

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

In the Consolidated Matters of:

STUDENT,

Petitioner,

OAH CASE NO. N 2006040780

v.

LANCASTER SCHOOL DISTRICT,

Respondent.

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LANCASTER SCHOOL DISTRICT,

Petitioner,

OAH CASE NO. N 2006080084

v.

STUDENT,

Respondent.

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**DECISION**

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matters at Lancaster, California from October 16, 2006 to and including October 20, 2006.

Petitioner and Respondent (Student) was represented by his attorney, Diane B. Weissburg, who is also his paternal grandmother, and by his parents. Student's paternal aunt and his maternal grandparents also attended on his behalf.

Respondent and Petitioner Lancaster School District (District) was represented by Carol Grogan, Esq., of School's Legal Service. Ms. Janis Rivera, Director of Student Services, also appeared on behalf of the District.

Student's Due Process Hearing Request was filed on April 26, 2006. Student also named the Antelope Valley Special Education Local Service Plan Area (AVSELPA). The AVSELPA's Motion to Dismiss was granted by Order of OAH on June 27, 2006. The case went off calendar on July 20, 2005, at Student's request. District's Due Process Hearing Request was filed on August 2, 2006. The cases were consolidated for hearing pursuant to the parties' stipulation filed on August 7, 2006.

The ALJ opened the record on October 16, 2006, and received testimony and evidence. The hearing concluded on October 20, 2006. The record remained open to permit the parties to submit written closing arguments on or before November 9, 2006. Student's Closing Argument is identified for the record as Exhibit BB. District's Closing Argument is identified as Exhibit 117. The record was closed and the matter submitted for decision on November 9, 2006.

## ISSUES

The 2005- 2006 School Year-

- I. Did the District fail to properly assess Student and properly identify Student's disability based upon autistic-like behaviors?
- II. Did the District fail to determine Student's eligibility for special education services based upon autistic-like behaviors and inappropriately find that Student was eligible for services based upon mental retardation?
- III. Did the District fail to reassess Student as required in the November 4, 2005 Individualized Education Program (IEP)?
- VII. Did the District deny Student a free appropriate public education (FAPE) for the 2005- 2006 school year by:
  - A. Failing to provide educational assessments and services which were designed to meet Student's unique needs as an autistic child;
  - B. Failing to develop an IEP on August 9, 2005, November 4, 2005, and April 21, 2006, based upon the disability of autistic-like behaviors, and that was reasonably calculated to provide some educational benefit;

C. Failing to offer Student placement in the least restrictive environment by refusing to change Student's placement from a classroom with mentally retarded children to a classroom or program equipped to provide supplemental services to autistic children, based upon the request of the Student's parents;

D. Failing to change Student's IEP on August 9, 2005, August 22, 2005, November 4, 2005, and April 21, 2006, to include placement in a full-day Palmdale School District Head Start-State preschool program with non-disabled peers in the least restrictive environment;

E. Failing to provide services and a specially trained one-to-one paraprofessional in autism;

F. Failing to authorize an Independent Educational Assessment (IEE)<sup>1</sup> paid for by the District as requested by parents at the April 26, 2006 IEP?

The 2006 -2007 School Year-

V. Was the District's multidisciplinary assessment of June 14, 2006, appropriate?

VI. If the District's multidisciplinary assessment of June 14, 2006, is not deemed appropriate, is student entitled to reimbursement for the IEE performed by Larry Gaines, Ph.D., dated June, 2006?

VII. Did the District deny Student a FAPE for the 2006 -2007 school year by:

A. Failing to develop an IEP on June 16, 2006, and September 13, 2006, based upon the disability of autistic-like behaviors, and that was reasonably calculated to provide some educational benefit;

B. Failing to change Student's IEP on, June 16, 2006, and September 13, 2006, to include placement in a full-day Palmdale School District Head Start-State preschool program with non-disabled peers in the least restrictive environment?

VIII. If Student prevails on his claims is he entitled to the following remedies at the District's expense:

A. Private assessments by educational psychologists or psychiatrist at the District's expense to determine student's proper eligibility classification;

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<sup>1</sup> While the federal Individuals with Disabilities in Education Act (IDEA) refer to such testing as "evaluations," California uses the term "assessments." The acronym "IEE" is used to describe independent educational testing under either rubric.

- B. Placement in a full-day mainstream Pre-Kindergarten program with non-disabled peers with appropriate services. In the alternative, placement in a full-day head Start-State preschool program in the Palmdale School District or in an equivalent full-day non-public school program with non disabled peers and supplemental services designed to assist an autistic child;
- C. Transportation;
- D. A one-to-one specially trained paraprofessional designed to assist students with autism;
- E. An inclusion specialist;
- F. A biannual formal observation and assessment by an educational psychologist to adjust services provided in both the general and special education settings?

#### PARTIES' CONTENTIONS

Student contends that District failed to properly assess Student and to properly identify the basis for his eligibility for special education services as autistic-like behavior rather than the disability category of mental retardation. Student further contends that District denied Student a FAPE in both the 2005 -2006 and 2006 -2007 school years by failing to provide a program and services designed to meet Student's unique needs as an autistic child. Student asserts that District failed to develop an IEP in the IEP team meetings of August 9, 2005, August 22, 2005, November 4, 2005, April 21, 2006, June 16, 2006, and September 13, 2006, based upon Student's primary disabling condition of autism. Student contends that District failed to offer Student placement in the least restrictive environment by refusing to change Student's placement from a preschool severely handicapped special day class (SHSDC) with mentally retarded children to a classroom or program equipped to provide supplemental services to autistic children.

Student seeks private assessments by educational psychologists or psychiatrists at the District's expense to determine Student's proper eligibility classification, and placement of Student in a full-day mainstream pre-kindergarten program with non-disabled peers with appropriate services. In the alternative, Student seeks placement in a full-day Head Start State preschool program in the Palmdale School District or in an equivalent full-day non-public school (NPS) program with non disabled peers and supplemental services designed to assist an autistic child. Student also requests the provision of transportation services, an inclusion specialist, a biannual formal observation and assessment by an educational psychologist to adjust services provided in both the general and special education settings, and reimbursement to parents for the June 21, 2006 IEE of Larry Gaines, Ph.D.

District contends that it properly assessed Student and identified his eligibility category as mental retardation. District contends that its multidisciplinary assessment of June 14, 2006, is appropriate. District further contends that the District provided Student a FAPE in both the 2005 - 2006 and 2006 - 2007 school years because the test of whether District provided a FAPE is not based upon the designated eligibility category, but whether the IEP meets Student's unique needs, was reasonably calculated to provide an educational benefit, provided services to Student that met Student's unique needs, and places him in the least restrictive environment.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student is four years old and lives with his parents within the boundaries of the District. Student has attended preschool at the Lincoln Elementary School (Lincoln), his school of residence, where he was enrolled in a SHSDC and a state preschool head start program beginning in the 2005 - 2006 school year to the present. It is undisputed that Student is eligible for special education services.

### *Background*

2. Student was born May 30, 2002. Student's parents observed delays in Student's development from infancy<sup>2</sup> and contacted the North Los Angeles County Regional Center (Regional Center) for assistance when Student was approximately 10 months old. The Regional Center determined Student exhibited signs of developmental delay and began providing Student with early intervention services under its Baby Steps or Early Start/Intervention Program, where Student received occupational therapy, physical therapy and speech therapy services.

3. Student's parents had also consulted with Student's pediatrician who felt that Student was developmentally delayed and that he might be suffering from mental retardation or autism.

4. Some time in May 2005 the Regional Center referred Student to Larry E. Gaines, Ph.D., a licensed Clinical Psychologist, for a psychological evaluation to determine current levels of cognitive and adaptive functioning. The evaluation was specifically limited to the assessment of developmental disabilities, including mental retardation and/or autism. Dr. Gaines concluded that Student met the Diagnostic and Statistical Manual, 4th Edition, Text Revision (DSM IV-TR) criteria for an Axis I 299.00 diagnosis of Autism Spectrum

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<sup>2</sup> When Student was approximately 10 months, old his mother observed that he was not lifting his head up on his own, he was not reaching, and he was not scooting or crawling.

Disorder (ASD or autism).<sup>3</sup> He also suspected Student might have an attention deficit disorder (ADD) but felt that Student was too young for the appropriate confirming testing.

5. Dr. Gaines recommended to the Regional Center that Student would benefit from special education classes, speech therapy, and behavioral or social skills therapy. Dr. Gaines also recommended that, because of his young age, Student would benefit from a reevaluation of his cognitive skills in two years as he developed test-taking capabilities.

6. The Regional Center operates under the California Department of Developmental Services and provides medical and clinical support services to its clients deemed eligible for services under state law. The Regional Center does not make determinations of eligibility for special education services, which is governed by the IDEA. Based upon the assessment, the Regional Center notified Student's parents that Student was eligible for mental health services after the age of three due to the diagnosis of autism.

#### *The 2005 -2006 School Year*

##### *Assessment*

7. Student contends the District failed to properly assess him. Student further contends that as a result of the inappropriate assessment District misidentified or "mislabeled" Student's eligibility for special education services, which Student believes, is autistic-like behaviors and not mental retardation. Student also contends that he is entitled to an IEE at District's expense.

8. Under the IDEA a district must, in an initial evaluation, determine whether the child evaluated is a child with a disability. In California, a district assessing a student for eligibility for special education must use tests and other tools tailored to assessing "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability. Federal law also requires that the child be "assessed in all areas of suspected disability."

9. Assessments must be conducted by persons knowledgeable of the suspected disability. Psychological assessments shall be conducted by a credentialed school psychologist who is trained and prepared to assess Testing and assessment materials must be administered by trained personnel in conformance with test instructions; and must be validated for the specific purpose for which they are used.

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<sup>3</sup> Autism is a developmental disorder; those affected by autism exhibit significant deficiencies in communication skills, social interaction, and motor control; not the same but may be associated with mental retardation. The DSM IV-TR, published by the American Psychiatric Association is one of the current standards for diagnosis and classification of ASD in clinical practice.

10. If parents disagree with the school district's assessment, the parent or guardian has the right to obtain, at public expense, an independent educational assessment of the student from qualified specialists.

*District's August 2005 Psychoeducational Assessment*

11. Near the time of Student's third birthday, the Regional Center referred Student to the District to facilitate Student's transition to enrollment in preschool and for a determination by District of Student's eligibility for special education services.

12. On May 25, 2005, the AVSELPA requested and obtained Student's parents' written consent to conduct a pupil assessment and to develop an assessment plan. The basis for the assessment was that Student had a suspected disability of autism.

13. The District administered an Early Childhood Education Program Transdisciplinary Team Evaluation/Psycho Educational Assessment (initial psychoeducational assessment) to determine if Student met the criteria to receive special education services as a child with autistic-like behaviors. The assessment was completed and issued on August 9, 2005. At the time of this assessment Student was approximately three years and three months old.

14. The assessment team included Student's parents; Victoria Gluck, School Psychologist; Kathleen Barron, Speech/Language Pathologist; and Joy Wogu, School Nurse.

15. Victoria Gluck, assisted by Kathleen Barron and Joy Wogu, conducted the psycho educational assessment over several days starting in July 2005. Ms. Gluck had a bachelor's degree in psychology, and Masters of Science in Counseling. She also possessed a Pupil Personnel Services Credential with Advanced Specialization in School Psychology and a Nationally Certified School Psychologist Credential. She served as school psychologist for District since June 2003 had conducted 150 to 200 psychoeducational assessments, including 20 to 30 assessments of children three years of age. Kathleen Barron had bachelors and masters degrees in Speech Pathology & Audiology, a Clear Clinical or Rehabilitative Services Credential, and she was trained in teaching and providing services and therapies to autistic and mentally retarded children up to five years of age. Ms. Barron had extensive experience in conducting assessments and was employed with the District for more than 20 years. District assessment team members Gluck and Barron were knowledgeable of the suspected disability, were properly credentialed and were qualified to conduct the assessment.

16. The assessment instruments administered by the team included observation, parent interview, the LAUSD Preschool Team Assessment-III, The Developmental Profile-II: Academic Subtest (DP-II), Oral Sensory-Motor Evaluation, the Preschool Language Scale-4 (PLS-4), the Vineland Adaptive Behavior Scales (Interview Edition) (VABS), and Child Autism Rating Scales (CARS). The assessment tool included parent responses to questions and parent observation of Student and was completed by the District assessment

team members. Student's father provided the responses to this assessment tool. These assessment instruments were used for the purpose of determining Student's developmental levels, and his pre-academic, social/emotional, sensory-motor, language, self-help, and cognitive skills. The CARS was used to determine whether Student rated as a child with ASD. Each of the tests was used to assess specific areas of educational need. The tests and assessment materials were administered by trained personnel in conformance with the test instructions and were validated for the specific purpose for which they were used. Each of the tests was used to assess specific areas of educational need.

17. The assessment results showed Student's cognitive skills were estimated to be in the mild range of mental retardation.<sup>4</sup> The DP-II results indicated that Student scored the age equivalent of a 15-month old child and displayed a 23-month delay in the area of pre-academic skills. Based upon the Vineland, when compared to children his age, Student's self-help, social, and motor skills fell within the low adaptive levels. For example, while Student was able to feed himself using his fingers he required adult assistance in dressing, grooming, and tending to his toileting needs. Student's father participated in the CARS. The overall results of the CARS yielded a total score of 25, which indicated "non-autistic" behaviors. From this result the District team concluded that Student's overall behaviors did not suggest a primary handicapping condition of autistic-like behaviors. The assessment results also indicated that while Student's words and phrases were generally intelligible, Student's receptive and expressive language skills fell within the severely delayed range. The District assessed all areas of suspected disability. The District's assessment was appropriate

### *Eligibility Determination*

18. The District assessment team also reviewed the assessment conducted by Dr. Gaines. The team compared the DSM IV-TR criteria used by Dr. Gaines with the criteria required for a determination that Student was an individual with exceptional needs based upon autistic-like behaviors under California Administrative Code, title 5, section 3030, subdivision (g) (1)-(7).<sup>5</sup> The District assessment team noted that Student's parents reported to the Regional Center that Student displayed some "autistic-like behaviors". The District team then concluded that such behaviors in a child of his age were to be associated with Student's severe global developmental delays rather than an "autistic-like behaviors

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<sup>4</sup> The District assessment team added a note of caution in the interpretation of these results due to Student's young age and his unwillingness to participate in some of the activities.

<sup>5</sup> California Administrative Code , title 5, section 3030 (g) (1)-(7), establishes the assessment criteria to be used in evaluating eligibility for special education services based upon the disability of autistic-like behaviors. Under this section a pupil must exhibit any combination of the following of autistic-like behaviors to include but not limited to: (1) inability to use oral language for appropriate communication; (2) history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) obsession to maintain sameness; (4) extreme preoccupation with objects or inappropriate use of objects or both; (5) extreme resistance to controls; (6) display of peculiar motoric mannerisms and motility patterns; and (7) self-stimulating, ritualistic behavior.

educational handicapping condition.” The District assessment team did not report in this assessment that they had observed a combination of “autistic-like” behaviors in Student.

19. The District assessment team indicated in its assessment report that “[Student] displays significantly below average general intellectual functioning concurrently with deficits in his adaptive behavior, which are manifested during the developmental period, which will adversely affect his educational performance.” The District team considered Dr. Gaines’ report and concluded that Student met the eligibility criteria for special education services as a student with mental retardation under California Administrative Code, title 5, section 3030, subdivision (h).<sup>6</sup> Based upon the evidence, the District’s eligibility determination was appropriate.

20. Student’s parents disagreed with the District’s eligibility determination for special education services under mental retardation. They requested that the District rely on the Regional Center assessment, which diagnosed Student as a child with an autistic spectrum disorder. The District was required by law to consider the assessment, but the District was not bound by the Regional Center’s assessment and eligibility determination because that assessment was not dispositive of the District’s determination of Student’s eligibility for special education services.

21. Student’s parents requested an IEE at District’s expense. On August 17, 2005, the District’s Coordinator of Student Services, Benay Loftus, gave written notice to parents consenting to their requests to obtain an IEE at District’s expense. The District included a list of psychologists they recommended to conduct the IEE. The District also attached a copy of the AVSELPA Guidelines for IEEs advising parents of their right to obtain an IEE. Parents contended the psychologists listed were unqualified or lacked credentials equivalent to those of Dr. Gaines. Parents were entitled to an IEE at District’s expense, but Student’s parents declined to obtain the IEE.

*The District’s Offer of FAPE in the 2005-2006 School Year*

22. Student contends District denied him a FAPE in the 2005-2006 school year by failing to develop an IEP on August 9, 2005, August 22, 2005, November 4, 2005, and April 21, 2006, based upon the disability of autistic-like behaviors, designed to address his unique educational needs, and reasonably calculated to provide some educational benefit.

23. The District has provided a FAPE if the school district’s program was designed to address Petitioner’s unique educational needs and was reasonably calculated to provide him some educational benefit. The term “unique educational needs” is to be broadly

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<sup>6</sup> California Administrative Code, title 5, section 3030, subdivision (h), establishes assessment criteria to be used in evaluating eligibility for special education services based upon the disability of mental retardation. A student is eligible as a mentally retarded student if the student has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil’s educational performance.

construed and includes the student's academic, social, emotional, communicative, physical and vocational needs.

24. The law does not require a student to be labeled with a particular disability for special education services so long as the child has a disability listed under the IDEA. A child's IEP must be tailored to the unique needs of that particular child who, by reason of disability needs special education, and related services, and is regarded as a child with a disability.

#### *Student's Unique Needs*

25. The assessment established that Student had unique educational needs in the areas of pre-academic skills, self-help skills, motor skills, social/emotional, and language and communication skills. Student's needs required an educational program with goals and objectives that addressed development of his pre-academic skills, speech and language, socialization, and self-help skills, including toileting, in order to help Student to access his educational environment.

26. The District convened the initial IEP team meeting on August 9, 2005, following completion of the initial psychoeducational assessment. Student's parents and maternal grandmother attended on behalf of Student. The District team members included Kathleen Barron, Speech and Language Pathologist: Early Childhood Education; Victoria Gluck, School Psychologist; and Daria Lane, Special Education Coordinator for the District.

27. The IEP established Student's present levels of performance, annual goals, objectives, and benchmarks in the identified areas of Student's unique needs. Student's goals were to be achieved in structured classroom activities with adult facilitation based upon the following:

#### 28. Pre-Academic Skills

A. Pre-Writing - the IEP identified a need for Student's development of his pre-writing skills. The annual goal was to be met by August 2006 and required Student, with structured table activities and verbal guidance from adults, to imitate lines and circles drawn by an adult, as measured by observations and teacher made tests, in three out of four trials, for a period of four weeks.

B. Pre-Reading Color Identification –the annual goal required Student to match color pairs, with verbal and physical prompting, with at least 85 percent accuracy measured by observation and teacher made tests, for a period of four weeks.

C. Pre-Reading Matching – the annual goal required Student to independently match an assortment of objects and pictures, as measured by observations and teacher made tests, in three out of four trials for a period of four weeks.

D. Pre-Reading Vocabulary – the annual goal required Student to independently point to at least seven body parts when asked, as measured by observations and teacher made tests, in three out of four trials for a period of four weeks.

E. Pre-Math Counting – when given visual models and verbal and physical guidance from adults, Student was to demonstrate understanding of number concepts by imitating counting by rote to at least the number seven, as measured by observation and teacher made tests, in three out of four trials for a period of four weeks.

## 29. Self-Help Skills

A. Toileting – when given an opportunity, with verbal and physical guidance Student was required to follow the classroom toileting routine, including pulling his garments up and down, using the toilet, flushing and washing and drying his hands measured by observation and teacher made tests three out of four trials for a period of four weeks.

B. Tooth brushing - Student was required to tolerate tooth brushing with a wet tooth brush for a period of 30 seconds on a plus three-fourths trials, observed over a period of one month.

## 30. Motor Skills

A. Gross Motor – during structured outdoor activities Student was to independently hop on one foot at least twice, as measured by observations and teacher made tests, in three out of four trials, for a period of four weeks.

B. Fine Motor – during structured table activities Student was to independently stack one-inch blocks to build a ten plus block tower, in three out of four trials for a period of four weeks.

## 31. Social Emotional Skills

A. Unlike the other goals and objectives established in the IEP, the IEP outlined the assessment results in social/emotional skills based upon the District's use of the Vineland, where student scored 65 and the CARS parent's interview, where student scored 25. The IEP stated that Student presented with some behaviors that could be considered autistic-like but that the current assessment using direct assessment, clinical observations and parent interviews indicated Student's overall behaviors "did not suggest a primary disability of Autistic-Like Behaviors or Autism." A handwritten statement in this section of the IEP indicated that "the classroom staff will need to closely monitor [Student's] overall behaviors within the

school setting to further consider whether an educational handicapping condition of Austistic-Like Behavior/Autism is appropriate.”

B. The IEP established a goal in the area of Peer Interaction Skills. Student was required to play alongside peers and share class materials for a period of at least 10 minutes, as measured by observations and teacher tests, in three out of four trials, for four weeks.

32. Language/Communication

A. Expressive Language - Student was expected to establish a vocabulary of at least 30 words to label objects and actions related to classroom environment and school routine. This goal was also expected to enable Student to relate his wants and needs.

B. Receptive Language – in this goal Student was to demonstrate the understanding of names of at least six common objects and to demonstrate understanding of spatial concepts, “in”, “out”, and “on,” by manipulating objects on 75 percent of trials over a four week period.

33. Speech Articulation and Oral Motor

Though speech and articulation could not be formally assessed due to Student’s limited oral language, the IEP established annual goals based upon parent report and observation. The goal required Student to articulate or imitate speech sounds in simple consonant-vowel variations on 50 percent of trials over a four week period.

34. Finally, three short-term objectives and benchmarks were established with each of Student’s goals, which were required to be met by Student in quarterly increments in December 2005, March 2006, and August 2006.

35. The IEP goals and objectives appropriately addressed Student’s unique educational needs and provided Student a FAPE.

*Placement in the Least Restrictive Environment*

36. Student contends that the IEP offer of placement in the Lincoln Early Childhood SHSDC (Lincoln SHSDC) was inappropriate because the placement was not in the least restrictive environment. Student’s parents also contend that Student should be mainstreamed in a general education class.

37. The law requires that disabled students be mainstreamed to the maximum extent possible. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education

environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily.

38. The District assessment team recommended that the IEP team consider placement of Student in a preschool SHSDC. The District IEP members adopted the assessment team's recommendations and concluded that Student required a small group setting, and a modified curriculum, which emphasized development of communication and functional life skills. The IEP did not offer designated instruction services at this time but offered Student placement in the Lincoln SHSDC four days a week for three hours a day for the 2005-2006 school year.

39. The SHSDC class was taught by a credentialed special education teacher with training and experience in teaching students with learning disabilities, severe handicaps and autism. The class had nine students of which two were autistic, five mentally retarded, one speech and language disabled and one other health impaired. In addition to the teacher, the class was staffed with two paraeducators and two one-to-one aides. The methods used in the class were various including PECS, Icon exchange therapy, shaping programs and discreet trial training, teaching methods used to work with children with various types of disabilities including autism and mental retardation.

40. Parents did not want Student in the SHSDC because they believed the class was attended solely by mentally retarded students. Parents wanted Student mainstreamed in a general education preschool class to allow him to attend with "typically developing peers."

41. In response to Parents' Request for Due Process Hearing the District held a Resolution Session on or about August 22, 2005. During the resolution session, Student's parents agreed to the IEP placement offer. Student's parents also agreed to Student's attendance at the State Head Start Preschool Program, a general education class, on the same campus in the afternoons.<sup>7</sup> District agreed to provide a paraeducator to facilitate Student's successful integration into a class of typically developing peers in the State Head Start Preschool Program. The paraeducator was provided to support Student in the general education State Preschool class only and for the one-hour break between the SHSDC and State Preschool class. Parents agreed to these terms pending further resolution of their disagreement with District's eligibility determination.

42. On October 14, 2005, Parents wrote a letter to the District in which they expressed their desire for Student to attend a full day preschool program, which was not available in the District. Parents requested an inter-district transfer to the Palmdale School District (PSD) to enable Student to attend PSD's full day State Head Start Preschool

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<sup>7</sup> District was funded only for a half day Head Start Program and did not have a full-day preschool SHSDC. District's program provided classes for autistic students starting at eight years of age.

Program. Parents also sought Student's placement in the PSD Program because the school was convenient to Student's day care.<sup>8</sup>

43. On October 26, 2005 Parents unilaterally removed Student from the Lincoln SHDC based on the belief that District was neglecting Student's needs.

*The November 4, 2005 IEP*

44. District convened the next IEP team meeting on November 4, 2005, at the request of Student's parents on November 4, 2005. Both parents and Student's maternal grandmother attended on behalf of Student. The District team members included Janis Rivera, Director of Student Services and Early Childhood Education; Diane Sasaki, Coordinator, Early Childhood Education; Geraldine Watts, Speech and Language Pathologist; Victoria Gluck, School Psychologist; and Ellen Avol-Law, SHSDC teacher, Early Childhood Education Services. The IEP team discussed Student's progress toward the goals and objectives established in the August 9, 2005 IEP. The IEP team agreed to continue working on the existing communication goals and to add speech, articulation and language services. The District team members again decided that their previous recommendation of placement continued to be the most appropriate placement to meet Student's needs. The District included in this IEP the terms of the agreement to place Student in the State Head Start Preschool Program offered at Lincoln for three hours in the afternoon. The District team discussed parents' request for a one-to-one paraprofessional aide for the full school day and explained that the aide would only be provided to facilitate Student's inclusion in the general education class on a half day basis in the afternoon. The aide was not recommended for the SHSDC because the District team member felt the existing adult supports in that class adequately met Student's needs. The District IEP offer included a General Education and Instructional Assistant 5 days per week for 19 hours per week, speech and articulation services twice per month, for 15 minute sessions and language services four times per month in collaboration with the SHSDC teacher for 15 minutes each.

45. Parents agreed to resume Student's attendance in the SHSDC effective November 7, 2005. Parents also dictated a statement incorporated into the IEP that although they disagreed with the implementation of some of the goals and objectives, they agreed with the present goals and objectives and the addition of speech and language services. Parents testified at the hearing that the District failed to reassess Student as agreed to in the November 4, 2005 IEP and that such failure constituted a denial of FAPE. The testimony of District witnesses that there was no such agreement coupled with the absence of any reference in the IEP established that District made no such offer at that time.

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<sup>8</sup> District consented to sign a transfer request on the condition that PSD would pay for the cost of Student's attendance in their District. PSD declined the request.

*The April 21, 2006 IEP*

46. The District convened the next IEP, at Student's parents' request on April 21, 2006. Student's parents, his attorney and paternal grandmother, Diane Weissburg, and his maternal grandmother attended on behalf of Student. The District team included Dara Lane, the administrator/designee; Diane Sasaki; Geraldine Watts; F. Rodarte-Vargas, School Psychologist; Shanek Johnson, General Education Teacher; and Ellen Avol-Law, Severe Handicap Special Day Class Teacher, Early Childhood Education Services. The IEP team reported that Student made progress on his goals in pre-reading vocabulary, pre-math counting, toileting, gross motor skills, fine motor skills, peer interaction, expressive/receptive language, and speech articulation/oral motor skills and that his goals should be continued. The IEP team also reported that Student had met his self-help skills goals in tooth brushing. The District team members agreed to add an inclusion specialist to collaborate with Student's SHSDC and general education teachers to build continuity between the two classrooms. The District offered to provide a Special Circumstance Instructional Assistant one-to-one aide trained in behavior, social and academic skills. The aide would also provide all day assistance with Student's toileting needs. The District further agreed to search for a paraeducator with specialized training in autism and in the interim to hire and train a special education paraeducator effective April 26, 2006. The IEP offer continued the services provided in the prior IEP.

47. The parents expressed the same concerns as in prior IEP team meetings including their requests for a change in Student's eligibility label to autistic-like behaviors from mental retardation, a full-day Head Start Program, support for Student from inclusion and autism specialists, a full-day one-to-one aide, and a change in Student's toileting schedule. Student's parents provided additional medical reports, obtained through the Regional Center, to the team members that purportedly diagnosed Student with autistic and that recommended provision of extra supports and services.<sup>9</sup> The District team members informed parents that eligibility category does not determine services and that it was Student's unique needs identified by District that determined which services were appropriate.

48. The IEP offer of placement and services contained in the August 9, 2005, November 4, 2005 and April 21, 2006 IEPs were designed to address Student's unique educational needs, were reasonably calculated to provide him some educational benefit, and offered appropriate placement in the least restrictive environment. There is no evidence that District convened an IEP on August 22, 2005. Rather, District convened the statutorily required resolution session, which amended the August 9, 2005 IEP resulting in provision of additional services to Student. The District provided Student with a FAPE in the 2005-2006 school year.

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<sup>9</sup> These reports are the Kaiser Permanente assessment reports of Donald Gallo, Ph.D., dated April 21, 2006, and Nancy J. Brill, M.D., dated April 11, 2006, requested by the Regional Center. These reports offered by Student were admitted at hearing as administrative hearsay only for the purpose of establishing that Student's parents had received them. They were determined by the ALJ as inadmissible for purposes of establishing that Student was autistic and are not accorded any evidentiary weight in the decision.

*The 2006-2007 School Year*

*Assessments*

49. District contends that the District assessment dated June 14, 2006, is appropriate and that Student is not entitled to an IEE at public expense.

50. The District's legal obligation to conduct an appropriate assessment is set forth in Factual Findings 8 to 10. A school district may initiate a due process hearing to show that its assessment is appropriate. If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent or guardian maintains the right for an IEE, but not at public expense.

*District's Assessment of June 14, 2006*

51. The District responded to parent's request for an IEE with a written offer to conduct a comprehensive assessment to determine if Student required additional supports and services and to provide behavioral and autism specialists to reassess Student as part of Student's Assessment Plan. District also informed parents if they disagreed with the assessment District would exercise its option to pay for an IEE or initiate a due process hearing to determine the appropriateness of the assessment. Parents consented to the assessment plan but continued to pursue an IEE separately because they wished to have the assessment administered by a licensed clinical psychologist with credentials equivalent to those of Dr. Gaines.

52. The District conducted a multidisciplinary assessment of Student beginning in May 2006 and culminating in the Assessment Team Report dated June 14, 2006. The purposes of the assessment were to review all previous assessment results; to assess Student's present levels of performance or functioning; to develop an overall profile to assist in determining Student's primary handicapping condition; and to assist in reviewing appropriate needs, services, and placement. The assessment would also evaluate eligibility under the handicapping conditions of autism, speech and language and mental retardation.

53. The assessment team members included Benay Loftus, M.A., and Theresa Ede-Levine, M.S., School Psychologists<sup>10</sup>; Elaine LaMonk, Special Education Teacher<sup>11</sup>;

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<sup>10</sup> Ms. Loftus, District's autism expert, has a B.A. in Psychology and a M.A. in Psychology with an emphasis in school psychology. She worked as school psychologist in the Preschool to 6th grade for District for more than 10 years. She was credentialed and trained in the administration of applied behavioral analysis (ABA), discreet trial training, PECS, TEACCH, Behavior Intervention, and other methodologies to teach autistic students. Ms. Ede Levine has a BA and MS in Psychology, and has been employed by District as a Supervising School Psychologist from 1998 to the present. Both had conducted numerous assessments

<sup>11</sup> Ms. La Monk has a B.A. in Communication Disorders and a Life Restricted Special Education Credential. She has been employed by District as a Special Education Teacher since 1991 and Special Education Inclusion Teacher since 2002. She has approximately 15 years experience as a Special Education Teacher in the primary grades for the severely language delayed students.

Susan Matthew, General Education Teacher; Joy Wogu, R.N., B.S., M.S.N., Nurse; Liezel O'Brien, M.S., CCC;SLP, Speech and Language Pathologist<sup>12</sup>; and Ellen Avol Law<sup>13</sup>. The participating assessment team members were qualified to administer the assessment.

54. The team used the assessment tools and protocols: (1) The Scale of Independent Behavior-Revised administered by Theresa Ede-Levine and Benay Loftus; (2) Report of Adaptive Behavior Testing, respondent by Ellen Avol Law; (3) The Childhood Autism Rating Scale (CARS), respondent by Ellen Avol-Law; (4) The Developmental Profile II, by Theresa Ede-Levine and Benay Loftus; (5) Autism Diagnostic Observation Schedule-Generic (ADOS), administered by Theresa Ede-Levine and Benay Loftus; (6) Goldman Fristoe 2 Test of Articulation; (7) The Preschool Language Scale, Fourth Edition, administered by Liezel O'Brien; (8) The Hawaii Early Learning Profile (HELP) Strands, Curriculum-Based Developmental Assessment administered by Elaine LaMonk; and (9) The Vineland Adaptive Behavior Scales-II, which required in put from Student's parents. The District mailed the assessment forms and questionnaires to Student's parents and requested they complete them and return them for use in the assessment. Parents refused to participate in the assessment and failed to return the forms to the District. The District alternatively used the forms previously completed by parents in the District's August, 2005 initial psychoeducational assessment.

55. The assessment included a health, medical, and developmental history that found, with the exception of the diagnosis of autism, there were no present medical concerns. Student was observed in multiple settings including classrooms, the playground and other testing environments over a period of 11 days between May 4, 2005, and June 12, 2006. Alternative assessment tools consisting of observations, review of work samples, parent/teacher reports, and specific tests of reasoning and presentation of memory and learning tasks over trials were administered to determine Student's intellectual ability.

56. The tests and assessment materials were administered by trained personnel in conformance with the test instructions and were validated for the specific purpose for which they were used. Each of the tests was used to assess specific areas of educational need. The tests assessed all areas of suspected disability, and identified Student's unique needs. The assessment was appropriate.

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<sup>12</sup> Ms. OBrien, a Speech and Language Pathologist for the District since 1999, has a B.A. in Communication Disorders and a M.S. in Communications Sciences and Disorders. She has approximately 10 years experience in speech and language pathology is District's Speech and Language Pathologist Program Chairperson.

<sup>13</sup> Ms. Avol-Law was Student's SHSDC teacher. She had over 20 years experience as a teacher including teaching disabled, severely handicapped, and autistic students in preschool and elementary school. She has been the Lincoln SHSDC teacher and Student's teacher since 2005. Ms. Avol-Law had participated in Student's IEPs and worked with Student in the classroom.

## *Eligibility*

57. The CARS is an observational rating instrument for children suspected of having autism spectrum disorder. The instrument contains 15 items that are rated through observation of the child by parents, teachers and assessors, and a cut off score of the items is suggested for diagnoses within the autistic spectrum. There were two CARS rated in the June 14, 2006 assessment rated by the assessment team. The results of the CARS rated by Ms. Avol-Law and the CARS rated by Ms. La Monk and Ms. O'Brien both rated item 15 entitled "General Impressions" to indicate Student scored in within a "mild degree of autism". The overall results of the CARS administered and rated by La Monk and O'Brien showed that Student's rating of 29.5 fell just below the cut-off for demonstrating significant behaviors associated with Autism. A rating of 30 would indicate Student had autism. The results of the CARS depended on the rater and the setting in which the rater observed the child. In other items of CARS the behaviors rated as mildly to moderately abnormal were relating to people, emotional response, and body use. Behaviors rated moderately abnormal were imitation and activity level.

58. The assessors' detailed review of the California Department of Education (CDE) eligibility criteria for autistic-like behavior showed that of the seven enumerated criteria Student exhibited overall language delays, inappropriate use of objects, peculiar motoric mannerisms illustrated in Student's hand-flapping and walking in circles and self-stimulatory and ritualistic behaviors. Overall, the assessment results established that Student met a combination of at least three of the seven criteria sufficient to find that Student is a child with "autistic-like" behaviors.

59. The assessment team concluded that Student did not meet the eligibility criteria for autistic-like behaviors because in their view "these behaviors were characteristic of overall development delays noted in students with mental retardation." The assessment team again concluded that Student continued to meet the CDE eligibility criteria as a student with mental retardation because Student exhibited "significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior...which adversely affect [Student's] educational performance."

60. The assessment teams' conclusion is not persuasive because the results reached under its own tests confirm that Student exhibited a number of autistic like behaviors. These behaviors were not established by the District experts as the behaviors particularly characteristic of children identified as mentally retarded.

61. The District's assessment results established that Student had autistic-like behaviors that met the eligibility criteria for autistic-like behaviors under the California Code of Regulations, title 5, section 3030, subdivision (g)(1), (4), (6), and (7) and the scores were sufficiently close to the eligibility thresholds that the team should have concluded that Student was eligible under the category of autistic-like behaviors. The assessment results also confirmed Student had significantly below average general intellectual functioning with deficits in adaptive behavior, adversely affecting Student's educational performance, which

met the criteria under section 3030, subdivision (h), for a student with mental retardation. District's Assessment team misidentified Student's disability as solely mental retardation. The evidence supports a finding that the assessment was appropriate but the eligibility determination was flawed. Student had more than one eligibility category and was eligible under the criteria for both mental retardation and autistic-like behaviors.

*Independent Educational Assessment of June 21, 2006*

62. Parents requested a referral from the Regional Center for a reevaluation of Student. The Regional Center referred Student to Dr. Gaines. The evaluation was limited to the assessment of developmental disabilities, including mental retardation and autism, and to specifically rule out mental retardation as Student's disability. There is no dispute that Dr. Gaines met agency criteria as a qualified independent evaluator. In addition to clinical interviews and record review, Dr. Gaines administered the Leiter International Performance Scales-Revised (Leiter-R), Visual Motor Integration Test, Autism Diagnostic Interview-Revised (ADIR), ADOS Module One and the Vineland Adaptive Behavior Scales. Dr. Gaines was also provided and reviewed the District's reassessment dated June 16, 2006. Dr. Gaines' assessment of Student's performance on the ADOS and ADIR indicated that Student fell within the "Autism cut-off" range. Dr. Gaines cited autistic behavior patterns, which met the criteria both under the DSM IV-TR 299.00, which is a more stringent standard than the criteria set forth under California Code of Regulations, title 5, section 3030, subdivision (g) (1)-(7). His diagnostic impressions that Student presented with behavioral symptoms consistent with autism is consistent with the evidence.

63. Dr. Gaines' diagnostic impressions also indicated Student's performance on the Leiter-R used to measure verbal communication, gave him a score in excess of the range of mental retardation. Dr. Gaines testified at hearing that the score tended to show that Student functioned within the low-average range of intellectual ability that would tend to show Student was not mentally retarded. His expert opinion that Student was not mentally retarded is not supported by the evidence. Dr. Gaines testified that as he noted in his report, in order to determine whether Student was mentally retarded, he departed from standardized testing procedures by readministering sections of the test to rule out guessing by Student on the test. As a result, Student achieved "good scores" and a mentally retarded child could not "fake good scores." District's expert, Ms. Ede-Levine, testified and established that when administering standardized tests, in order to use the scores derived from a test it must be administered in compliance with standardized procedures and test instructions. A departure from the standardized procedure may result in an invalid test score, which then cannot be properly compared to other, standardized scores. Based upon the evidence and the testimony of District's expert, Dr. Gaines' deviation from the test instructions invalidated the results. Dr. Gaines' opinion that Student was not mentally retarded is based upon flawed and invalid test data and is not persuasive.

*The District's Offer of FAPE in the 2006-2007 School Year*

*Unique Needs*

*The June 16, 2006 IEP*

64. Student contends District denied him a FAPE in the 2006-2007 school year by failing to develop an IEP on June 16, 2006, and September 13, 2006, based upon the disability of autism, that was reasonably calculated to provide some educational benefit.

65. The District's legal requirement to provide a FAPE is set forth in Factual Findings 23 and 24.

66. The District convened the IEP team meeting on June 16, 2006, to review the multidisciplinary assessment results and discuss Student's placement and development goals. The District team members included Dara Lane, Ellen Avol-Law, Benay Loftus, Elaine La Monk, Liezel O'Brien, Susan Matthew, Therese Ede-Levine, and Diane Sasaki. Attorney Carol Grogan attended only as counsel for the District. Student's parents and his attorney, Diane Weissburg, attended the meeting on behalf of Student. They refused to participate and left the meeting shortly after the meeting began. The meeting continued without Student's representatives.

67. The assessment team presented their results to the District IEP team members. The IEP team reviewed Student's progress toward his goals and objectives during the 2005-2006 school year. For example, the IEP indicated that as of June 2006, Student had met the December and March benchmarks of his four speech and language goals. Student also made progress in his pre-academic skills in pre-writing, pre-reading, and pre-math skills. Student met his self-help skills in the areas of toileting and tooth brushing. Student made some progress toward his goals in gross motor skills and social emotional skills. The District IEP team discussed modified goals and objectives and generated new goals for Student for the 2006-2007 school year to include the use of picture icons to enhance Student's spontaneous language skills.

68. The team discussed the benefits of Student's attendance in the SHSDC and the State head start preschool general education program and concluded that Student benefited more from the smaller structured environment of the SHSDC class because the activities were more tailored to his individual educational needs. The team believed while Student derived a benefit from the general education afternoon class, three hours in class was excessive as Student was observed to become sleepy during the afternoon. The team also discussed additional skills Student had learned since the completion of the reassessment. Examples given included that Student was able to urinate in the toilet, he developed new words, and he showed interest in social interaction with peers. The IEP offer included the following placement and services: the SHSDC with mainstreaming for 20 minutes a day for socialization and self-help/independent living skills, speech and language services, paraeducator/Special Circumstances Instructional Assistant, Transportation Services, and 20

days Extended School Year (ESY) to work on goals and objectives and to address parents concerns about the continuity of services. The IEP was appropriate because it focused on Student's unique preacademic developmental, socialization, self-help, communication, and behavioral needs

*The September 13, 2006, IEP*

69. The District was not notified of Dr. Gaines' reassessment until August, 2005. The District convened another IEP on September 13, 2006, to review and consider the Dr. Gaine's assessment. Student's mother, maternal grandmother, paternal aunt and his attorney, and paternal grandmother, attended on behalf of Student. The District team members included Janis Rivera, Liezel O'Brien, Theresa Ede-Levine, Susan Matthew, Ellen Avol-Law, Elaine LaMonk, Diane Sasaki, and Benay Loftus. Attorney Carol Grogan attended on behalf of the District. Angelia Franklin and Lilia Galardo of the North Los Angeles County Regional Center also attended.

70. The District team considered Dr. Gaines' June 21, 2006 assessment. The team disagreed with his findings but found some of his recommendations were consistent with some of the programs and services offered in the June 16, 2006 IEP. Student's attorney mentioned the Parents' concern about what they perceived as Student's regression as the result of returning to school after receiving discreet trial training through the Regional Center over the summer. Student's attorney represented that Dr. Gaines' recommendations included additional behavioral intervention services that were not included in his June 21, 2006 report. Based upon representations made by Student's attorney, the District team members requested further clarification from Dr. Gaines concerning his recommendations. No clarification was provided. The team members and others present discussed the different methodologies and services offered and provided in the June 16, 2006 IEP. Student's parents requested the District adopt the methodologies Student was receiving at home through the Regional Center. The District IEP team members responded that a variety of methodologies were already in use in Student's classroom including those being provided at Student's home through the Regional Center, like discreet trial training and applied behavioral analysis.. Student's SHSDC teacher discussed draft revisions to some of Student's goals and discussed Students progress toward his goals. Student's parents again voiced their disagreement and requested an IEE. The District team denied the request on the ground that the assessment was appropriate. Student's parents rejected District's offer of ESY services. Parents testified at hearing that Student "regressed" upon his return from the summer break in the 2006-2007 school year, during which he was given discreet trial training services by the NPA under contract with the Regional Center. Parents did not establish Student's "regression" was caused by a denial FAPE.

71. The IEPs of June 16, 2006, and September 13, 2006, were appropriate because they focused on the development of Student's unique pre-academic, developmental, socialization, self-help, communication, and behavioral needs and not Student's eligibility category.

### *Placement in the Least Restrictive Environment*

72. Student's contention is set forth at Factual Findings 36 and pertains to the 2006-2007 school year.

73. During the September 13, 2006 IEP meeting, Student's attorney requested the District consider placement of Student in a NPS and requested an IEE. The District team denied the request on the ground that the IEP offer of placement and services provided Student a FAPE. District's SHSDC class was taught by a credentialed special education teacher, Ellen Avol-Law, who taught Student in both school years. Ms. Avol-Law also possesses a California Clear Credential in Special Education, Learning Handicapped, Severely Handicapped, and Physically Handicapped. Student's class in the 2006 to 2007 school year had eight students, one less than the 2005 to 2006 school year and the same classmates. There were two paraeducators in addition to the teacher. Two of the eight students also had additional one-to-one aides. Two of Student's classmates were autistic, five mentally retarded and one other health impaired. Student also had an aide to assist with toileting needs and to transition to the afternoon general education head start class. Ms. Avol-Law's un rebutted expert opinion was that Student still required placement in her class because he required a smaller more intensive classroom setting. She also testified and established that Student had not made progress toward his goals in the afternoon state head start preschool class.

74. The head start state preschool class had approximately 20-24 students. The preschool class teacher did not have a special credential for teaching special education children. Student did not receive the structured and individualized attention he received in the SHSDC.

75. Student's progress toward his annual goals and objectives near the end of the 2005 to 2006 school year was achieved in the SHSDC setting. The IEP offer of continued placement in the Lincoln SHSDC for the 2006 to 2007 school year met Student's unique educational needs, was calculated to provide Student with some educational benefit, and provided an appropriate placement in the least restrictive environment. The IEPs of June 16, 2006, and September 13, 2006, provided Student a FAPE.

### *Services*

76. Student's contends that District failed to provide services in the 2006-2007 school year based upon Student's eligibility as a child with autistic-like behaviors denied him a FAPE.

77. In addition to the services provided in the 2005- 2006 school year and the services offered in the June and September, 2006 IEP, District expert Ellen Avol-Law provided PECS, Icon exchange therapy, discreet trial training, and other behavior intervention services that addressed Student's needs as a child with autistic-like behaviors.

Parents' testimony at hearing that Icon Exchange therapy did not benefit Student is not supported by the evidence. The provision of these services was appropriate and provided Student with a FAPE

78. The District's June 14, 2006 assessment did not properly conclude Student was eligible for special education services under the category of autistic-like behaviors, but the assessment appropriately identified Student's unique needs. The evidence overwhelmingly established that the services offered by District were adequate and appropriately addressed the needs of a child with autism and mental retardation and the services were sufficient to provide Student with a FAPE in the 2006 -2007 school year.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. Student has the burden of persuasion in an administrative hearing challenging an IEP. District has the burden of persuasion that its multidisciplinary assessment was appropriate. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed 2d 387].)

2. A child with a disability has the right to a FAPE. (20 U.S.C. §1412(a) (1) (A); Ed. Code, § 56000) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA- procedural and substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [*Rowley*].) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* At pp. 206-207.)

4. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*Rowley, supra*, 458 U.S. at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634,

646; *MM v. Sch. Dist. Of Greenville County* (4th Cir. 2002) 303 F.3 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F. 3d 877, 892.)

5. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings concerning the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code §§ 56304, 56342.5; 34 C.F.R. § 300.501, subd. (a), (c).) Education Code section 56341.1 requires the IEP team to consider strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, as well as the results of the initial assessment or most recent assessment of the pupil. School officials and staff do not predetermine an IEP simply by meeting to review, discuss, and take notes regarding a child's evaluation and programming in advance of an IEP meeting, so long as they "come to the meeting with suggestions and open minds, not a required course of action." (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. A parent is a required member of the IEP team. (20 U.S.C. § 1414(d) (1) (B) (i); 34 C.F.R. § 300.344(a) (1); Ed. Code § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c) (1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.343(c)(2)(iii), 300.346(a)(1)(i), (b), 300.533(a)(1)(i); Ed. Code § 56341.1, subd. (a)(1), (d)(3), (e).) A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*, supra, 315 F.3d at 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.*, supra, 993 F.2d at 1036.) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (App. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).)

7. Under the IDEA a district must, in an initial evaluation, determine whether the child evaluated is a child with a disability. (20 U.S.C. § 1414(a)(1)(C)(i)(I).) In California, a district assessing a student for eligibility for special education must use tests and other tools tailored to assessing "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code, § 56320, subd. (c),(f).) Statutory examples of such related areas of educational need include areas such as vision, hearing, motor abilities, academic performance, and social and emotional status. (*Ibid.*) Federal law also requires that the child be "assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).) Like the California statute, the federal statute does not require a medical diagnosis. Instead, it requires assessment in all areas of educational need related to the suspected disability. (34 C.F.R. § 300.532(g); see, *J.K. v. Fayette County Bd. of Educ.* (E.D.Ky., Jan. 30, 2006, Civ. A. No. 04-158) 2006 U.S.Dist. LEXIS 3538, pp. 12-13.)

8. Assessments shall be conducted by persons knowledgeable of the suspected disability. (Ed. Code, § 56320, subd. (g).) Psychological assessments shall be conducted by a credentialed school psychologist who is trained and prepared to assess (Ed. Code, § 56324, subd. (a)). Testing and assessment materials must be administered by trained personnel in conformance with test instructions; and must be validated for the specific purpose for which they are used. (Ed. Code, § 56320, subds. (a) & (b).) Assessment materials must assess specific areas of educational need and not merely provide a single general intelligence quotient. (Ed. Code, § 56320, subd. (c).) No single procedure shall be used as the sole criterion for determining an appropriate educational program for a child. (Ed. Code, § 56320, subd. (e).)

9. If parents disagree with the state agency's evaluation, the parent or guardian has the right to obtain, at public expense, an independent educational evaluation of the student from qualified specialists, as defined by Agency criteria, if the parent or guardian disagrees with an assessment obtained by the public agency, in accordance with 34 Code of Federal Regulations, section 300.502, subdivision (b) (1).

10. If the parent or guardian obtains an Independent Educational Evaluation at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of FAPE to the child, and may be presented as evidence at a due process hearing pursuant to Chapter 5 (commencing with Section 56500) regarding the child. The public education agency may initiate a due process hearing pursuant to Chapter 5 (commencing with Section 56500) to show that its assessment is appropriate. If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent or guardian maintains the right for an Independent Educational Evaluation, but not at public expense. (Ed. Code § 56329, subd. (c).)

11. California Administrative Code, title 5, section 3030, subdivision (g)(1)-(7), establishes the assessment criteria to be used in evaluating eligibility for special education services based upon the disability of autistic-like behaviors. Under this section a pupil must exhibit any combination of the following of autistic-like behaviors to include but not limited to: (1) inability to use oral language for appropriate communication; (2) history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) obsession to maintain sameness; (4) extreme preoccupation with objects or inappropriate use of objects or both; (5) extreme resistance to controls; (6) display of peculiar motoric mannerisms and motility patterns; and (7) self-stimulating, ritualistic behavior.

12. California Administrative Code, title 5, section 3030, subdivision (h), establishes assessment criteria to be used in evaluating eligibility for special education services based upon the disability of mental retardation. A student is eligible as a mentally retarded student if the student has significantly below average general intellectual

functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil's educational performance.

13. A child is not required to be classified by his or her disability so long as each child who has a disability listed in paragraph (3) of section 1401 of Title 20 of the United States Code and who, by reason of this disability, needs special education and related services as an individual with exceptional needs defined in section 56026. A disabled child's IEP must be tailored to the unique educational needs of that particular child and who, by reason of disability needs special education, and related services and is regarded as a child with a disability. (*Heather v. State of Wisconsin* (1997) 125 F.3d 1045.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No 1 v. B.S.*, (1996) 82 F. 3d 1493, 1500.)

14. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a) (5) (A); Ed. Code § 56031.) (*Board of Education of La Grange School District v. Illinois State Bd. Of Educ.*, (7th Cir. 1999) 30 IDELR 891 p. 4; 184 F.3d 912.)

15. The courts have considered the following factors in determining whether a proposed placement satisfies LRE requirements: (1) educational benefit available to the student in a regular classroom setting, supplemented with appropriate aids and services, compared to educational benefits of a special education classroom; (2) nonacademic benefits to the disabled child of interaction with non disabled children; (3) the effect of the presence of the disabled child on the teacher and other children in the regular education classroom; and (4), the costs of supplemental aids and services necessary to mainstream a disabled student in a regular classroom setting. (*Sacramento City Unified School District v. Rachel Holland* (9th Cir. 1992) 786 F. Supp. 879.)

16. An IEP must include, in pertinent part, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414, subd. (d)(1)(A)(i), (ii), (iii) and (vii) (I); 34 C.F.R. § 300.347, subd. (a)(1), (2), (3) and (7) (i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's

instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, “rigid ‘adherence to the laundry list of items [required in the IEP]’ is not paramount.” (W.G., supra, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.) An IEP is evaluated in light of the information available at the time it was developed, and is not to be evaluated in hindsight. “An IEP is a snapshot, not a retrospective.” (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149) It must be evaluated in terms of what was objectively reasonable when the IEP was developed.

17. Parents may be entitled to appropriate relief including reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, the private placement or services were or are determined to be appropriate under the IDEA, are reasonably calculated to provide educational benefit to the child, and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.)

### *Determination of Issues*

The 2005 - 2006 School Year

Issue I. Did the District fail to properly assess Student and properly identify Student’s disability based upon autistic-like behaviors?

18. No. It is undisputed that Student has a disability and is eligible for special education services under the IDEA. Based upon Factual Findings 12 through 17 and Legal Conclusions 7 through 10, and 12, the initial assessment conducted by the District on August 9, 2005, was appropriate and the District properly determined Student was not eligible under the category of autistic-like behaviors but was eligible for special education services as a student with mental retardation.

Issue II. Did the District fail to determine Student’s eligibility for special education services based upon autistic-like behaviors and inappropriately find that Student was eligible for services based upon mental retardation?

19. No. Based upon Factual Findings 18-20, and Legal Conclusions 7-10, and 12, and paragraph 18 above, the District’s eligibility determination was appropriate.

Issue III. Did the District fail to reassess Student as required in the November 4, 2005 IEP?

20. No. Based upon Factual Finding 44-45, and Legal Conclusion 7-10, the District did not offer to assess Student in the November 4, 2005, IEP. There was no basis established that obligated the District to conduct an assessment at that time.

Issue IV. Did the District deny Student a free appropriate public education FAPE for the 2005 - 2006 school year by:

21. (A) Failing to provide educational assessments and services which were designed to meet Student's unique needs as an autistic child?

No. The facts in this case are analogous to *Heather v. State of Wisconsin*, (7th Cir. 1997) 125 F.3d 1045, cited in Legal Conclusion 13, where the 7th circuit court of appeals affirmed the lower court decision granting summary judgment in favor of the State of Wisconsin and the school district on the ground that while the school district misidentified a special education student's disability designation district's IEP did not deny student a FAPE. The court stated in dicta that "the IDEA concerns itself not with labels, but with whether Student received a FAPE. A disabled child's individual education plan must be tailored to the unique needs of that particular child." There is no 9th Circuit Court decision on point. Similarly, in the present case, whether Student was designated autistic or mentally retarded is beside the point. The District carefully determined Student's unique needs and as a result tailored his program and services to develop Student's pre-academic skills and other deficiencies identified in the assessment. Based upon Factual Findings 7-35, and Legal Conclusions 2-4 and 13, the District properly identified Student's unique needs and provided Student a FAPE. It should also be noted here that Student raised for the first time in closing argument that district violated parent's procedural rights to meaningfully participate in the IEPs by having decided the IEP details of services, etc. prior to the meetings and by not communicating with parents. This issue is not addressed here. Even if Student had raised this procedural issue the evidence does not support that District violated Student's procedural rights to a FAPE.

(B) Failing to develop an IEP on August 9, 2005, November 4, 2005, and April 21, 2006, based upon the disability of autism, and that was reasonably calculated to provide some educational benefit?

No. Based upon Factual Findings 7-34 and 44-48, and Legal Conclusions 1-10 and 16, the District developed an IEP that was reasonably calculated to provide Student an educational benefit. Student's IEP's were developed based upon his unique educational needs identified in the initial assessment and not the eligibility designation. The evidence overwhelmingly establishes that Student derived educational benefit from the IEP goals and objectives initially developed in the August 9, 2005, IEP. Moreover, although Student's parents disputed District's eligibility determination they consented to the August and November, 2005 and April, 2006 IEPs.

(C) Failing to offer Student placement in the least restrictive environment by refusing to change Student's placement from a classroom with mentally retarded children to a classroom or program equipped to provide supplemental services to autistic children, based upon the request of the Student's parents?

No. Contrary to Student's parents claims the evidence establishes the makeup of the SHSDC class was not limited to mentally retarded children. The services provided in the SHSDC were designed to teach and develop students with a range of disabilities and in particular autism. The SHSDC teacher was highly trained, skilled and credentialed in teaching handicapped children like Student and that Student performed better in the SHSDC than in the general education class Based upon Factual Findings 22-42, , and Legal Conclusions 14-15, the District's offer of placement in the Lincoln SHSDC was the appropriate placement in the least restrictive environment and provided a FAPE even if his parents' preferred program would have resulted in greater educational benefit.

(D) Failing to change Student's IEP on August 9, 2005, August 22, 2005, November 4, 2005, and April 21, 2006, to include placement in a full-day Palmdale School District Head Start-State preschool program with non-disabled peers in the least restrictive environment?

No. Based upon Factual Findings 22-42, and Legal Conclusions 14-15, the District did not have the jurisdiction to offer Student placement in another school district. Placement could only be accomplished by an inter district transfer to which District agreed.

(E) Failing to provide services and a specially trained one-to-one paraprofessional in autism?

No. Based upon Factual Findings 7-47, and Legal Conclusions 1-5, and 13, Student was not entitled to a one-to-one paraprofessional specially trained in autism.

(F) Failing to authorize an Independent Educational Evaluation in the April 26, 2006 IEP at the request of Student's parents at the District's expense?

No. The District offered and parents consented to a multidisciplinary reassessment by District. Based upon Factual Findings 49-61, and Legal Conclusions 7-10, the District did not fail to authorize an IEE in April 21, 2006 IEP meeting. The law permits District to exercise an option to authorize an IEE or to conduct its own and file a Due Process Hearing Request for a determination on the appropriateness of the assessment.

The 2006 -2007 School Year-

Issue V. Was the District's multidisciplinary assessment of June 14, 2006, appropriate?

22. Yes. Based upon Factual Findings 51-56, and Legal Conclusions 10 and 13-15, the evidence supports a finding that Student was both autistic and mentally retarded. The District's June 14, 2006 assessment failed to properly conclude based upon the assessment tools used and the results that Student was a student with "autistic-like" behaviors. Accordingly, while the conclusions reached were incorrect the assessment was appropriate.

Issue VI. If the District's multidisciplinary assessment of June 14, 2006, is not deemed appropriate, is student entitled to reimbursement for the IEE of Larry Gaines, Ph.D., dated June 21, 2006?

23. No. Based on Factual Findings 51-56 and Legal Conclusions 10 and 17, Student is not entitled to reimbursement.

Issue VII. Did the District deny Student a FAPE for the 2006 -2007 school years by:

24. (A.) Failing to develop an IEP on June 16, 2006, and September 13, 2006, based upon the disability of autism, and that was reasonably calculated to provide some educational benefit?

No. Based on Factual Findings 65-78 and Legal Conclusions 1- 4, and 14-15, District did not deny Student a FAPE.

(B) Failing to change Student's IEP on, June 16, 2006, and September 13, 2006, to include placement in a full-day Palmdale School District Head Start-State preschool program with non-disabled peers in the least restrictive environment?

No. Based on Factual Findings 65-78, and Legal Conclusions 1-4, and 14-17, the June 16, 2003 and September 13, 2006 IEPs were designed to address Petitioner's unique educational needs, were reasonably calculated to provide him some educational benefit, and provided a program in the least restrictive environment. The District provided Student a FAPE. The law does not require District to tailor the IEP or its placement of a child based upon parent's request. The evidence in this case shows that the Lincoln SHSDC was comprised of children with mental retardation, autism, and other health impaired, that the District had no other program or classroom in which to place Student, the placement was the most appropriate for Student, and District provided appropriate services to Student through a highly experienced SDC teacher. District's evaluation of Student's performance in the general education classroom setting showed that Student was not developing as quickly there as he was observed to be doing in the SHSDC. Student needed placement in a more structured classroom setting as that provided in the SHSDC. The IEP offered Student a placement in the least restrictive environment and was appropriate.

Issue VIII. If Student prevails on his claims, is he entitled to the following remedies at the District's expense?

25. (A.) Private assessments by educational psychologists or psychiatrist at the District's expense to determine student's proper eligibility classification;

No. Based upon Factual Findings 51-61, and Legal Conclusions 71-77, Student is not entitled to placement in a full-day pre kindergarten program and/or full-day head start preschool program in the Palmdale School District. Concerning Students entitlement to placement in an equivalent NPS, Student failed to present any evidence on this issue.

(B) Placement in a full-day mainstream Pre-Kindergarten program with non-disabled peers with appropriate services. In the alternative placement in a full-day head Start-State preschool program in the Palmdale School District or in an equivalent full-day non-public school program with non disabled peers and supplemental services designed to assist an autistic child;

No. The IEPs of June 16, 2006 and September 13, 2006, offered to provide the following services to Student: transportation, a one-to-one paraeducator who would be trained to assist students with autism, and an inclusion specialist. Based upon Factual Findings 65-78, and Legal Conclusions 17, the services requested by Student as a remedy are offered within Student's IEPs, thus no such remedies are warranted.

(C) Transportation;

No. The IEPs of June 16, 2006 and September 13, 2006, offered to provide the following services to Student: transportation, a one-to-one paraeducator who would be trained to assist students with autism, and an inclusion specialist. Based upon Factual Findings 65-78, and Legal Conclusions 17, the services requested by Student as a remedy are offered within Student's IEPs, thus no such remedies are warranted.

(D) A one-to-one specially trained paraprofessional designed to assist students with autism;

No. The IEPs of June 16, 2006 and September 13, 2006, offered to provide the following services to Student: transportation, a one-to-one paraeducator who would be trained to assist students with autism, and an inclusion specialist. Based upon Factual Findings 65-78, and Legal Conclusions 17, the services requested by Student as a remedy are offered within Student's IEPs, thus no such remedies are warranted.

(E) An inclusion specialist;

No. The IEPs of June 16, 2006 and September 13, 2006, offered to provide the following services to Student: transportation, a one-to-one paraeducator who would be trained to assist students with autism, and an inclusion specialist. Based upon Factual Findings 65-78, and Legal Conclusions 17, the services requested by Student as a remedy are offered within Student's IEPs, thus no such remedies are warranted.

(F) A biannual formal observation and assessment by an educational psychologist to adjust services provided in both the general and special education settings.

No. Finally, Student's request for ongoing observations and assessment by an educational psychologist would not be warranted in any event. Student failed to produce any evidence that would support the need for such a remedy. The IDEA provides for assessments by District annually, triennially, and as the need develops. Based upon Factual Findings 51-56 and Legal Conclusions 1-17, Student's request for such a remedy is unwarranted.

#### ORDER

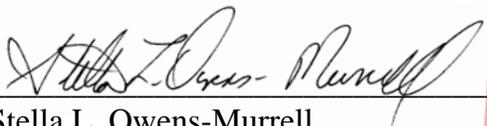
1. The District's June 14, 2006 multidisciplinary assessment was appropriate.
2. The District's eligibility determination in the 2006-2007 school year was not appropriate.
3. Student is deemed eligible for special education services as a child with autistic-like behaviors and as a child with mental retardation.
4. Student is not entitled to obtain an IEE at public expense.
5. Student is not entitled to reimbursement for cost of the IEE of Larry Gaines, Ph. D., dated June 21, 2006.

#### 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.

1. Student prevailed on issue V to the extent that the District failed to properly identify Student's eligibility category(s).
2. The District prevailed on all other issues.

December 8, 2006

  
Stella L. Owens-Murrell  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division

## RIGHT TO APPEAL THIS DECISION

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