

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SAN RAMON VALLEY UNIFIED  
SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009061134

**DECISION**

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in San Ramon, California, on September 14, 15, 16, 17, 21, and 22, 2009.

Ernest Bell, Attorney at Law, represented the San Ramon Valley Unified School District (District). Karen Heilbronner, the District's Director of Secondary Special Education, was present on behalf of the District throughout the hearing.

David J. Ramirez, Attorney at Law, represented Student. Student's Mother was present for most of the hearing, and Student's Father was present for part of the hearing. Student was not present at the hearing.

On June 23, 2009, the District filed a request for due process hearing (complaint). On July 20, 2009, a continuance was granted. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to October 15, 2009, for the submission of closing briefs. On that day the briefs were filed, the record was closed, and the matter was submitted.

**ISSUES**

1. Whether the District's May 5, 2009 triennial assessment was appropriate, so that the District is not required to reimburse Student's Parents for an Independent Educational Evaluation (IEE)?

2. Whether the District's June 8, 2009 offer to Student of a placement, program, and services constitutes a free appropriate public education (FAPE) in the least restrictive environment?

### *Background and Jurisdiction*

1. Student is a 14-year-old male who lives with Parents within the boundaries of the District. He is eligible for, and has been receiving, special education and related services due to autistic-like behaviors and a speech and language impairment. He has significant deficits in receptive and expressive speech, occasional behavioral outbursts, and substantial cognitive delays.

2. Student is in the eighth grade at the District's Charlotte Wood Middle School (Charlotte Wood). The last individualized education program (IEP) on which the parties agreed was adopted in June 2007. Pursuant to that IEP, which is still in effect, Student is placed in general education classes for science, art, computers, and physical education (PE), and in a mild/moderate special day class (SDC) for other academic subjects.

3. In the spring of 2009, the District conducted extensive assessments of Student in preparation for his triennial IEP meeting on June 8, 2009. At that meeting, over Parents' objection, the District IEP team members recommended reclassifying Student's eligibility for special education. The District added the eligibility category of mental retardation, and stated that mental retardation is Student's primary disability, and his autistic-like behaviors and speech and language (SL) impairment are secondary disabilities. The District offered to place Student for the eighth grade, with services and supports, in a moderate/severe SDC at its Diablo Vista Middle School for academic subjects, and in general education there for lunch, recess, passing time, PE, and an elective. Parents declined the District's IEP offer of June 8, 2009, whereupon the District filed the instant complaint.

### *Validity of Triennial Assessment*

4. Assessments upon which a special education determination is based must comply with numerous legal requirements.<sup>1</sup> They must, for example, be conducted in all areas related to any suspected disability the student may have. They must occur at least every three years, or more frequently if circumstances require it, or if a parent or teacher requests it. They must not be based on a single procedure or criterion; must be technically sound and used for purposes for which they are valid and reliable; must be properly administered by trained personnel; must accurately reflect the pupil's aptitude, achievement level and other relevant factors; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless that is not feasible.

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<sup>1</sup> Federal statutes and regulations generally use the term "evaluation." California statutes and regulations generally use the term "assessment." This decision conforms to California usage.

These and additional requirements identified in the Legal Conclusions of this decision are referred to herein as “the statutory criteria.”

5. The District's triennial assessment results for Student were presented in a single document as a psychoeducational assessment. Michelle Nutter, a school psychologist, was its principal author. She was assisted by Barbara Larson, the teacher of Student's mild/moderate SDC at Charlotte Wood, and Meredith Fischer, Student's SL pathologist.

#### *Psychoeducational Assessment*

6. Michelle Nutter has a master's degree in special education and a doctoral degree in educational policy and management from the University of Oregon. She has been trained to administer and interpret psychoeducational and SL assessments. She has taught classes on assessments, and on modifying curriculum for disabled children, to students in the doctoral program at the University of Oregon, and has practiced as a licensed school psychologist in Oregon. Dr. Nutter has also been employed by a private organization as a leader of social skills groups for disabled children, including autistic children. She has a multiple-subject teaching credential and has taught third grade classes in the District.

7. Dr. Nutter has been a state-licensed school psychologist for the District since 2003. In her current job she attends IEP meetings, works with teachers to implement IEPs and modify curriculum, conducts assessments, works with students individually and in groups, and works with parents to better understand their children's disabilities. In this role, she has conducted an average of 60 psychoeducational assessments a year for students from kindergarten to the eighth grade.

8. Dr. Nutter has had significant experience with Student. She is in her third year of working directly with Student, and currently provides him counseling on social skills once a week in a small group. She has attended many of his IEP meetings and discussed him extensively with his other teachers and service providers. She was well qualified to conduct a psychoeducational assessment of Student.

9. In her psychoeducational assessment of Student in April and May 2009, Dr. Nutter reviewed Student's school records and educational history in detail. She interviewed Student's teachers and observed Student in class. She and her colleagues administered an extensive battery of test instruments. To determine Student's cognitive ability and processing skills, Dr. Nutter used two versions of the Wechsler Intelligence Scale for Children (WISC-IV and WISC-IV Integrated), selected subtests from the WISC-III, and the Comprehensive Test of Nonverbal Intelligence (CTONI). To measure Student's autistic-like behaviors, Dr. Nutter obtained from his teachers and providers their responses to the Vineland Adaptive Behavior Scales Teacher Rating Form (Vineland). She asked Parents to complete a Vineland scale but they refused. She also used the Gilliam Autism Rating Scale (GARS), and reported the results of a battery of SL measures administered by SL pathologist Meredith Fischer. To determine Student's achievement, Ms. Larson administered the Wechsler Individual

Achievement Test (2d ed.)(WIAT-II) and the Brigance Diagnostic: Comprehensive Inventory of Basic Skills (Brigance).

10. Dr. Nutter found that Student displayed significant weaknesses in adaptive functioning in the school environment. She also found that, according to many sources, Student was far too dependent on the prompts of his instructional assistant (IA).

11. Dr. Nutter summarized Ms. Larson's intelligence testing, which yielded a full scale intelligence quotient (IQ) of 49 and showed that Student's cognitive and adaptive functioning were well below age level expectations. He has difficulty with higher level processing, including comprehending and synthesizing information. Taken together, these measures showed that Student also met the criteria for eligibility as mentally retarded. After observing Student, examining his history and test results, and consulting with her colleagues, Dr. Nutter concluded on behalf of the assessment team that "Mental Retardation is the umbrella that best encapsulates [Student's] needs ... ."

12. In a series of questions, the District's attorney asked Dr. Nutter whether in assessing Student she had complied with each of the statutory criteria for assessments, and in each case she testified credibly that she had done so. For example, she testified that she was trained and qualified to administer the tests that she used, and knowledgeable in the areas of disability in which she tested Student; that her tests were conducted so as not to be racially, sexually, or culturally discriminatory; that her tests were conducted in Student's native language and primary mode of communication; that the tests she selected were used for purposes for which they are valid and reliable; and that they were administered in accordance with the instructions provided by the producers of the tests. In that fashion, Dr. Nutter answered affirmatively to each question inquiring whether each of the statutory criteria had been met. Independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report.

13. Student argues that Dr. Nutter failed to use a technically sound instrument to measure Student's autism because she used the GARS, rather than the 2006 revision of that test, the GARS-2. This fact, he claims, invalidates the entire assessment and resulted in an underestimation by the District of Student's educational needs related to his autism. His argument is based on the testimony of neuropsychologist Cynthia Peterson and a single article in a technical journal.

14. Cynthia Peterson holds a master's degree and a doctoral degree in clinical psychology from California State University at Fresno. She is a state-licensed psychologist and a pediatric neuropsychologist in private practice. She is a consultant on the problems of disabled students at Hastings College of the Law. She has been a licensed teacher of kindergarten and sixth grade classes in New Mexico. Dr. Peterson has done numerous neuropsychological assessments of disabled students for districts and parents, and has attended many IEP meetings. Dr. Peterson was the only expert witness who testified for Student at the hearing.

15. In late August 2009, Dr. Peterson conducted a neuropsychological evaluation of Student at Parents' request as an IEE. She reviewed a selection of Student's educational records supplied by Parents, including the District's 2009 triennial reassessment of Student. She administered to Student a battery of neuropsychological tests that was similar to the battery administered by Dr. Nutter and Ms. Larson. She wrote an extensive report on her findings. Although Dr. Peterson found that Student was mildly mentally retarded, with a full scale IQ of 71 on the test she selected, she concluded that his autism had greater significance for his educational needs and should have remained his primary category of special education eligibility.

16. For several reasons, Dr. Peterson was not a very credible witness. When she wrote her report and testified, she had never observed Student in any educational environment, and had not observed the placement proposed for him. There was no evidence that she spoke to any of Student's teachers, assessors, or service providers except for his IA. She knew it was the best practice to observe those placements, but she rushed to complete her report, she testified, so Student could use it at the hearing.

17. Dr. Peterson showed unwarranted hostility to the District. She criticized the District because it failed to obtain a GARS questionnaire from parents; because its teachers had not returned her own GARS-2 questionnaires; and because the District allegedly delayed in arranging her visit to Student's current and proposed placements. She may have been misled to these views by Parents. The evidence showed that Mother refused to fill out a GARS questionnaire for the District, though she supplied one to Dr. Peterson; that Dr. Peterson's questionnaires had not been distributed by Student's representatives until after Dr. Peterson wrote her report; and that the District had not delayed in arranging her visits.

18. Dr. Peterson's bias against the District was apparent in her testimony. While she was straightforward and helpful on direct examination by Student's counsel, she was evasive and combative in answering questions by District counsel. She had to be admonished, sometimes repeatedly, to answer the question put to her rather than evading it or rephrasing it more favorably to Student.

19. Dr. Peterson was forced on cross-examination to retreat from several statements she made in her report and on direct examination. For example, she had repeatedly criticized the District for using "only" the GARS to determine Student's eligibility under the category of autistic-like behaviors. She conceded on cross-examination that Dr. Nutter's report itself demonstrated that the GARS was not the only measure that the District used. In her report she relied on a GARS-2 questionnaire filled out by Student's IA, calling the IA a "teacher," but admitted on cross-examination that the IA is not a teacher. She freely opined on direct examination that the District's offered IEP was not an offer of FAPE, but conceded on cross-examination that she had no basis to determine that without visiting the current and proposed placements.

20. In combination, the factors described above substantially undermined the credibility and persuasiveness of Dr. Peterson's testimony.

21. Dr. Peterson in her report and testimony, and Student in his closing brief, attack Dr. Nutter's use of the GARS rather than the 2006 revision of that instrument, the GARS-2. Dr. Peterson claimed in her testimony that research had shown the GARS to be "invalid." In her report, which presumably was more carefully phrased, she stated that research had shown the GARS to be of "limited validity." Student introduced in evidence a single journal article in support of that claim. The article was by a group of psychologists, led by Mikle South of the University of Utah, who conducted a study to measure the accuracy of the GARS in predicting autism in a clinical population already diagnosed as autistic (the South article).<sup>2</sup> Based on the South article and Dr. Peterson's testimony, Student contends that Dr. Nutter's use of the GARS instead of the GARS-2 invalidates her psychoeducational assessment.

22. The Guilliam Autism Rating Scale is administered by distribution of questionnaires (scales) to professionals who know a student and to his parents. Scores on each rating scale are then aggregated in a summary score for each respondent called the autism quotient, which is stated numerically for each of several categories, such as stereotyped behaviors, communication, and social interaction. The autism quotients reported for the four respondents in Dr. Nutter's administration of the GARS were:

SL Pathologist	95
SDC Teacher	101
Behaviorist	108
Mainstream Teacher	81

The evidence showed that in the 2006 revision of the GARS (the GARS-2), in response to academic comment, the test publisher lowered the numerical threshold for a finding of probable autism from 90 on the autism quotient to 80. Since three of the four scores Dr. Nutter obtained on the GARS were well over 90, they would have indicated the likelihood of autism on either version of the test.

23. The South article does not establish what Student claims it does. The authors address the use of the GARS solely in the clinical context of screening and surveillance for initial determinations of autism. The authors caution that placing the threshold of likely autism at an autism quotient of 90 may miss autism in some subjects. But the District was not making a clinical diagnosis or an initial determination of autism; it was merely reconfirming Student's eligibility under that category.

24. Quoting a statement in the South article that the authors are not aware of any "published research, independent of the manual, regarding the validity of the GARS" (South article, p. 594), Student argues that there is no research at all that supports its use. The record does not show what the manual contains, but the South article itself cites three studies

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<sup>2</sup> South et al., Utility of the Gilliam Autism Rating Scale in Research and Clinical Populations, in *Journal of Autism and Developmental Disorders*, vol. 32, no. 6 (Dec. 2002), pp. 593 et seq.

supporting use of the GARS. Most importantly, the authors state: "The GARS has been formally recommended for use in California (California Collaborative Work Group on Autism Spectrum Disorders, 1997) and is being widely used in schools ... ." <sup>3</sup> The authors also refer to "several recent research projects [that] have adapted the GARS as a measure of autism ... ." <sup>4</sup> So it appears from the South article itself that use of the GARS has been endorsed as a best practice by the California Department of Education and has been adapted by other researchers.

25. Dr. Nutter testified that, in her opinion, the GARS was a valid tool. There was no evidence at hearing that the GARS was invalid or unsound, except testimony by Dr. Peterson that the test is "invalid," which she contradicted in her own report by stating the GARS has "limited validity." The authors of the South article do not state that the GARS is invalid or unsound, or that it should not be used. They state only that it should be used with caution in the initial clinical screening and surveillance for autism in light of the tendency of its threshold to exclude some children with autism.

26. Dr. Nutter's statement of her GARS results contains a typographical error. She admitted in her testimony that the word "not" should not have been included in the phrase "in general, [Student] does not present with behaviors consistent with Autism Spectrum Disorder." However, the typographical error had no practical consequence. Dr. Nutter herself interpreted the results of the GARS as indicating some likelihood that Student had autism, found that he did, and recommended that he remain eligible for special education due to autistic-like behaviors. Since neither the typographical error nor the threshold for autism quotient scores on the GARS had any effect on the outcome of Dr. Nutter's assessment, neither rendered the assessment inappropriate.

27. Student's argument that Dr. Nutter's assessment was inappropriate relies on an elaborate series of unsupported conclusions. Student argues that the GARS had the potential to understate Student's autism because its autism quotient threshold was 90 rather than 80; that the GARS therefore failed to reveal information relevant to Student's educational programming; that Dr. Nutter therefore underestimated or understated Student's autism; that the IEP team therefore failed to appreciate the extent of Student's autism; and that as a result the triennial IEP failed adequately to meet Student's unique educational needs related to his autism. Student even claims that *any* IEP resulting from an assessment so allegedly flawed must necessarily deny the student involved a FAPE.

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<sup>3</sup> The authors cite "California Department of Education and Developmental Services Collaborative Work Group on Autistic Spectrum Disorders (July, 1997), *Best Practices for Designing and Delivering Effective Programs for Individuals with Autistic Spectrum Disorders.*"

<sup>4</sup> The authors cite Owley, et al., *A Multi-site, Double-blind, Placebo-controlled Trial of Porcine Secretin in Autism*, in *Journal of the American Academy of Child and Adolescent Psychiatry*, vol. 40 (2001), pp. 1293-1299; and Schreck et al., *Parental Report of Sleep Problems in Children with Autism*, in *Journal of Autism and Developmental Disorders*, vol. 30 (2000), pp. 127-135.

28. Student's argument that Dr. Nutter's use of the GARS led to an IEP that underestimated his autism is purely speculative and has no support in the record. In fact, as mentioned above, Dr. Nutter's GARS results did not mislead her or anyone else. As the authors of the South article advised, Dr. Nutter used the GARS with caution. She found that Student had autism and recommended that Student remain classified as eligible for special education due to autistic-like behaviors. The triennial IEP team agreed with those conclusions. Dr. Nutter did not even mention the GARS results in her conclusions, because she analyzed and relied upon a great deal of other information showing the presence of autism. She reviewed all of Student's records, and concluded his autism was "firmly established in the historical review." She also relied on some of the results of Ms. Fischer's SL assessment; on her own results on the Vineland; and on the results of a private assessment in 1999 and triennial assessments in 2000, 2003, and 2006, all of which indicated the presence of autistic-like behaviors. She also considered her interviews with teachers and her own observations.

29. The first of the conclusions in Dr. Nutter's report is that Student met all four of the necessary criteria for eligibility under the category of autistic-like behaviors: evidence of developmental disability; a combination of seven named autistic-like behaviors; resulting deficits that adversely affect his educational performance; and the impossibility of meeting the needs resulting from his autism in the general education setting or through regular categorical programs. In other words, Dr. Nutter reached precisely the opposite conclusion from the one Student argues that use of the GARS would produce. Thus, Student's chain of speculative reasoning has no application to this case, and does not establish that Dr. Nutter's psychoeducational assessment was inappropriate. In any event, if there were any merit in Student's argument, analysis of the IEP would reveal that Student's needs related to his autism were not properly addressed. As shown below, the IEP does adequately address those needs.

30. In a variant of the same argument, Dr. Peterson and Student claim that since the District IEP team members decided mental retardation is Student's primary disability, and autistic-like behaviors and SL impairment his secondary disabilities, they must have neglected fully to provide for Student's need related to his secondary disabilities. Dr. Peterson and Student make the mistaken assumption that the existence and relative ranking of eligibility categories somehow determines educational programming. Dr. Peterson argued in her report that Student's autism should be regarded as his primary disability "as his autism necessitates specific goals and research designed services and programming that he would otherwise not receive under any other eligibility category." But special education law requires that, once a student is deemed eligible under any category, all of the student's unique needs must be addressed whether they relate to that category or not. The District would have been under the same obligation to address Student's autism-related educational needs if it had found him eligible only as mentally retarded. The ranking of disabilities does not determine programming decisions. Again, the relevance of this concern can best be determined by examination of the IEP itself. As shown below, that IEP adequately addresses Student's

autism-related educational needs. Thus, the ordering of Student's disabilities does not establish that Dr. Nutter's psychoeducational assessment was inappropriate.<sup>5</sup>

#### *Assessment of academic achievement*

31. Barbara Larson is Student's teacher in the mild/moderate SDC at Charlotte Wood. She has a bachelor's degree in human development and a master's degree in special education from California State University at Hayward. She has a clear level two educational specialist instruction credential for teaching the mildly to moderately disabled. In her current role, she teaches 13 students ranging from sixth to eighth grade in her SDC; attends IEP meetings; conducts assessments; develops goals; and helps disabled students access the curriculum. Ms. Larson was well qualified to assess Student for academic achievement.

32. In the same series of questions that were asked of Dr. Nutter, Ms. Larson was asked whether she had complied with each of the statutory criteria for assessments in assessing Student. In each case she testified credibly that she had done so. Independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report.

33. Ms. Larson found on the WISC-IV that Student's full scale IQ is 49. In his only criticism of Ms. Larson's assessment, Student contends that the IQ score of 49 unfairly understates his intelligence and overemphasizes his mental retardation. Student prefers the score of 71 obtained by Dr. Peterson.

34. Knowing that Parents resisted the classification of Student as mentally retarded, Dr. Peterson selected the single cognitive test that she thought would produce the highest score. To determine Student's cognitive capacity, Dr. Peterson administered only the Leiter-R, a test of nonverbal intelligence. She selected that test to eliminate the "complicating variable of language" that troubles autistic children, and because "quick processing speed is not required." She used the resulting score of 71 to argue that Student's mental retardation is mild. However, the District's assessment of Student's intelligence is more balanced, thorough, and accurate. Using a nonverbal IQ score alone presents an unbalanced view of Student's abilities in the educational context, which, as Dr. Nutter pointed out, is "language-heavy" and requires some facility in processing. Dr. Nutter measured Student's intelligence with a nonverbal measure, the CTONI, and Ms. Larson measured his verbal intelligence with several versions of the WISC. The law prohibits a district from determining intelligence based on a single measure, as Dr. Peterson did.

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<sup>5</sup> The District's complaint asserted a third issue: "Whether Student's primary eligibility for special education is mental retardation, with secondary eligibilities for autistic-like behaviors and speech-language impairment?" The District withdrew that issue at hearing, and it is not resolved here.

*Assessment of speech and language impairment*

35. Meredith Fischer conducted the SL portion of Student's triennial assessment. Ms. Fischer has a bachelor's and a master's degree in speech pathology from California State University at Hayward and Humboldt State University respectively. She is a state-licensed speech pathologist and has received a certificate of clinical competency from the American Speech/Language/Hearing Association in 1976. She has worked previously for the Petaluma Unified School District and the Livermore Valley Unified School District, and has been a contractor for a regional center. She has worked for the District for six years. In her current job, she provides SL services in general education classes, resource classes, and SDCs at two of the District's middle schools to students whose IEPs require it. As an SL pathologist, she attends about 70 IEP meetings a year and has conducted many SL assessments. This is her third year of providing SL services to Student in his general education classroom. Ms. Fischer was well qualified to assess Student's SL needs.

36. Ms. Fischer concluded from her assessment that Student has significant deficits in expressive language. On the Peabody Picture Vocabulary Test and the Expressive Vocabulary test she found Student to be at or below the first percentile relative to his peers. He was also below the first percentile in the auditory comprehension of language, and below the tenth percentile in pragmatic skills.

37. In the same series of questions that were asked of Dr. Nutter and Ms. Larson, Ms. Fischer was asked whether, in assessing Student, she had complied with each of the statutory criteria for assessments. In each case she testified credibly that she had done so. Independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report. At hearing, Student stipulated to the appropriateness of the SL portion of the District's triennial assessment.<sup>6</sup>

38. The preponderance of evidence showed that the District's triennial assessment was accurate and appropriate, and that the District is not liable for Parents' expenses in obtaining an IEE.

*The District's Offer of FAPE*

39. A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs.

40. The District's June 8, 2009 IEP offer would place Student on the campus of the Diablo Vista Middle School (Diablo Vista), about 10 miles from his home. It would place him in a general education setting for about half his school day, for lunch, recess, passing

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<sup>6</sup> The District's triennial assessment also included assessments of Student's health and physical status and occupational therapy needs. Student also stipulated to the appropriateness of those portions of the assessment.

time, school activities, PE, and one elective course. It would place him in a moderate/severe SDC for the other half, where he would receive all academic instruction. The IEP offer included SL services in a group once a week for 45 minutes, and individually twice a week for 25 minutes; 8 hours a month of behavioral management services; 30 minutes a month of occupational therapy; a behavior support plan; and extended school year services.

### *Needs Related to Autism*

41. A district is required to provide a placement that is designed to address the student's unique educational needs and is reasonably calculated to allow the student to obtain educational benefit.

42. Student argues that the June 2009 IEP offer does not adequately address his educational needs related to autism, and that it places him with students whose skills are far lower than his own.

### *The Teaching Method*

43. The teaching in the Diablo Vista moderate/severe SDC is organized to address the social, attention, and communications needs of autistic students. At present, the SDC contains 13 students ranging from sixth to eighth grade. Many of them, like Student, are autistic, and some are also mentally retarded. Their levels of academic and social skills vary considerably, and it is the practice of the SDC staff to provide to each student an individual program directed to his or her abilities and needs, and based on his or her IEP goals. The SDC is staffed by one special education teacher and five staff aides, resulting in a staff-to-student ratio of about one-to-two.

44. Jean Holmstead, who is in her second year as the teacher of the Diablo Vista SDC, described a typical day in her class. It would include an exercise in gross motor skills; some public speaking time; some individual or group reading or language work; a walk, during which language skills are exercised; separation into academic groups; a science lesson; an art project, and PE. Ms. Holmstead and her aides are trained and prepared to teach autistic children, and several such children are in the class.

45. Ms. Holmstead established that the program in her class is highly structured, language-enriched, and routinized. The students' desks are surrounded by tables that function as learning stations. Normally, students are taught in pairs by one adult. Ms. Holmstead selects the pairs to match her students' abilities and learning levels. This results in intensive one-to-two instruction at several different ability levels.

46. Ms. Larson testified that a principal difference between a mild/moderate SDC and a moderate/severe SDC is that, in the latter, functional skills as well as academic skills are directly addressed. Diane Bradley, a district inclusion specialist who has been an SDC teacher and currently works with Student, testified that in the proposed placement, Student would have a greater opportunity to learn functional life skills necessary for independent

living than he does now. He would, for example, learn to use and make change and balance a checkbook, and learn how to go to a doctor, explain an injury, and say where it hurts. He is not able to do those things now.

### *The Proposed Goals*

47. An IEP must include a statement of measurable annual goals that are designed to meet the student's needs resulting from his or her disability, and a statement of how the student's progress toward the annual goals will be measured.

48. The District's June 2009 offer proposed 23 goals: 5 speech goals; 2 reading goals; 2 writing goals; 4 math goals; and 10 behavior goals. Several District witnesses testified that the goals are appropriate and measurable. Independent examination shows that the present levels of performance in the goals derive directly from the District's assessments, that the goals are measurable, and that the persons responsible for determining progress are adequately identified. Student does not criticize any of the specific goals.

49. In her report, Dr. Peterson stated that Student's greatest needs related to autism are in the areas of communication skills, attention, and social interaction. The proposed goals in the June 2009 IEP offer thoroughly address those needs.

50. At least eight of Student's proposed goals concentrate on the social and language difficulties associated with autism: Speech / Social Interaction; Speech / Daily Social Language; Behavior / Sportsmanship Game Behavior; Behavior / Appropriate Approach to Peers; Behavior / Initiate Greetings; Behavior / Initiating Requests; Behavior / Requesting Help; and Behavior / Returning Greetings. Other goals are designed in part to assist with Student's educational and social needs related to autism by improving his articulation, clarity of speech, and functional language.

51. Dr. Peterson's report and Student's closing brief assert at length that the District's use of the GARS meant that the District underestimated and therefore failed adequately to address Student's educational needs related to his autism. However, neither the report nor the brief identifies any particular example of that alleged failure, or of any relevant information that Dr. Nutter's assessment failed to produce. Neither even attempts to describe any specific failing in the resulting IEP that would suggest that the GARS results had any effect on the offer in this case. Nonetheless, Dr. Peterson testified at hearing that the June 2009 IEP did not offer Student a FAPE because additional goals were needed in the areas of prompting, repetitive stereotyped behavior, and sensory seeking. She testified that, as a standard measure, intensive application of ABA principles, perhaps 25 to 35 hours a week, would be required before an autistic student could make any progress.

52. Dr. Peterson's opinion concerning the need for additional goals addressing prompting was unpersuasive. When she testified, Dr. Peterson had never seen Student with his IA, or talked to his teachers, and appeared unaware that Student is already overly prompt-dependent. Several of the 10 behavioral goals do address prompting, primarily to reduce

Student's dependency on it. Dr. Peterson did not address why she thought those goals were flawed, or even recognize their existence. Her generalizations about the need for goals concerning prompting are therefore not entitled to substantial weight.

53. Julia Siebig is a board-certified behavior analyst who has a master's degree in psychology and applied behavior analysis (ABA). In 2007 she began work for the District, and before that was a consultant for two private ABA providers and for the Kennedy Krieger Institute at Johns Hopkins Hospital. Ms. Siebig credibly testified that the one-to-two teaching model in the Diablo Vista SDC would reduce Student's prompt-dependency on a single person, and would teach skills, like responding to group instructions and waiting one's turn, that are important to social advancement, but are not part of the one-to-one instruction Student now receives. Dr. Nutter testified that the one-to-two method, which also includes prompting, would provide sufficiently close supervision so that Student would not need a one-to-one aide. That is why the June 2009 offer does not propose retention of the aide. Ms. Holmstead established that she encourages the aides to work with all the students so that students do not learn to depend on a particular aide.

54. Dr. Peterson did not explain why the absence of goals concerning stereotyped behavior and sensory seeking could halt Student's progress. She did not address the fact that Student has been making substantial progress on his current goals in the absence of the additional goals she proposes. And her argument is inconsistent with Student's claim, discussed below, that he is making enough progress to receive a FAPE in his current placement.

55. Dr. Peterson testified that Student needs an intensive program of ABA to acquire skills before acquiring academic knowledge. Her testimony in that respect did not discuss Student particularly; rather, she described it as the "standard" treatment for autistic students. That school of thought has been examined extensively by courts. In an appropriate case, a particular student may be shown to need intensive ABA therapy before academic instruction. However, as shown in Legal Conclusion 14, the IDEA does not require that districts supply intensive ABA therapy simply because some professionals view it as the standard approach.

56. Behaviorist Siebig, whose ABA credentials are much stronger than Dr. Peterson's, testified that Student can receive a FAPE under the District's proposal, even though it lacks an ABA program of the intensity Dr. Peterson proposes. Ms. Siebig, who was responsible for much of the training of the Diablo Vista SDC staff, established that they are all trained in, and apply, the principles and practices of ABA.

57. Most importantly, Dr. Peterson's views must be discounted because she admitted on cross-examination that she was in no position to decide whether the District's offer was an offer of FAPE until she visited Student's current placement and the classroom in which the District proposes to place him. Her failure to do so by the time of her testimony meant that she could not learn anything about Student's reaction to prompting in the academic setting, or accurately determine how Student's repetitive behaviors and sensory

seeking affect his learning, or judge whether the teaching methods in the proposed SDC sufficiently address his needs.

58. After the hearing, Dr. Peterson did visit the proposed placement, and described her visit in a post-hearing declaration.<sup>7</sup> She visited for one hour. Half of that she spent with the SDC class watching an outdoor presentation concerning dog agility training. Part of the remaining half hour she spent watching the students obtain and eat lunch in the cafeteria. In the remaining minutes she saw one math lesson delivered in class. Her visit to the Diablo Vista classroom was so brief that it is not useful here.

59. At hearing, Dr. Peterson anticipated that, as soon as she could visit the proposed placement, she would be able to offer an opinion about whether the District had offered a Student a FAPE. It is telling that she does not do so in her post-hearing declaration; she states only that she recommends Student remain in his current placement.

#### *The Relative Skill Levels of the Students*

60. The preponderance of evidence did not support Student's claim that his abilities are far greater than those of the other students in the Diablo Vista SDC.

61. Fran English is the District's Program Supervisor for Middle Schools. She is credentialed as a teacher and in administrative services. She has been an English and social studies teacher in an Oakland high school, a vice principal, and an eighth grade class advisor. Her current job duties include supervising all of the District's middle school programs, including all of its SDCs. She commonly visits each SDC in the District several times a year, and is knowledgeable about them due to her position. She also attends IEP meetings. She has observed Student in class ten to twelve times.

62. Ms. English estimated, and Ms. Holmstead confirmed, that the general level of work done by the students in the Diablo Vista moderate/severe SDC ranges from kindergarten to second grade. From her observations of Student and of the Diablo Vista SDC, Ms. English testified that Student would not be the highest in the Diablo Vista class. She has seen Student's reading and writing worksheets, and testified that they were approximately at the first grade level.

63. Student's current SDC teacher, Barbara Larson, testified that Student was functioning generally between the first and third grade level according to his scores on her achievement testing. She also testified that, in her class, he functioned between those same levels. His writing, for example, is about on the level of a first grader.

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<sup>7</sup> Dr. Peterson's schedule prevented her from visiting Student's current and proposed placements until a week after the hearing. In addition, she testified she did not think a visit in the first two weeks of school would produce the best information. Over the District's objection, Student was permitted to file a post-hearing declaration by Dr. Peterson about her visits.

64. One of Student's relative strengths is reading aloud, and he may be able to read the words in third grade texts. However, as his IA, Nina Oddieo, put it, "comprehension is another story." He does not understand the words he reads. Inclusion specialist Bradley, who modifies Student's curriculum, testified that his understanding of the written word is at the first or second grade level.

65. Another of Student's relative strengths is in the recounting of math facts; he appears to have memorized several multiplication tables. However, SDC teacher Larson established that while Student could work with some math facts at a third grade level, the rest of his math work was lower than that. He does not understand what a number is; the concept is too abstract. Ms. Bradley confirmed that Student's overall math skills are at the first or second grade level.

66. SL therapist Meredith Fischer has worked with the population of the Diablo Vista SDC, though not recently. Asked by Student's counsel to rank Student's SL abilities on a sliding scale with respect to the other students she had seen there, Ms. Fischer stated that, if 100 percent were the highest ranking, Student would be at about 65 percent to 70 percent among those students.

67. Mother and Ms. Oddieo gave estimates of some of Student's skills were higher than the estimates of the District's witnesses, but each also stated she was unqualified to judge the grade levels of Student's work.

68. Ms. English established that the students in the Diablo Vista SDC have a range of motor skills. Some of them can play basketball, and perhaps 10 of the 13 students can play the game four square, which Student likes. All of the students in the SDC go to general education PE with support.

69. Student's physical skills do not necessarily exceed those of the students in the Diablo Vista SDC. Student's PE teacher Bradford Duffey testified that Student's gross motor skills are very limited, and that he can play basketball only "in a limited way."

70. Mother testified that, when she visited the proposed placement, the SDC students all sat together at lunch in the cafeteria, did not mix with general education students, and seemed isolated. Dr. Peterson visited the Diablo Vista cafeteria after the hearing, and made the same observation. Ms. Holmstead agreed that on the day Mother visited, her students were not mixing with general education students; at this time of the year her current students do not have the necessary social skills. But Ms. Holmstead testified that last year some of her students learned to mix with general education students, and she and her staff are prepared to support any of the students who have the skills to socialize with nondisabled peers as soon as they are ready to do so. Ms. English confirmed those statements. She testified, mostly from her observations last year, that whether a Diablo Vista SDC student mixes with general education students depends on the child. Some can be involved in intramural sports. Some do not choose to mix.

71. Although Student sometimes approaches nondisabled students, his social skills are not significantly greater than those of Ms. Holmstead's current students. Even Dr. Peterson reported that Student's "social interaction is negligible, [and] at times nonexistent," and that his "[s]ocial engagement and social reciprocity are extremely limited."

72. Some of the students in Ms. Holmstead's SDC are verbal, and some are not. Some of the less advanced students need prompting to go to the bathroom. These facts do not mean Student would be inappropriately placed there. The evidence showed that students in the SDC are grouped and taught according to their different skill levels. There are enough students in the SDC with skills similar to Student's that he can easily be integrated into the program.

73. The preponderance of evidence showed that Student's academic skills are similar to some of the students in the Diablo Vista SDC, and that he would likely be grouped with those students for instruction. It also showed that his motor and social skills were roughly equivalent to those of the other students, and that the staff of the SDC had the ability and training to adjust his curriculum and his social activities to his skills.

74. District witnesses English, Bradley, Fischer, Larson, and Nutter all credibly testified that they believed the placement proposed for Student in the June 2009 IEP offer is appropriate and would provide him a FAPE. As described above, the evidence confirmed those views.

75. The preponderance of evidence showed, and the District discharged its burden of proving, that the June 8, 2009 IEP offer adequately addressed all of Student's unique needs and was reasonably calculated to allow him to obtain educational benefit.

#### *Least Restrictive Environment*

76. The IDEA requires that a student with a disability be placed in the least restrictive environment (LRE) in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. Whether a student is placed in the LRE requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.<sup>8</sup> Student argues that he is being satisfactorily educated in his current placement, and that therefore the District's proposed

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<sup>8</sup> Neither the District nor Student makes any argument concerning the cost of Student's placement, so that subject is not addressed here.

placement of Student in a moderate/severe SDC is more restrictive than necessary and is not in the LRE.

77. Student's current placement results from an IEP agreed upon by the parties in June 2007 which divides his time roughly in half between general education and a mild/moderate SDC. It places Student in general education for science, PE, and two electives (computers and art), and in the SDC for math, social studies, and language arts. Student has the services of a full-time IA. He is pulled out of class twice a week for direct SL services. In addition, two certified behavior analysts work with him, or consult with others about him, a total of eight hours a week.

78. District witnesses Nutter, Larson, Bradley, Siebig, and Duffey all credibly testified that, in their opinions, Student's current placement is inappropriate and is not providing him a FAPE. The evidence supported those opinions.

*Student's current general education classes*

*Academic Benefits in General Education*

79. Student is roughly six or seven grades behind his eighth grade classmates. He cannot answer "wh" (who, what, when, why, where) questions. He does not understand anything abstract. He does not understand time, and frequently confuses the big and little hands on an analog clock. He cannot remember the names of teachers or providers he has worked with for years. Student communicates only in sentences of one or two words, and his language is frequently difficult to understand. He is able to say his name and address at home, but not reliably at school. He is not able to identify his age or date of birth on a form at school.

80. Ms. Siebig is one of the two behaviorists who work a total of eight hours a week with Student. She testified that Student requires constant verbal prompting in an academic setting. Even with that prompting, he rarely responds to an instruction the first time it is delivered and needs constant redirection to focus on a task. He cannot answer a question about his day or what he likes at school in a comprehensible sentence.

81. The evidence showed that Student does not understand or respond to the statements of his general education teachers; instead, he takes his instruction exclusively from his IA and other service providers. Every one of Student's teachers and service providers testified that Student cannot access information from his teacher and depends instead on his IA. Ms. Siebig established that Student has a distinct behavior pattern: when he hears an instruction from a teacher, he turns to his IA and waits for a prompt, and may wait for the IA to write down the appropriate response so that he can copy it. Behavior Analyst Lauren Wasano, the other behaviorist who serves Student directly, established that, as an experiment, Student's providers once counted the number of times Student was prompted in an art class last year. He received 40 prompts in 15 minutes.

82. Ms. Oddieo, Student's IA, testified that she was the teachers' "echo" and agreed with the characterization of her prompting as constant. In order to prompt Student successfully, she frequently finds it necessary to highlight the correct answer on Student's work papers so that Student can locate it.

83. Student's curriculum is so thoroughly modified for him that it bears almost no resemblance to the curriculum of his class. Inclusion specialist Bradley testified that she routinely simplifies Student's curriculum but he still frequently does not understand it. His behaviorists also alter his curriculum, as does his aide. Sometimes the classroom teacher alters it as well. Thus, the material Student studies is simplified for him at least once, and frequently two to four times. As a result, if the class were studying California history, Student might color a map and be asked to locate his home town. If his classmates are discussing a movie, he might repeat the title of it.

84. Sixth grade science teacher Kathryn Levitt established that Student cannot understand the metric system, or even the concept of measurement. His seventh grade life science teacher Allison Jordan established that while his classmates studied how the parts of the cellular unit in animals and plants interact, Student would draw a picture of a cell. She attempted to teach him the vocabulary of life science through pictures, but it was evident he did not see the connection. While his science classmates were learning photosynthesis, Student was learning what a tree is, and that its leaves are green.

85. Student contends that he receives academic benefit from his placement in general education because he has made progress on most of his goals. However, the progress he enjoys is at a level that has almost nothing to do with the curriculum in a general education class. For example, Student made substantial progress in SY 2008-2009 on a goal about answering "wh" questions that sought, in a year, to have him learn and use three words a week in a sentence with 40 percent accuracy, then five words a week in a sentence with 50 percent accuracy. His progress on that goal, while welcome, was unconnected to his presence in general education. The evidence showed that Student's education comes solely from working individually with his aide, his SL therapist, one of his behaviorists, or the inclusion specialist. He is, as the District correctly puts it, an island of special services in a sea of general education students. He could as well be receiving his instruction in a separate room; it is all one-to-one and unrelated to the class surrounding him.

86. The evidence showed that Student derives no significant academic benefit from being in general education classes. The academic benefit he does derive results from intensive one-to-one instruction by his IA and other providers, and is unrelated to his physical presence in the general education setting.

#### *Non-academic Benefits in General Education*

87. Student has no significant social interaction with his classmates in class. While he sits in a general education class, his attention is entirely on his aide or another provider working with him. He can begin a conversation with a peer or an adult if he has

substantial prompting, but cannot sustain it. His conversation normally consists of one or two monosyllabic words; he cannot speak a normal sentence.

88. Student does have limited social interaction outside the classroom at lunch and recess. He occasionally approaches another Student, usually because he wants to play a game. He does play uncomplicated games like four square with other students, though he does not always understand the rules. He occasionally approaches another student in the cafeteria, but cannot maintain a conversation.

89. The evidence showed that Student does not derive substantial non-academic benefit from his placement in general education classes, though he derives some non-academic benefit outside of classes.

### *Disruption*

90. Student disrupts his general education classes. Inclusion specialist Bradley testified that it disturbs Student's classmates to have to listen to his IA's constant stream of instructions and prompts, particularly during quiet times. Some of the other students have asked to be moved away from him. Student sometimes tears up papers, makes noise, or otherwise disturbs the class by undesirable behaviors, and must be removed from the classroom. He has a history of occasional assaults on other students and breaking materials in class. Recently, in frustration, Student overturned his computer, slapped the boy next to him, left the classroom, and had to be restrained by five adults. While this behavior has declined in frequency in the last two years, it has increased in intensity due to Student's growth and physical size.

91. Student's seventh and eighth grade science teachers credibly testified that Student poses a danger to himself and others in eighth grade science, which involves the laboratory use of glass beakers, dangerous chemicals like acids, and fire. He does not understand how to use these materials and cannot understand the basic safety rules that students in the class must learn. He cannot be relied upon to refrain from occasional outbreaks of violence, even though he is supervised at all times by his aide, and sometimes by one of the behaviorists who attend him.

92. Behavior analyst Siebig testified that the delivery of eight hours a week of intensive behavioral intervention in Student's class is highly unusual and an inappropriate use of behavioral services, which are intended to be support services. She has never before had a student on her caseload who receives as much in-class behavioral support as Student does. Those services are normally intended to improve behavior within a given structure, she testified, not to supply a structure that is not there.

93. PE teacher Duffey testified that Student requires his constant attention. Mr. Duffey's PE class cannot play a game of basketball that includes Student, because Student does not understand the rules. He can dribble the ball, but he does not understand the concept of dribbling and will simply run with the ball. The class cannot play football with

Student because he does not understand the concept of a line of scrimmage or where the goal is.

94. The evidence showed that Student's presence in his general education classes, even with unusually intensive behavioral support, is disruptive for other students and distracts his teachers.

95. On balance, because Student derives no significant academic or non-academic benefits from his placement in general education classes, and disrupts those classes, he cannot satisfactorily be educated in the general education environment except outside of class.

*Student's current SDC*

*Academic Benefits in the mild/moderate SDC*

96. Student's academic abilities are far below those of his classmates in his SDC. The class contains 13 other students between 6th and 8th grade. All the other students are on a diploma track, are expected to adhere to state academic standards, and are expected to take the California High School Exit Examination (CAHSEE). None is mentally retarded. None has a one-to-one aide. Some do study modified curriculum, but not modified nearly to the degree that Student's curriculum must be. Inclusion specialist Bradley testified that she modifies curriculum for the other SDC students in one or two areas. She might, for example, reduce the number of questions to be answered from four to three, or, in California history, might reduce the number of missions studied from nine to four, but she would ensure that the other students worked toward grade level standards. But most of Student's curriculum, Ms. Bradley testified, cannot be characterized as modified. Instead, it is "parallel"; if the class studies a novel, Student might receive a 10-page version of the novel presented in pictures.

97. Student's SDC teacher Barbara Larson testified that Student's placement in her class is academically inappropriate because he cannot access the curriculum she teaches the other students, and cannot use the texts she employs. She testified that he cannot identify the town he lives in, his age, or his place of birth, and cannot tell the time of day. Dr. Nutter established that the curriculum in Ms. Larson's SDC assumes that a student possesses functional skills that Student does not yet have.

98. Every District witness with personal knowledge of Student's performance testified that he is unable to access his curriculum. Even Student's IA, Ms. Oddieo, who was more optimistic about Student's capabilities than anyone except Parents, stated that overall he is unable to access the curriculum.

99. A week after the hearing, Dr. Peterson visited Student in his current placement for one hour, half of which was during lunch. The other half she spent in Student's SDC during a math class in which only Student and three other students were present, all working individually. Student's IA was at lunch. In her post-hearing declaration, Dr. Peterson stated,

unpersuasively, that Student's work is roughly at the level of his classmates. She stated that she saw Student drill with multiplication flash cards and on a computer program called Aleks. She stated that in comparison to one of the students present, Student was doing "similarly complex" work. Dr. Peterson walked around the classroom and looked at the work left out on the desktops of other students not present. From this inspection, she concluded that Student was doing work that was "congruent with" the work of his SDC classmates. Dr. Peterson's observation of the SDC class was too brief and random, and her conclusion too vague, to prove anything about the level of Student's academic work.

100. Student points out that he has received high grades on his report cards and is on the honor roll. However, Student will not take the CAHSEE, and will instead be evaluated according to the California Alternate Performance Assessment (CAPA), which is given to children with severe cognitive disabilities who are not expected to graduate with a diploma. Ms. Bradley and Ms. Larson both testified without contradiction that, for students who are subject to alternative assessment, the District's middle school grading represents merely a recognition of a student's willingness to work hard and to try to learn. Student has essentially been given an "A for effort" in each of his courses. His grades do not represent academic achievement. The evidence showed that neither Student's teachers nor his Parents understood the grading system to reflect academic performance levels, and Student stops short of arguing that his receipt of high grades signifies any particular level of academic achievement.

101. The evidence showed that Student derives no significant academic benefit from his placement in the mild/moderate SDC. As in his general education classes, the academic benefit he does derive results from intensive one-to-one instruction by his IA and other providers, not from his physical presence in the SDC.

#### *Non-academic benefits in the SDC*

102. There was no evidence that Student derives any more social benefit from his presence in the mild/moderate SDC than he does in his general education classes. He is an island of special services in the SDC as well, pursuing a curriculum that has little relation to the curriculum of those around him. Ms. Larson testified she did not believe his situation gave him opportunities to model his behavior on that of his peers.

103. The evidence showed that Student does not derive substantial non-academic benefit from his placement in the mild/moderate SDC.

#### *Disruption in the SDC*

104. There was less evidence that Student disrupts Ms. Larson's SDC than that he disrupts his general education classes. Ms. Larson testified that Student does not always display appropriate behavior, and may approach others in a manner perceived to be aggressive, or push to the front of the line. But there was no substantial evidence that Student is significantly disruptive in the SDC.

105. On balance, because Student derives no significant academic or non-academic benefits from his placement in Ms. Larson's mild/moderate SDC, he cannot satisfactorily be educated in that class.

*The Proposed SDC as Student's LRE*

106. As Ms. Fischer and Ms. Wasano both observed, and as the evidence showed, Student's placement under the June 2009 offer would in some ways be less restrictive than his placement is now. In his current placement Student is wholly focused on, and dependent upon, a single adult. Like Student, the students in Ms. Holmstead's SDC tend to retreat into themselves and remain isolated if left alone. She and her aides therefore deliberately bring students together during the learning process. While learning, the students play games together involving math manipulatives, for example, and usually share a computer mouse and screen.

107. On balance, the District's June 2009 IEP offer would place Student in the LRE. Half of his time would be spent in general education, as it is now. In Ms. Holmstead's SDC, Student would derive academic and social benefit from the method of instruction and from working on his goals, and would be supervised by adults trained and prepared to deal with his undesirable behaviors.

108. The preponderance of evidence showed that the June 8, 2009 IEP adequately addresses Student's needs related to autism both by the teaching method used at Diablo Vista, and by the numerous social, language, and behavioral goals proposed for him. It also showed that Student would be appropriately placed among the other students at the Diablo Vista SDC.

109. Based on all the findings above, the District's June 2009 IEP offer addresses all Student's unique needs, is reasonably calculated to allow him to derive educational benefit, and places him in the LRE. It is an offer of FAPE, and should be implemented.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The District, as the petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

### *Assessments*

2. In evaluating a child for special education eligibility, a district must assess the child in all areas related to a suspected disability. (Ed. Code, § 56320, subd. (f); 20 U.S.C. § 1414(b)(3)(B).) A reassessment may be performed if warranted by the child's educational or

related services needs, or if requested by a parent or teacher. (Ed. Code, § 56381, subd. (a)(1); 20 U.S.C. § 1414(a)(2)(A)(i).) No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (Ed. Code, § 56320, subds. (c), (e); 20 U.S.C. § 1414(b)(2)(B).)

3. An assessment must be conducted “by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student’s suspected disability. (Ed. Code, § 56320, subd. (g).) An assessment must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3); 20 U.S.C. § 1414(b)(3)(A)(iv), (v).) Only a school psychologist may administer tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).)

4. Assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student’s native language or mode of communication unless it is clearly not feasible to do so. (Ed. Code, § 56320, subd. (a); 34 C.F.R. § 300.304(c)(1)(i), (ii)(2006).) Assessments must also be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible. (Ed. Code, § 56320, subd. (b)(1); 20 U.S.C. § 1414(b)(3)(A)(ii).)

5. Assessments must be used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(2); 20 U.S.C. § 1414(b)(3)(A)(iii).) Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3)(2006).) The assessor must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(3)(C).) The term "technically sound instruments" generally refers to assessments that have been shown through research to be valid and reliable. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46642 (Aug. 14, 2006).)

6. The assessor must prepare a written report that includes,: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student’s academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) the need for specialized services, materials, and equipment. (Ed. Code,

§ 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3); 20 U.S.C. § 1414(b)(4)(B).)

### *Independent Educational Evaluation (IEE)*

7. Under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c); see also 20 U.S.C. § 1415(d)(2).) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i)(2006).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2)(2006).)

### *Consequences of procedural error*

8. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child’s right to a FAPE, significantly impedes the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) That rule applies to flaws in an inappropriate assessment; there must be some prejudice under the *Target Range* rule or the student is not entitled to relief. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3.)

9. A procedural error does not always make an assessment inappropriate. In *Capistrano Unified School Dist. v. Student* (July 11, 2006)(amended decision) Cal.Offc.Admin.Hrngs. Case No. N2005090873, a district assessor had failed to follow the instructions of the publisher of the assessment measure. The assessment was nonetheless held appropriate, since the error had no effect on the outcome of the assessment. (See also, *Student v. Newport-Mesa Unified School Dist.*, SEHO Case No. SN02-01489 (May 11, 2004)[SL assessment not inappropriate notwithstanding minor errors in administration].)

*Issue No. 1: Whether the District’s May 5, 2009 triennial assessment was appropriate, so that the District is not required to reimburse Student’s Parent for an Independent Educational Evaluation (IEE)?*

10. Based on Factual Findings 1-38, and Legal Conclusions 1-9, the District’s triennial assessment was appropriate. The psychoeducational portion by Dr. Nutter, the academic achievement portion by Ms. Larson, and the SL portion by Ms. Fischer were all administered in compliance with the statutory criteria above. Dr. Nutter’s use of the GARS

instead of the GARS-2 was not the use of a technically unsound instrument, nor did it have any effect on the outcome of her assessment. It was just one of several measurements that brought her to the conclusion that Student remains eligible for special education because of autistic-like behaviors. Ms. Larson's scoring of Student's full scale IQ was proper and part of a balanced assessment of his intelligence and achievement. Student does not challenge the SL portions of the assessment. Accordingly, the parents are not entitled to an IEE at public expense.

### *Elements of a FAPE*

11. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

12. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690](*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

13. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

### *Necessity of Intensive ABA for Autistic Students*

14. Several federal courts have disagreed with the argument that intensive ABA is in general the best or the only way to treat an autistic student, and that a school district that does not provide it has denied the student a FAPE. The Ninth Circuit has twice rejected the argument. (*Joshua A. v. Rocklin Unified School Dist., supra, affirming Rocklin Unified School Dist. v. Student* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110278; *Adams v. Oregon, supra*, 195 F.3d at pp. 1149-1150; see also, *Deal v. Hamilton County Dept. of Educ.* (6th Cir. 2008) 258 Fed.Appx. 863, 865 (unpublished); *Gill v. Columbia 93 School Dist.* (8th Cir. 2000) 217 F.3d 1027, 1036-1038; *Burilovich v. Board of Educ.* (6th Cir. 2000) 208 F.3d

560, 571-572; *Dong v. Board of Educ.* (6th Cir. 1999) 197 F.3d 793, 802-804; *J.P. v. West Clark Community Sch.* (S.D.Ind. 2002) 230 F.Supp.2d 910, 938-939.)

### *Least Restrictive Environment*

15. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

*Issue No. 2: Whether the District's June 8, 2009 offer to Student of a placement, program, and services constitutes a free appropriate public education (FAPE) in the least restrictive environment?*

16. Based on Factual Findings 1-3, 10-11, 33, 36, and 39-109, and Legal Conclusions 1 and 11-15, the District's June 8, 2009 IEP offered Student a FAPE. It adequately addressed his educational needs relating to autism as well as his needs relating to mental retardation and SL impairment, and offered an appropriate placement at Diablo Vista Middle School among students with needs similar to his own. The offer constituted a proposed placement in the least restrictive environment for Student, as he could not satisfactorily be educated in general education classes or a mild/moderate SDC. For practical purposes the offer would place him in an environment less restrictive than his current environment of exclusively one-to-one instruction. The District may therefore implement the IEP without parental consent.

### ORDER

1. The District's triennial assessment was appropriate. The District is not liable for the costs of an independent educational evaluation.

2. The District offered Student a FAPE in its IEP offer of June 8, 2009.

3. The District is entitled to implement the June 8, 2009 IEP offer in its entirety without parental consent. It may implement the IEP offer until its expiration date of March 25, 2010, unless the parties agree on another IEP before that date, and thereafter until the parties either agree on another IEP or another IEP is ordered implemented by an ALJ.

