

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

In the Consolidated Matters of:

HIGH TECH MIDDLE MEDIA ARTS  
SCHOOL,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006090461

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STUDENT,

Petitioner,

v.

DESERT MOUNTAIN SELPA and HIGH  
TECH MIDDLE MEDIA ARTS SCHOOL,

Respondents.

OAH CASE NO. N 2006100331

**DECISION**

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard these consolidated matters on December 7, 8, 11, and 15, 2006, in San Diego, California.

Jack B. Clarke and Steven E. Lake of Best Best & Krieger, represented High Tech Middle Media Arts School (High Tech) and Desert Mountain Special Education Local Plan Area (SELPA) at the hearing. Robert Parker, Director of Special Education, appeared for most of the hearing on behalf of High Tech. Dr. Ruth Aldrich, Program Manager, appeared on behalf of the SELPA.

Patricia A. Lewis represented Student (Student). Student was present at various times during the hearing and also testified on her own behalf. Student's mother and father were also present for most of the hearing.

On September 20, 2006, High Tech filed a due process hearing request in OAH Case number N2006090461. On October 5, 2006, Student filed her request for a due process hearing in OAH Case number N2006100331 against both High Tech and the SELPA. On October 19, 2006, OAH granted High Tech's motion to consolidate the two cases and continued the hearing date for High's Tech's due process case to the same date as Student's hearing (December 7, 2006). At the close of the hearing on December 15, 2006, the parties requested the opportunity to file written closing argument. That request was granted, and the matter was deemed submitted upon receipt of written closing argument on January 2, 2007.<sup>1</sup>

## ISSUES

Did High Tech/SELPA fail to assess Student in all areas of suspected disability, specifically in the areas of visual processing and auditory processing?<sup>2</sup>

May High Tech exit Student from the special education program because she no longer qualifies for special education services?

## CONTENTIONS OF THE PARTIES

Student contends that High Tech failed to assess her in the areas of auditory and visual processing. High Tech contends that it assessed Student in all areas related to a suspected disability. Student has obtained an auditory processing assessment from audiologist Carol Atkins and a visual processing assessment from optometrist Dana Dean. Student contends that High Tech must either conduct auditory or visual processing assessments of Student using its own experts or accept the findings of the independent expert evaluations of Atkins and Dr. Dean.

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<sup>1</sup> During the telephonic Prehearing Conference, the SELPA indicated that it might bring a motion to dismiss on the basis that High Tech, a charter school, was the proper LEA in this case, not the SELPA. During both the opening statement and written closing argument, the SELPA reiterated its position that it was not a proper party. However, no motion to dismiss was made, so no findings are made in this Decision regarding the issue of whether the SELPA is a proper party.

<sup>2</sup> Student originally had two additional issues for hearing: 1) Is Student entitled to be retained in special education based upon eligibility of specific learning disability because she suffers from visual processing and auditory processing disorders; and 2) Is Student entitled to reimbursement for independent assessments funded by her parents, which were performed by Dr. Joan Hewitt, Carol Atkins, and Dr. Dana Dean, in the total amount of \$1,834.63? However, Student requested dismissal of those issues on the first day of hearing and the issues were dismissed from the action. Student's counsel explained that the proposed resolution for Student's remaining issue is either that High Tech/SELPA be required to assess Student in the areas of visual and auditory processing or that they be required to accept the findings from the assessments done by the experts privately retained by Student.

Student was previously found eligible for special education under the “hearing impaired” category. High Tech contends that Student no longer has a hearing problem and that she no longer qualifies for special education under any eligibility category. Student contends that she qualifies for special education under the category of specific learning disability based on an auditory and/or visual processing disorder.

## FACTUAL FINDINGS

### *Has High Tech Properly Assessed Student in all Areas of Suspected Disability?*

1. Student contends that High Tech failed to assess Student in all areas of suspected disability, particularly auditory and visual processing.<sup>3</sup> The law requires a local education agency (LEA) to assess a child in all areas related to a suspected disability, and no single measure or assessment may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. An LEA must conduct a reassessment of a child prior to exiting that child from the special education program.

2. Student is a 13-year-old girl who is currently in the eighth grade at High Tech. Student’s eligibility category for special education according to her last agreed-upon and implemented Individualized Education Program (IEP) is hearing impaired. Student gets A’s and B’s in her middle school classes and has a grade point average of approximately 3.74. She is articulate, thorough, and careful in her work. Her teachers praise her work in the classroom and describe her as a role model for other children.

3. Student has a history of chronic sinus condition, enlarged adenoids, and fluid build up in her ears. In March 2004, when Student was in the fifth grade at an elementary school within the San Diego Unified School District, the district conducted an assessment of Student. At the time of the assessment, Student suffered from fluid build up in her ears and a bulging right ear drum. The district’s assessor concluded that Student suffered from mild conductive hearing loss and recommended that she be qualified for special education services. At an IEP meeting subsequent to that assessment, the IEP team agreed that Student would be eligible for special education services.

4. Student’s hearing began to improve the following year. On January 6, 2005, auditory testing showed that Student’s hearing was much closer to the normal ranges, but still indicated improper pressure behind Student’s ear drums. On December 8, 2005, Student’s pediatric otolaryngologist reported that Student’s ears and nose seemed clear.

5. On February 20, 2006, a private audiologist hired by Student’s parents assessed Student and found only minimal to borderline hearing loss. The audiologist

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<sup>3</sup> California law uses the term “assessment” while the federal law uses the term “evaluation.” The two terms have the same meaning. (20 U.S.C. § 1414(a); Ed. Code, § 56320.)

recommended that Student be referred for an auditory processing assessment because, during the testing conducted by the audiologist, Student's responses to "pure tones" were much slower than those to speech.

6. On March 22, 2006, during Student's seventh grade year at High Tech, Student's annual IEP team meeting was held. The team members from High Tech recommended that Student be exited from the special education program on the basis that her hearing impairment issues had been resolved and that she no longer needed special education. Thomas Teubl, an audiologist working with High Tech, reviewed the test results from the prior audiological testing done of Student and concluded that Student no longer met the eligibility criteria for a child with a hearing impairment. Diane Levy, the deaf/hard-of-hearing instructor who had been providing services to Student under the terms of Student's IEP, concurred with that opinion. She reported that Student had met her IEP goals.

7. Student's parents disagreed that Student should be exited from special education. Student's parents raised the possibility that Student might have an auditory processing disorder. High Tech proposed that Carren Stika, Ph.D., conduct a comprehensive assessment of Student to determine if she still needed special education services. In the meantime, Student continued to receive services under her last agreed-upon and implemented IEP.

8. On April 21, 2006, Student's father signed an assessment plan agreeing to let Dr. Stika perform the comprehensive assessment of Student.

9. Dr. Stika conducted her assessment in May and June 2006. Dr. Stika is a clinical psychologist and a certified teacher for the deaf and hard of hearing. She is an assistant professor at San Diego State University, a psychologist in private practice and a consultant for governmental agencies, including the San Diego Regional Center. She reviewed Student's records, including the prior audiological testing of Student, and interviewed the audiologist who had tested Student on February 20, 2006. She also interviewed Student, her parents, her classroom teachers and the deaf/hard-of-hearing instructor who was providing services to Student under her IEP.

10. Dr. Stika conducted extensive testing of Student. The tests and rating scales she administered included the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the Woodcock-Johnson III, Tests of Achievement (WJ-III), the Screening Instrument for Targeting Educational Risk (SIFTER), the Developmental Test of Visual-Motor Integration (VMI), the Peabody Picture Vocabulary Test, Third Edition, the Piers-Harris Children's Self Concept Scale, Second Edition, the Revised Children's Manifest Anxiety Scale, the Sentence Completion Test, the Behavior Assessment System for Children, Second Edition, Self-Report – Adolescent, and the Behavior Assessment System for Children, Second Edition, Parent Rating Scales – Adolescent.

11. The WISC-IV is designed to assess a child's intellectual functioning. Dr. Stika's test results showed Student to be in the high average range in the categories of verbal comprehension (composite score 119) and perceptual reasoning (112), in the average range in the category of working memory (102), and in the low average range in processing speed (83).

12. Because of the discrepancy between Student's verbal comprehension score and processing speed score, Dr. Stika did not believe it was appropriate to derive a full scale intelligence quotient score. Instead, Dr. Stika believed that the general ability index (GAI) found by combining Student's verbal comprehension index and perceptual reasoning index was a better measure of Student's intellectual ability. That GAI score was 117, placing Student in the high average range of intelligence.

13. Dr. Stika concluded that Student's low processing speed on the WISC-IV was not a result of an auditory processing disorder, because the two tasks involved in determining the processing speed index "are nonverbal and require no audition to complete."

14. Stika also administered the WJ-III to test Student's achievement. Student scored above her grade level in every category of that test except math fluency, passage comprehension and reading fluency. Her scaled scores were: broad math 108, broad reading 88, and broad written language 114. A breakdown of her scores in broad reading showed the following subtest scores: letter-word identification 111, passage comprehension 97, word attack 114, and reading fluency 71.

15. Because auditory processing issues had been raised by Student's parents, Dr. Stika conducted the Extended Battery of the WJ-III. In the WJ-III clusters and subtests that rely upon auditory processing skills, Student scored between 103 and 118, in each case above her grade level. None of those test scores indicated an auditory processing disorder.

16. Dr. Stika also asked Student's teachers to complete the SIFTER in order to assess Student's auditory processing. The SIFTER is a screening instrument in which the teachers responded to a series of questions designed to address different hearing and listening problems. The teachers' responses to the SIFTER indicated that Student had no more difficulty hearing and understanding in class than any other child.

17. Dr. Stika did not conduct any specific tests designed to determine if Student had a visual processing disorder. The issue of visual processing had not been raised by anyone at the time of Dr. Stika's assessment. However, a few of the tests she conducted were related to visual processing. For example, the VMI measures visual processing. In this test, Student was required to copy a series of shapes and designs using a paper and pencil. Student took almost 20 minutes to complete the test, while the average child takes only 10 to 15 minutes. Student scored in the 98th percentile in her performance on the test, far above her grade level.

18. The block design, picture completion and processing speed subtests of the WISC-IV also relate to visual processing. Student scored above the mean on block design, but below the mean on the picture completion portion of the test and on both parts of the processing speed subtest.

19. In Dr. Stika's opinion, Student's slow processing speed scores were a result of a psychological tendency toward perfectionism and a cautious way of approaching tasks, not a result of a visual or auditory processing disorder. Student's "high level of deliberation and carefulness" and her desire to be "right" affected her speed in completing the tests. Dr. Stika admitted that the slow processing speed could be the result of a visual processing disorder, but she did not find visual processing problems to be consistent across the other tests. She believes that her evaluation was comprehensive and no additional testing was necessary.

20. On September 7, 2006, the IEP team met again to consider Dr. Stika's report. The High Tech members of the team concluded that Student no longer qualified for special education. Student's parents and their educational advocate disagreed. The educational advocate pointed out the discrepancies in the test results and recommended further assessments. High Tech did not agree to further assessments.

21. On October 30, 2006, after both due process complaints had been filed in this matter, Student's parents obtained an independent audiological evaluation by audiologist Carol Atkins. Atkins first conducted a hearing test of Student and concluded that Student's hearing was within normal limits. Atkins would not have tested Student for auditory processing unless Student's hearing was normal.

22. Auditory processing involves the way the brain receives and responds to auditory information. Atkins administered tests to determine if Student had an auditory processing disorder, including a test of speech discrimination in noise, a frequency pattern test, the SCAN-A Competing Sentences subtest, the Staggered Spondaic Word Test, and the Gap in Noise test. Based on the results of the tests, Atkins concluded that Student had an auditory processing disorder.

23. Atkins recognized that the teachers' responses on the SIFTER did not show any evidence of an auditory processing disorder, but she concluded that the teachers were biased in completing the rating scale. Atkins' opinions were based, in part, on her belief that Student's classes had only a very small number of children in each class. Instead, the evidence showed that the classes had over 20 children in them. Atkins testified that she was "biased" when she reviewed her notes because Student's mother told her that the teachers were under a "gag order" not to speak with anyone about the case. The evidence at hearing showed there was no such "gag order." Atkins also admitted that Student's high grades in school and high percentile scores on state tests were inconsistent with her findings.

24. On November 7, 2006, Student's parents obtained an independent assessment of Student's visual processing by Dr. Dana Dean, O.D. Dr. Dean conducted various tests and determined that Student had numerous problems with reading, including difficulty with

“pursuits” (how well the eye tracks across a page) and “saccadic” eye movements (how the eyes jump from place to place). Dr. Dean also found that Student had difficulty with binocular eye teaming (how well her eyes coordinate) and with visual discrimination, closure, and sequential memory. As a result of the testing, Dr. Dean believes that Student probably reads one word at a time, rather than reading in word clusters, and must go back over her reading to comprehend what she has read. Dr. Dean’s tests found that Student’s passage comprehension was 80 percent, but Student’s “efficiency” of reading was at a second grade level. Based on the test results, Dr. Dean believes that Student has a visual processing disorder. Student’s disorder will cause her to become fatigued with her reading and require her to take longer to read her assignments. Dr. Dean opined that, although Student is smart enough to be able to keep up with her work despite her reading difficulties at the moment, she will have increasing difficulty in keeping up with the demands of her school work as she moves from middle school into high school.

25. The evidence supports a finding that High Tech properly assessed Student in auditory processing. Although Dr. Stika is not an audiologist, she has expertise in hearing impairments as well as psychology. She gave Student tests specifically designed to evaluate Student’s auditory issues. None of the test results indicated that Student had an auditory processing disorder. There was no reason for High Tech to have recommended additional testing from an audiologist based on Dr. Stika’s test results.

26. Carol Atkins’s assessment is of limited persuasive value. As she herself admitted, she did not have full information about Student’s classroom circumstances and was somewhat “biased” based on what Student’s parents told her. Her findings were not consistent with what the teachers reported regarding Student’s circumstances in the classroom and were not consistent with Student’s high grades and grade point average.

27. Visual processing is a different matter. The tests Dr. Stika conducted showed that Student had a potential problem with visual processing. Dr. Stika recognized that the test results reflected “something going on” with Student. Student’s processing speeds on all the tests Dr. Stika administered were far below where Student should have been. Dr. Stika knew it was not a result of an auditory processing disorder because the low scores were related to visual portions of the test. Although the issue of visual processing had not been raised at the time of Dr. Stika’s assessment, the discrepancy in test results, coupled with the reports of Student’s slow speeds in class work and homework should have raised a “red flag” with High Tech that further assessments were warranted. Student’s educational advocate recognized this problem and raised it with the IEP team. High Tech should not have concluded, based on Dr. Stika’s assessment, that there was no visual processing problem.

28. The evidence supports a finding that High Tech/SELPA failed to assess Student in all areas of suspected disability, particularly in the area of visual processing.

*Student's Eligibility for Special Education as Hearing Impaired.*

29. A child is eligible for special education services if the child has a hearing impairment, whether permanent or fluctuating, which impairs the processing of linguistic information through hearing and which adversely affects educational performance. High Tech contends that Student no longer qualifies for special education under the eligibility category of hearing impaired. It is not clear whether Student disputes this contention. In her written closing argument, Student admitted that: "Neither [Student] or her parents dispute that she has a history of fluctuating hearing loss and that, today, [Student's] hearing levels appear to be within normal limits."

30. Even if this issue is in dispute, the evidence supports a finding that Student no longer qualifies for special education services under the eligibility category of "hearing impaired." As established in Factual Findings 2 - 23, Student's middle ear problems, although initially fluctuating, are no longer educationally significant. Student has been virtually free of difficulties for at least a year and her most recent test, conducted within two months of the hearing date by Student's own auditory expert, was within normal limits.

*Student's Eligibility for Special Education as a Child with a Specific Learning Disability*

31. Student contends that she qualifies for special education as a child with a specific learning disability (SLD) based on either an auditory or visual processing disorder or both. High Tech disputes that contention.<sup>4</sup> There are two current methods for determining whether a child has an SLD: the "severe discrepancy" method and the response to intervention (RTI) method. The evidence supports a finding that Student does not qualify for special education under either of these methods.

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<sup>4</sup> The issue of SLD is technically a separate issue from High Tech's ability to exit Student from the special education program, because Student has never been found eligible for special education as a child with an SLD. Student raised the issue of whether Student qualified as a child with an SLD in her due process complaint, but dismissed that issue on the first day of hearing. High Tech's due process complaint did not specifically raise the adequacy of High Tech's finding that Student did not qualify as a child with an SLD. However, counsel for High Tech indicated during the hearing that High Tech considered its due process issue to be broader than merely the "hearing impairment" eligibility issue. During the hearing, the parties presented extensive evidence and argument regarding the SLD issue. It would serve no purpose to require the parties to bring a separate action to address the issue, so the issue will be decided in this Decision. Because the issue is being addressed as part of High Tech's due process case, High Tech has the burden of proof to show that Student does not qualify under the SLD category. (See Legal Conclusion 2.)

Neither party contends that Student might have a disability other than SLD. In all other respects, Student appears to be a typically developing child who is achieving at or above her grade level in her class work. Therefore, it is not necessary for this Decision to discuss additional eligibility categories besides SLD.

### *The Severe Discrepancy Method*

32. The severe discrepancy method of determining SLD looks at whether a severe discrepancy exists between the child's intellectual ability and his or her achievement. There are two factors to consider in determining whether a child has an SLD under this method: 1) Does a severe discrepancy exist; and 2) Does a child have a disorder in one of the basic psychological processes (such as auditory or visual processing). If the answer to both questions is "yes," the child is considered to have an SLD. A determination must then be made regarding whether, as a result of that SLD, the child needs special education.

#### *Does Student have a Disorder in One of the Basic Psychological Processes?*

33. The evidence supports a finding that Student has a visual processing disorder. As set forth in Factual Findings 9 - 28, Dr. Stika's assessment raised the possibility that Student might have a visual processing disorder, but High Tech did not follow up with any additional assessments to determine whether Student's low fluency and processing speed scores were the result of a visual processing disorder or the result of "perfectionist" tendencies and a cautious approach to problems as suggested by Dr. Stika. Dr. Dean's testing, on the other hand, unequivocally determined that Student has a visual processing disorder.

High Tech's visual expert, Philip Smith, O.D., disagreed with Dr. Dean's conclusions. However, his opinion was based almost entirely on Student's good performance in the classroom. He admitted that, if classroom performance was removed from his consideration, there is evidence of a visual problem that might have an impact on education.

The first part of the "severe discrepancy" test has been met – Student has a disorder in one of the basic psychological processes.

34. The evidence does not support a finding that Student has an auditory processing disorder. Dr. Stika's assessment found no evidence of such a disorder. Carol Atkins's assessment found a disorder, but her assessment lacks persuasive value, for the reasons stated in Factual Findings 21 – 23 and 26.

#### *Is there a Severe Discrepancy Between Student's Intellectual Ability and Achievement?*

35. In the instant case, neither party contends that standardized testing demonstrates a severe discrepancy. Instead, Student's educational expert contends that the appropriate test to use is the one that applies when standardized testing does not reveal a severe discrepancy. That test requires an evaluation of Student's educational circumstances, including: 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.

### *Data Obtained From Standardized Assessment Instruments*

36. As stated in Factual Findings 9 - 15, Dr. Stika administered the WISC-IV and WJ-III to Student. These are both standardized tests that can be used to determine if there is a severe discrepancy between Student's intellectual ability and achievement. Student's GAI score was 117, in the high average range of intelligence. Student's scores on the WJ-III were: broad reading 88, broad math 108, and broad written language 114.

### *Information Provided by the Parents*

37. Student's parents do not question their daughter's intellectual ability to do her class work or the level of her achievement. Instead they are concerned about the amount of time it takes Student to do the work. They report that Student is very slow in completing her homework and will often stay awake until 11:00 p.m. or midnight to complete her work. They believe that Student reads passages of books more than once to understand them. They have assisted their daughter by subscribing to an internet service that allows Student to download audio versions of books to assist with Student's reading. Student's mother testified that Student gets headaches which Student's mother has been told are caused, at least in part, by Student's eye strain due to reading.<sup>5</sup> Student's father has overheard Student listening to portions of the audio recordings over and over. Student has told her parents about difficulty she has hearing in noisy environments or when people are speaking at the same time.

38. In order to combat Student's eye strain, about a month prior to the hearing, Student's parents began requiring Student to go to bed at 9:00 p.m., no matter how much homework she has. This new restriction has not impacted Student's class standing or achievement, because her teachers have given her extra time to complete her work.<sup>6</sup>

### *Information Provided by Pupil's Present Teachers*

39. Student's humanities teacher for her current school year (eighth grade) reported that Student is one of the top pupils in her class. The humanities class includes the subjects of English and history. Every Friday, the teacher gives the children in the class a vocabulary test in which the children are graded on spelling and definitions. Student does very well on those tests, and gets close to 100 percent correct. Student's grade for the first trimester of the class (which had concluded shortly before the hearing) was one of the highest grades in the class (96 percent).

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<sup>5</sup> Although Student's mother testified as to what various medical doctors said to her about Student's headaches, no medical doctor testified at the hearing.

<sup>6</sup> Student's parents also took Student out of school for a vacation for approximately one week during the month before the hearing. Student was able to keep up with her classes despite this absence.

40. Student's drama teacher recounted that Student is able to do "cold readings" of plays without any difficulty. These "cold readings" require Student to read a script when she has not had sufficient time to memorize or rehearse it. Student may not even have seen the script before she performs the "cold reading."

*Evidence of the Student's Performance in the Classroom Obtained from Observations, Work Samples, and Group Test Scores*

41. Student gets A's and B's in her middle school classes and has a grade point average of approximately 3.74. She is articulate, thorough, and careful in her work. Her teachers praise her work in the classroom and describe her as a role model for other children. One of Student's projects – a radio play that she wrote for drama class – was done so well that Student received a perfect score on the project.

42. Student took the California "STAR" test in the spring of 2006. This test is given to pupils in California schools to see if those pupils meet California's educational standards. Student scored at the high end of the "proficient" level in English-Language Arts and in the middle of the proficient level in Mathematics. Both scores were well within California's target range. Student's score in English-Language Arts was 390. A score of 401 would have placed her in the "advanced" category. (The "proficient" category goes from 350 to 400.)<sup>7</sup>

43. In addition to taking the STAR test, Student also took the California Achievement Tests, Sixth Edition Survey (CAT/6). Student's scores on the CAT/6 were very high. When compared to a national sample of pupils across the United States, Student scored in the 94th percentile in reading, the 95th percentile in language, the 93rd percentile in mathematics and the 52nd percentile in spelling. The CAT/6 is a timed test. Student did not ask for extra time to take the test.

*Consideration of the Pupil's Age, Particularly for Young Children*

44. Student's age is not a significant factor in determining whether a severe discrepancy exists. As stated above in Factual Findings 39 - 43, Student's school achievement and her scores on the STAR and CAT/6 tests are appropriate for her age and grade level.

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<sup>7</sup> During the hearing, Student introduced an exhibit showing STAR test results for special education students in California. Student's counsel pointed out that many special education students score well on the STAR tests, and that merely scoring well on those tests does not automatically disqualify a child from receiving special education. Student misses the point – Student's scores on the STAR and CAT/6 tests are merely factors to be considered when determining whether there is a severe discrepancy under the California regulations. Student's good performance on those tests does not automatically disqualify Student.

### *Additional Relevant Information*

45. The expert testimony on the issue of severe discrepancy is conflicting. Dr. Stika concluded, based on her testing of Student, that Student did not have a severe discrepancy between intellectual ability and achievement. Although Dr. Stika acknowledged that the reading fluency score on the WJ-III (and therefore her broad reading score) was far below Student's grade level, she concluded that this did not indicate a severe discrepancy because of Student's performance in the classroom and on group test scores.

46. Student's educational expert Kathleen Edwards, Ed.D., disagreed with Dr. Stika. Dr. Edwards was the educational advocate retained by Student's parents to represent them at the September 2006 IEP meeting. Dr. Edwards's opinion was based on her review of Dr. Stika's report. In her opinion, Student qualifies as a child with an SLD under California Code of Regulations, title 5, section 3030, subdivision (j)(4)(C) based on the discrepancies in the WISC-IV and WJ-III test scores, on the information provided by the parents regarding the length of time that Student spends doing her homework, and on the amount of stress that Student has trying to keep up at school.

47. The opinions of Carol Atkins and Dr. Dean did not address whether Student had a severe discrepancy between intellectual functioning and achievement. In fact, both admitted that their findings of a processing disorder were inconsistent with the good grades Student has received in school.

### *Consideration of All the Factors Shows There is Not a Severe Discrepancy*

48. The evidence supports a finding that Student does not exhibit a severe discrepancy between intellectual ability and achievement. Student's evidence of a severe discrepancy – the standardized test scores on the WISC-IV and WJ-III, and the information provided by Student's parents – is countered by the other evidence in the case. Student's fine work in class, her good grades, her teachers' observations, her good scores on the STAR test, her ability to score very well on a timed test (CAT/6), and her age appropriate work, all demonstrate that there is no discrepancy between Student's intellectual ability and achievement. Student has a high average intellectual ability and that is precisely where she is achieving.

49. The testimony by Student's expert does not change this. Dr. Edwards is not a school psychologist, did not do any testing of Student, and did not prepare a report. She relied solely on Dr. Stika's findings. She has experience in reviewing WISC-IV results, but admitted that she is not qualified to administer the test. She was not familiar with all aspects of the test. For example, she could not comment on whether a GAI score was an "IQ" ability. Her testimony is not persuasive on the issue of severe discrepancy.

*Does Student Qualify as a Child With a Specific Learning Disability Under the RTI Method?*

50. Student contends that, even if there is no severe discrepancy between Student's intellectual ability and achievement, Student still qualifies for special education under the category of SLD based on the RTI method of determining SLD set forth in the federal laws and regulations. As discussed in Legal Conclusions 19 - 26, this RTI method of determining SLD is not a test or procedure that must be conducted with every child who has a processing disorder, but is instead a way to explore whether a child's underachievement is a result of a disability or a lack of appropriate instruction. The method looks at an underachieving child's response to scientific, research based interventions conducted in the classroom.<sup>8</sup>

51. In the instant case, there is no underachievement by Student, no failure to meet grade level standards, and no evidence of any research-based interventions attempted with Student. Because Student was getting As and Bs in all her classes and scored very high on the state standardized testing, there would have been no reason for the school to have maintained records of such interventions to determine if Student had an SLD using RTI. The evidence does not support a finding that Student has an SLD as determined by her response to scientific, researched-based interventions.

*Even if a Severe Discrepancy Exists, Student Does Not Need Special Education*

52. Both California and federal law define a child with a disability as one who, by reason of an impairment, needs special education and services which cannot be provided as part of the regular school program. High Tech contends that, even if Student has an impairment, she does not need special education. Her needs can be met with the modifications given to any pupil as part of the school's general education program.

53. Student's last agreed-upon and implemented IEP called for her to be placed in a regular education classroom, with pull-out services of 60 minutes per month provided by a deaf/hard-of-hearing instructor, three sessions per year of audiological services, a "peer-buddy" to help her with note taking in class, an FM speaker system, with a headset-microphone for the teacher and a portable speaker next to Student's desk, counseling services of 15 hours per year (to help Student with the transition from elementary school to middle school), preferential seating in class, and directions given in a variety of ways.

54. These IEP services and modifications were not designed to accommodate a visual processing disorder. Student has never needed special education services for a visual processing disorder. Considering Student's good grades, her excellent test scores, and her ability to keep up with her class work, even if Student does have an SLD based on a visual

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<sup>8</sup> California law also permits the use of the RTI method of determining SLD. The evidence at hearing did not establish to what extent California has implemented the use of RTI as a method for determining SLD. Because California's current laws regarding RTI appear to be the same as the federal standard, there is no need to have a separate discussion of RTI under California law.

processing disorder, she does not need any special education services or modifications to achieve appropriately in school at the present time.

55. The evidence also does not support a finding that Student needs special education services or modifications to address any SLD she may have due to an auditory processing disorder. As stated in Factual Finding 34, the evidence supports a finding that Student does not have an auditory processing disorder. However, even if Student has such a disorder, Student's special education services and modifications were designed to assist with hearing loss, not auditory processing. That hearing loss is no longer educationally significant. Student's deaf/hard-of-hearing instructor testified that Student no longer needs the pull-out instruction and has not needed it for many months. Student's counseling services were intended to help her make the transition from elementary school to middle school. She has made that transition smoothly.

56. Student's auditory expert Carol Atkins believes that Student's FM system is necessary to assist with Student's educational goals. However, her opinion was based in large part on Student's history of hearing loss and chronic ear infections, problems that do not currently trouble Student. Atkins's report made many other recommendations for services and modifications for Student, but it is apparent that those recommendations were not tied to current educational necessity, because Student has been successful in school without them.<sup>9</sup> Atkins' opinion is not sufficient to support a finding that Student's success in school is dependent on her current IEP services and modifications or that Student needs special education services at the present time. Student's teachers have not witnessed any difference in Student's classroom performance when the FM amplification system is not in use.

57. The other modifications Student is receiving under her IEP are the type that can be provided to any child in the general education curriculum, not just to special education Students. The evidence supports a finding that modifications provided in the regular curriculum are sufficient to address any disabilities Student may have.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. Under both state and federal law, students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that are available

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<sup>9</sup> Atkins's recommendations took up almost a full page of her eight page report and included services such as individual tutoring, classroom observation, and auditory processing therapy, including Dichotic Interaural Intensity Training one hour per week for approximately 16 weeks. Atkins's recommendation that Student continue her current IEP modifications was only a very small part of Atkins's full recommendations.

to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9).)

2. The burden of proof in this proceeding is on the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In this case, High Tech has the burden to prove that Student is not a child with a disability who qualifies for special education under state or federal law under both the eligibility categories of hearing impaired and SLD. Student has the burden to prove that High Tech failed to assess Student in all areas of suspected disability, particularly visual and auditory processing.

3. A district is required to assess a child in all areas related to a suspected disability, and no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (Ed. Code, § 56320.) A district is also required to reassess a child before exiting that child from special education (unless the child has graduated with a high school diploma or is past the maximum age for special education). (Ed. Code, § 56381, subds. (h) & (i).)

4. California Education Code section 56026 defines an individual with "exceptional needs" as one with an impairment that "requires instruction, services, or both, which cannot be provided with modification of the regular school program."

5. Federal law defines a "child with as disability" as 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, or specific learning disabilities and "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(3).)

6. Visual and auditory processing disorders are not, in and of themselves, separate eligibility categories for purposes of determining eligibility for special education. Instead, they are factors considered by an IEP team when determining whether a child has a specific learning disability (SLD) which makes the child eligible for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (j).)

7. Federal law defines "specific learning disability" as 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. The term includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. § 1401(30).) When determining whether a child has a specific learning disability, 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." The 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....” (20 U.S.C. § 1414 (b)(6).) California Education Code section 56337, contains a similar definition.

8. California law permits two methods for determining SLD: 1) the traditional severe discrepancy method; and 2) the “response to intervention” (RTI) method. (Ed. Code, § 56337.)

9. The severe discrepancy method is described in California Code of Regulations, title 5, section 3030, subdivision (j). Under that provision, a child has a specific learning disability if the child has a disorder in one or more basic processes (such as auditory or visual processing) 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.”

10. When standardized tests do not reveal a severe discrepancy between intellectual ability and academic achievement, a severe discrepancy may be found based on subdivision (j)(4)(C) of California Code of Regulations, title 5, section 3030. The factors to be considered in making that determination include: 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. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).)

11. The RTI method of determining SLD is described in federal law: “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).” (20 U.S.C. § 1414(b)(6)(B); see also Ed. Code, § 56637, subd. (c).) The federal regulations provide that states must adopt criteria for determining SLD which “permit the use of a process based on the child’s response to scientific, research-based intervention” and may permit “the use of other alternative research-based procedures....” (34 C.F.R. § 300.307(a) (2006).)

12. According to 34 Code of Federal Regulations part 300.309(a)(1), an IEP team may determine that a child has an SLD if the “child does not achieve adequately for the child’s age or to meet state-approved grade-level standards” in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving.

#### *Determination of Issues*

13. As set forth in Factual Findings 1 - 28, and Legal Conclusions 1 - 3, Student met her burden of showing that High Tech/SELPA did not properly assess Student in all areas of suspected disability. Although High Tech properly assessed (or reassessed) Student

in the areas of hearing impairment and auditory processing, High Tech did not properly assess Student in the area of visual processing. The extremely poor scores in fluency and processing speeds found on the tests Dr. Stika conducted, the concerns of Student's parents regarding Student's slowness in completing class work and homework, and the recommendations made by Student's advocate at the IEP meeting regarding further testing, should have led High Tech to conclude that further assessments were warranted.

14. Student has asked for one of two alternative remedies if it should be found that High Tech failed to properly assess Student in visual or auditory processing – either that High Tech accept the assessments and findings conducted by Student's independent experts or that High Tech be required to conduct its own assessments.

15. In this case, it would serve no purpose to require High Tech to conduct its own assessments. A visual processing assessment has already been done by Dr. Dean and determined that a visual processing disorder exists. As set forth in Factual Findings 31 – 57, despite Dr. Dean's findings, Student still does not have an SLD, because there is no severe discrepancy and no showing of SLD under an RTI analysis.

16. Likewise, it is not necessary to require High Tech to accept Dr. Dean's findings, because Student would not be eligible for special education even if those findings were "accepted." The appropriate remedy in this instance is to rule that Dr. Dean's findings are correct for purposes of this Decision and then to examine the issue of SLD in light of those findings. That was done and Student was still not found eligible under the SLD category, so there is no cause for a further remedy.<sup>10</sup>

17. As set forth in Factual Findings 1 – 30 and Legal Conclusions 1 – 5, High Tech met its burden of proving that Student does not qualify for special education services under the eligibility category of hearing impaired. Student no longer demonstrates any hearing loss of educational significance.

18. As set forth in Factual Findings 1 – 57 and Legal Conclusions 1 – 17, High Tech met its burden of proving that Student does not qualify for special education services under the eligibility category of SLD. Although Student has a visual processing disorder, she does not have a severe discrepancy between intellectual ability and achievement, so both parts of the "severe discrepancy" method for determining SLD are not met. In addition, even if there was a severe discrepancy, the evidence shows that Student does not need special education services as a result of an SLD – any necessary modifications can be made as part of the general education program.

19. In her written closing argument, Student contends that federal law preempts California law with respect to determining SLD. She also contends that federal law prohibits

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<sup>10</sup> Student withdrew her request for reimbursement for Dr. Dean's independent evaluation on the first day of hearing, so there is no need to consider that remedy.

states from using the “severe discrepancy” method of determining SLD. A reading of the federal statutes and regulations does not support Student’s claims in this regard.

20. The federal statutes and regulations provide that a state may not *require* an LEA to rely upon the severe discrepancy method: “...a local educational agency *shall not be required* to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability....” (20 U.S.C. § 1414(b)(6)(A) (emphasis added).) There is similar language in the federal regulations:

(a) *General.* A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State – (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability....

(34 C.F.R. § 300.307(a) (2006).)

This “not require” language is far different from saying that a state must forbid the LEA from using that method or that a state may not permit an LEA to use the severe discrepancy method. The comments by the drafters of the federal regulations support this interpretation of the law and regulations. Although the comments focus mostly on other methods of determining SLD, they point out that: “The regulations also allow for the assessment of discrepancies in intellectual development and achievement.” (71 Fed.Reg. 46651 (Aug. 14, 2006).)

California law permits both the severe discrepancy method and the RTI method (Ed. Code, § 56337, subd. (c)), so there is no conflict between state and federal law in this regard.

21. However, as stated in Factual Findings 50 – 51, even if federal law does preempt California law, and even if RTI is the required method for determining SLD, Student does not qualify as a child with an SLD based on the RTI method.

22. The comments by the drafters of the federal regulations indicate that the RTI method of determining SLD is not a test or procedure that must be conducted with every child who has a processing disorder, but is instead a method for determining whether a “child’s underachievement is a result of a lack of appropriate instruction.” (71 Fed.Reg. 46656 (Aug. 14, 2006).) The drafters of the federal regulations emphasized:

The first element in identifying a child with SLD should be a child’s mastery of grade-level content appropriate for the child’s age or in relation to State-approved grade-level standards, not abilities.

(71 Fed.Reg. 46652 (Aug.14, 2006).)

In the instant case, as established in Factual Findings 50 – 51, there is no underachievement by Student, no failure to meet grade level standards, and no evidence of any research-based interventions attempted with Student. Because Student was getting As and Bs in all her classes and scored very high on the state standardized testing, there would have been no reason for the school to have maintained records of such interventions to determine if Student had an SLD using the RTI method.

23. There is one other regulatory provision of note – 34 Code of Federal Regulations part 300.309 (2006), which is described in Legal Conclusion 12. Student did not raise this regulation at hearing or in her written closing argument, and it is not clear whether the regulation is intended to provide a method of determining SLD separate from RTI and severe discrepancy, or whether it is intended to provide guidance in the use of the established methods. For purposes of this Decision, it is not necessary to resolve that regulatory ambiguity, because even if it is a separate method for determining SLD, the evidence does not support a finding that Student qualifies as a child with an SLD under that regulation.

24. As established in Factual Findings 11 - 14, Student's passage comprehension and reading fluency scores on the WJ-III were below her grade-level standards. However, the comments to the federal regulations indicate that each of the items listed in part 300.309(a), is a factor to be considered, but is not to be used as the sole indicator of an SLD:

...several commenters recommended removing reading fluency from the list in § 300.309(a)(1), stating that a weakness in reading fluency, in isolation, does not indicate a reading disability.

*Discussion:* No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified.

(71 Fed.Reg. 46652 (Aug. 14, 2006).)

25. The comments to that regulation make it clear that reading fluency is one factor for an IEP team to consider in determining whether a child has an SLD. In Student's case, the evidence shows that Student's reading fluency score on the WJ-III subtest should not be considered in isolation. When considered in connection with Student's high grade point average, her exemplary class work, her excellent scores on state standardized tests and the comments from her teachers, the reading fluency score is not sufficient to show that Student has an SLD in the area of reading.

26. The same considerations apply to Student's low passage comprehension score on the WJ-III. Student's outstanding scores in reading on the CAT/6 and STAR tests and her excellent work in school, all indicate that she does not have an SLD in reading. Student is not an underachiever in any academic area. The length of time that Student spends doing her

homework and her need to take class work home to finish it are not sufficient evidence to show an SLD in reading, given her good performance in class and on standardized tests.

27. Student also contends that her good achievement in school cannot be a basis for denying her special education, relying on the case of *Corchado v. Board of Education* (W.D.N.Y. 2000) 86 F.Supp.2d 168. However, that case does not support her position. In that case, the court found a severe discrepancy between the child's superior cognitive ability (130 IQ) and his average to low average performance in class, as well as numerous physical disabilities, including a seizure disorder. Unlike the situation in the *Corchado* case, in the instant case Student's A/B grade point average is completely consistent with her high average intellectual capacity.

28. The case of *Mary P. v. Illinois State Board of Education* (N.D.Ill. 1996) 919 F.Supp. 1173, also relied upon by Student, did not deal with determination of an SLD at all, but instead dealt with a child's eligibility for special education based on a speech-language disorder, a separate eligibility category. (20 U.S.C. § 1401(3)(A)(i).)

29. The eligibility category of SLD is designed to address the educational needs of underachieving children. Student is not an underachiever in any respect. She does not need special education services at this time.

#### ORDER

High Tech may exit Student from the special education program.

#### 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.

Student prevailed on the issue of whether High Tech/SELPA properly assessed Student in all areas of suspected disability.

High Tech prevailed on the issue of whether High Tech may properly exit Student from the special education program.

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 in accordance with California Education Code section 56505, subdivision (k).

Dated: February 8, 2007

  
SUSAN RUFF  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings