESY, did the District deny her a FAPE by failing to obtain parental permission prior to assessing Student in or about November 2006?

19. Both state and federal law require that, before conducting an assessment, the LEA is required to secure parental consent. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, §§ 56321, 56501, subd. (a)(3).)

20. Based on Factual Findings 13 and 43, and Legal Conclusions 1 and 19, the District did not deny Student a FAPE by failing to obtain parental permission prior to assessing Student. In November 2006, the District obtained written consent from Student's mother to conduct the January 2007 academic assessment of Student.

Remedies

21. Compensatory education may be awarded to a pupil who has been denied a FAPE. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025 (citing *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496).)

22. Based on Factual Finding 44 and Legal Conclusions 1 and 21, the District shall provide Student with a total of 30 hours of compensatory education to compensate for the failure to offer special education services due to her ED from February 8, 2007, through the end of the 2006-2007 regular school year. The areas to be addressed should generally cover math, reading, writing, listening, and speaking. The District is permitted to utilize qualified District employees to deliver these compensatory hours.

23. When a parent disagrees with an assessment obtained by the public educational agency, the parent has the right to an IEE from qualified specialists at public expense unless the educational agency is able to demonstrate at a due process hearing that its assessment was appropriate. (Ed. Code, § 56329, subd. (a).)

24. Based on Factual Finding 46 and Legal Conclusions 1 and 23, the District shall reimburse Student's parents in the amount of \$3,000 for the IEE conducted by Mr. Garabedian in May 2007. This reimbursement is awarded because the District did not establish that its assessment was appropriate, because the January 2007 assessment did not assess Student in all areas of suspected disability.

25. Based on Factual Findings 44-49 and Legal Conclusions 1 and 21-24, Student is not entitled to further relief.

ORDER

1. As a remedy for the denial of FAPE determined in this Decision, the District shall provide Student with a total of 30 hours of compensatory education to compensate for the failure to offer special education services due to her ED from February 8, 2007, through the end of the 2006-2007 regular school year. The areas to be addressed should generally cover math, reading, writing, listening, and speaking.

2. As a remedy for the District's failure to conduct an appropriate assessment of Student in all areas of suspected disability, the District shall, within 60 days of the date of this Decision, reimburse Student's parents in the amount of \$3,000 for the May 2007 IEE conducted by Mr. Garabedian.

3. All of Student's other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The Student prevailed in part on Issue 3, and prevailed on Issues 4(A) and 4(C). The District prevailed on Issues 1, 2, 4(B) and 4(D), and prevailed in part on Issue 3.

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: November 7, 2007



SUZANNE B. BROWN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division