

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

In the Matter of:

NEWARK UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007040381

**DECISION**

Charles Marson, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 16, 17, 18, and 21, 2007, in Oakland, California.

Dora Dome, attorney at law, represented Petitioner (District). Laurette M. Garcia, attorney at law, represented Respondent (Student).

Student's mother (Mother) was present throughout the hearing. Leslie Koelsch, the District's Director of Special Education, was present throughout the hearing.

The request for due process hearing was filed on April 13, 2007. At hearing, oral and documentary evidence were received. On May 21, the matter was continued to June 30 for closing briefs and submission.

**ISSUES**

1. Were the District's September 2006 assessments of Student appropriate?
2. Is the Student no longer eligible for special education services?

## CONTENTIONS OF THE PARTIES

The District contends that the preacademic, occupational therapy, psychoeducational, and speech and language assessments it conducted for the September 29, 2006 IEP meeting were appropriate. Student contends that they were not because the District failed to assess him in social pragmatics, an area in which the District should have suspected that he had educational needs.

The District contends that Student made great progress in its preschool Special Day Class (SDC), and that, by September 2006, Student had overcome the speech and language disorder that made him eligible for those services. As a result, the District argues it appropriately determined on September 29, 2006, that Student no longer required special education, and that the degree of his impairment, if any, was sufficiently mild that all his educational needs could be met in a regular education classroom. Student does not contend that he is eligible for special education services as speech and language impaired, but instead contends that he is eligible for special education in the categories of autistic-like behavior and other health impaired. He contends that these disabilities so impair his social and other functioning that he still requires placement in the SDC, and that all his educational needs cannot be met in a regular education classroom.

## FACTUAL FINDINGS

### *Background*

1. Student is four years of age and resides with his parents (Parents) within the geographical boundaries of the District. In the school year (SY) 2005-2006, he received special education and services from the District in its Whiteford Preschool SDC (Whiteford) due to a speech and language disorder.

2. On September 29, 2006, the District determined that Student was no longer eligible for special education. Since the District had no regular education program for a student his age, Student left the District's schools. Instead, he attended a group for young children at the Newark Community Center (NCC) until March 15, 2007, when he returned to Whiteford pending the outcome of this proceeding. In SY 2007-2008, Student will be eligible for enrollment in a District elementary school.

### *Appropriateness of the assessments*

3. In the summer of 2006, Parents and the District agreed upon an assessment plan that authorized psychoeducational, speech and language (S/L), preacademic, and occupational therapy assessments of Student. Only the psychoeducational and S/L assessments are challenged as inappropriate here.

4. Assessments upon which a special education determination is based must comply with numerous legal requirements. They must, for example, 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 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 this is not feasible. Assessments for educational need must be done in all areas related to any suspected disability the student may have.

#### *The Psychoeducational Assessment*

5. Student was given a psychoeducational assessment in September 2006 by Anjanette Pelletier, a school psychologist for the District. Pelletier has a bachelor's degree in psychology, a master's degree in Clinical Child Psychology, an educational psychologist's credential, and is in her tenth year as a school psychologist. She reviewed Student's files and history, and observed him in class and on the playground. She administered to Student the Wechsler Preschool and Primary Scale of Intelligence – III (WPPSI-III), on which Student had a verbal score of 104, a performance score of 119, and a full scale score of 110, placing him at the high end of the average range relative to his peers. She rated him within the average range in verbal areas, and above average in nonverbal areas. He displayed good gross and fine motor skills. He was slow in copying drawings and primarily used a palmar (fist) grip on the writing tool, but not to the degree that showed a learning disorder or processing delay.<sup>1</sup>

6. Pelletier also administered to Student the Southern California Ordinal Scales of Development, the Beery Developmental Test of Visual-Motor Integration, the Pediatric Examination of Educational Readiness at Middle Childhood (PEERAMID), the Gilliam Autism Rating Scale (GARS), and the Adaptive Behavior Assessment Scale II (ABAS-II). These other measurements produced results similar to the WPPSI-III: Student was in the average or above average range for his age group in all the skills and functions measured. On the GARS, a rating scale designed for use in the diagnosis of autism, Pelletier asked Jensen, Moniz, and Mother to assign numerical rankings in areas such as stereotypical behaviors, communications, and social interaction, and did so herself based on her observations. Jensen and Moniz, the teachers who knew Student best, gave him ratings that indicated the probability of autism was very low. Pelletier's own ratings fell in the low range, and Mother's fell at the lowest end of the average range (91 out of an average range of 90-110). Pelletier reported that Mother's ratings were "overall ... not consistent with Autism Spectrum criteria to a significant degree" and, even with the level of social interaction

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<sup>1</sup> Mother had expressed to the District her concern that Student could neither use a tripod grip nor write his name. However, the evidence was undisputed that, at his age, he was not expected to have mastered those skills, and that his difficulties were age-appropriate.

Mother reported, Student “would not meet cutoff scores for an Autism Spectrum diagnosis on this rating scale.”

7. Pelletier found that, on the ABAS-II, an adaptive behavior rating scale, Student’s teachers rated him as having “strong functional preacademic skills, average communication, leisure, and social abilities, and average abilities to choose his activities and take care of his own needs in the school setting.” Mother, she noted, reported “significantly weaker abilities in home living abilities, health and safety at home, self-care, and social interactions.” As Pelletier reported, and as she and others testified, it is not uncommon that a Student’s behavior is different and less desirable at home, usually due to the relative lack of a structured setting. District employees were aware, from previous conversations with Mother, that there was a marked difference in Student’s behavior at school and at home.

8. After summarizing her findings, Pelletier concluded that “[a]t this time [Student] does not demonstrate any evidence of learning weaknesses or disability that would be considered educationally relevant or would indicate a need for specialized instructional services.”

9. On its face, Pelletier’s psychoeducational assessment complied with the statutory requirements for assessments. Student faults it on the grounds that Pelletier allegedly should have used a test for social interaction different from the GARS, and that she engaged in some speech and language testing that only a speech and language therapist should undertake. Those claims are addressed below.

#### *The speech and language assessment*

10. The District’s speech and language (S/L) pathologist Jayne Fong assessed Student in September 2006. Fong has bachelor’s and master’s degrees in speech language pathology and audiology, a clear credential for clinical or rehabilitative services, and is licensed as a S/L pathologist by the state. She also has a certificate of clinical competence from the American Speech Language and Hearing Association, which required that she complete an additional year of clinical work beyond her degrees. She has been evaluating and treating school-age children for 11 years.

11. Fong administered to Student the Peabody Picture Vocabulary Test–III (PPVT-III), the Expressive One Word Picture Vocabulary Test (EOWPVT), the Preschool Language Scales, fourth edition (PLS-IV), and the Goldman Fristoe Test of Articulation, second edition (GFTA-II). On the PPVT-III and the EOWPVT, Student scored in the 53d percentile among his peers. On the PLS-IV he scored in the 75th percentile in auditory comprehension, and in the 73d percentile in expressive communication. His receptive language was also age-appropriate. The number of errors he made on the GFTA-II was age-appropriate. Fong concluded that all his speech and language skills were age-appropriate, and that “[student] is not showing weaknesses that are interfering with his academic, language or functional progress.”

12. On its face, Fong's S/L assessment complied with the statutory requirements for assessments. Student argues that it did not, because Fong failed to assess in an area of suspected disability, pragmatic language (also known as social pragmatics, which addresses how language is used in social interaction). Fong testified that she did not test Student for social pragmatics because his pragmatic language was age-appropriate and he was not showing any deficit in it. She also did not test for it because no age-appropriate standardized test was available; standardized tests for social pragmatics are effective only for children five years old or older.

13. Leslie Jacobs, an educational psychologist in private practice, testified on Student's behalf.<sup>2</sup> Jacobs testified that there is a standardized test for pragmatic language that is accurate for children under five, the Hawaii Early Learning Profile (HELP). However, her claim was not entitled to substantial weight. She admitted on cross-examination that, not being a S/L pathologist, she did not administer the HELP herself, and, without the manual in front of her, could not state whether the test was standardized. Her belief that it was a standardized test accurate for children under five rested solely on the fact that a S/L pathologist with whom she had worked had used it on preschoolers.

14. The weight of evidence showed that there was no accurate standardized speech and language test for pragmatic language for a child less than five years of age. Fong, a S/L therapist, was more qualified to know, and Jacobs's belief to the contrary had no substantial basis.

15. Student's witnesses conceded that the District did assess for social pragmatics. Student's expert Liza Stevens, the psychologist at the Kaiser Permanente Autism Spectrum Disorders Center who assessed Student independently, testified that the Gilliam Autism Rating Scale (GARS) administered by psychologist Pelletier does contain communications and social interaction subtests that inquire into social pragmatics. Student responds that the GARS was not the best test of social pragmatics for him. Student's psychologist/advocate Jacobs testified that it would have been "more appropriate" to use the Autism Diagnostic Observation Schedule (ADOS) because it is more interactive. In her view, the GARS is merely a checklist for observations, while the ADOS is better because it requires interaction with the child. Jacobs testified that while the GARS worked well for children with more serious autism symptoms, in her experience it did not reveal any problems in higher-functioning children on the autism spectrum. However, in Student's case, Jacobs admitted that the GARS did produce scores that showed he had some problems, though they meant that he had a low probability of being on the autism spectrum. It did not, in other words, fail in the way that she anticipated it would. She admitted that the teachers' ratings on the GARS were based on their personal knowledge of Student in their classes. This implies that the teachers' observations were based on interaction with Student, the element Jacobs thought the GARS lacked. Jacobs also admitted that the District relied on observations, as well as the GARS, in assessing Student's social functioning.

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<sup>2</sup> Jacobs appeared in this matter as Mother's advocate, and also as her expert in school psychology.

16. Psychologist Liza Stevens of Kaiser, Student's other expert, also prefers the ADOS to the GARS; she uses the ADOS in her own diagnoses. She testified that while the GARS examines the likelihood of autism, it does not diagnose autism, and so she prefers to use it as a preliminary screener. She testified, however, that the GARS can be used "as an indicator of whether there's an issue going on." The most updated and recent research, she testified, suggested that "the most accurate clinical diagnosis" can be obtained, with an accuracy rate of 98 percent, by combining a patient's history with the ADOS and with the Autism Diagnostic Interview Revised (ADIR), whereas the accuracy rate of the ADOS alone, combined with history and clinical judgment, was between 85 and 89 percent. However, in describing this research, Stevens did not compare the accuracy rate of the ADOS to the GARS. The research was done by the developer of the ADOS, Dr. Catherine Lord, who had an interest in promoting her own test.

17. Student's argument that the District should have used the ADOS rather than the GARS in testing him for social pragmatics was not persuasive. Jacobs's testimony lacked weight because, contrary to her belief and expectation, the GARS, as used in Student's psychoeducational assessment, solicited information based on interaction with Student, and showed that he was not completely without symptoms of autism even though he was high-functioning. Stevens's choice of tests was premised on accuracy for clinical diagnosis, not educational assessment. School districts do not diagnose autism. Moreover, the law requires that assessment tools be used for the purposes for which they are valid and reliable, provide relevant information that directly assists persons in determining a student's educational need, and accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure. Student produced no evidence that the GARS failed any of these requirements. In any event, the District's assessment of Student's social difficulties relied on considerably more than the GARS alone.

18. Student also argues that only a S/L pathologist is qualified to inquire into social pragmatics, not a psychologist like Pelletier. Jacobs criticized Pelletier for making the inquiry on the ground that she was not "credentialed" to do it. Therefore, Student argues, an assessment for pragmatic language was not done at all, because it was not done by a person qualified to do it. However, Student's argument is both too categorical and too constricted. The law does not require assessment in subcategories predetermined by professionals, nor in subjects as narrowly defined as "pragmatic language." Instead, it requires that a district assess in all "areas related to" a suspected disability, and gives statutory examples that illustrate the breadth of the term "areas," such as "health and development," "language function," "communicative status," and (most pertinent here) "social and emotional status." An inquiry into social and emotional status implicates the skills of a psychologist as well as a S/L therapist.

19. Student's argument illustrates the shortcomings of assessing by categories rather than by individual needs. Mother and Jacobs allege that Student displays these specific deficits: being without friends; playing by himself rather than with others; failing to initiate conversations with peers; failing to discern or act on social cues; poor interaction with peers and adults; talking "at" rather than "to" people, especially his parents; using an

overly loud voice to emphasize his statements; having tantrums ("meltdowns") more often and more seriously than other children; rigidly clinging to his viewpoint; talking only about the things that interest him, not about the interests of others; engaging in stereotypical behaviors characteristic of children on the autism spectrum such as rapidly licking his lips and playing inappropriately with objects; having difficulty with transitions; resisting verbal commands; and not paying attention to classroom activities. None of these alleged deficits involves any difficulty in understanding or using spoken language. Instead, they involve Student's interactions with the people and objects around him, conducted by speech, gesture, and otherwise. All the evidence showed that Student has a good vocabulary, is articulate, and speaks in an age-appropriate way. Student concedes in his closing brief that his communications difficulties "are not with spoken language itself." For this reason, a speech and language therapist was not the only professional qualified to assess Student's suspected area of social and emotional educational need.

20. The evidence showed that the District's assessments inquired extensively into the possible existence of the specific deficits Student is alleged to have. The preacademic assessment examined how he engaged in large and small group activities. The OT assessment noted that he was talkative and friendly, and examined how he threw and kicked balls and engaged in pretend play with his peers, and how he participated actively on the playground, in the classroom, and in circle time, listening and responding verbally to instructions. Pelletier's psychoeducational assessment shows that, by substantial direct observation, she examined Student's alleged delays in socialization areas; his level of social understanding; his conversations at work and play with adults and peers; his ability to engage in shared, imaginative, and reciprocal play; his eye contact; his ability to deal with transitions and changes; possible word repetition; stereotypical and atypical behaviors; frequency of engagement with peers and adults; adherence to classroom routine; level of vocabulary and interactive conversation when engaging with others; and empathy skills. Overall, from these observations Pelletier concluded that Student displayed average abilities in social interaction in comparison to his peers.

21. The evidence showed that the District properly assessed Student in accordance with statutory requirements. More than one procedure was used in its determination. Its tests and assessment materials were properly administered by trained personnel and produced relevant and accurate results. They were not administered in a racially, culturally, or sexually discriminatory manner. They were administered in Student's primary language. The District assessed Student in the area of social and emotional status. Specifically, it assessed him for the range of individual social and emotional problems he is alleged to have. The District therefore assessed Student in all areas related to any suspected disability. Since Student does not allege that there is any other shortcoming in the District's assessments, those assessments were appropriate.

#### *The Determination that Student was No Longer Eligible for Special Education*

22. The District determined at its September 29, 2006 IEP meeting that Student was no longer eligible for special education, and revisited and reaffirmed that determination

in three subsequent meetings. The wisdom of an IEP decision is measured according to the information the District had, or should have had, at the IEP meeting, not by what later may have occurred. The District had different knowledge at each of the four meetings.

23. A student with a disability belongs in the least restrictive environment in which he can be satisfactorily educated. He should receive special education and services only if he cannot be satisfactorily educated in the regular education environment. To be eligible for special education, he must require instruction or services which cannot be provided even with modification of the regular school program.

*The September 29, 2006 IEP Meeting*

24. The IEP meeting on September 29, 2006, at which the District made the determination of ineligibility, was attended by Parents, and by SDC teachers Jensen and Moniz; occupational therapist Jones-Harrison; S/L pathologist Fong; and psychologist Pelletier. In addition, Leslie Koelsch, the District's Director of Special Education, was present, as were SDC teacher Julia Weber, Program Specialist Russ Riley and behaviorist Le-Ann Elgie.

25. The information before the IEP team on that day included the four assessments described above, a teacher's report from Jensen, materials provided by Mother, and the oral contributions of all the participants. The District participants unanimously concluded, based on the assessments and their own experiences with Student over the past year, that Student had made so much progress that he was no longer eligible for special education because of a speech and language deficit, or because of autistic-like behaviors. Their assessments and experiences fully supported that conclusion.

26. Moniz, Pelletier, Fong, and Jones-Harrison each presented and discussed her assessment. Moniz, in her preacademic assessment, had administered to Student two standardized tests, the Bracken School Readiness Assessment and the Brigance Kindergarten Screener. On the former, Student ranked in the 94th percentile relative to his peers, and was categorized as advanced. On the latter, he was categorized as higher than average. In classroom observations of Student's social interactions, Moniz observed that Student was able to engage in imaginary play, to participate actively in group time, and to participate in small group activities. Moniz concluded that Student had shown "significant improvement in all areas of development" and "shows no pre-academic delays at this time." Similarly, Jones-Harrison had found in her OT assessment that Student's skills were age-appropriate on all measures, and concluded that "[n]o direct occupational therapy services are warranted for [Student] at this time."

27. Each assessor reported that she knew of no reason Student could not prosper in regular education. Jensen and Pelletier expressed concern that if Student continued in an SDC, he would not have available appropriate models for language, behavior, and self-help skills. In addition, Koelsch, who has been both the Director of Special Education for the District and the Principal of Whiteford since 1992, had as part of her duties observed Student

several times in the SDC. Her reaction was to wonder why Student was in special education; she agreed he was ready for a regular education class.

28. In determining whether Student, notwithstanding any impairment, could be appropriately educated in a regular classroom, with appropriate modifications if necessary, the District was aware that its regular education teacher would have available significant resources to assist her if Student required individual attention. If Student were to be placed in regular education, his destination at the beginning of SY 2007-2008 would be the kindergarten classroom of Sheri Heskett, who has taught kindergarten in the District for six years and fourth grade for five years. Heskett has a multiple subject credential and has been a support provider for beginning teachers for five or six years. Her kindergarten class has 20 students. She has a part-time aide to assist primarily with English learners. Heskett testified that she was familiar with Student and had attended one of his IEP meetings.

29. Heskett credibly testified that she was confident she could educate Student adequately in her kindergarten class. Her class has structure and routines. She is sensitive to her students' social interactions and is able to identify a student who is not participating. If she sees that a student is not interacting, she approaches the student herself or sends another student to "buddy up." She routinely places students in groups for the purpose of social interaction, and knows how to identify groups of students that work, and groups that do not.

30. Heskett testified persuasively that she has substantial experience with kindergartners who cry, have tantrums, walk away from each other, and otherwise display the behaviors alleged to be troublesome in Student. This happens, she explained, because the children are just learning how to interact with each other. It is not uncommon, for example, that regular education kindergartners have difficulties with transitions, have tantrums as often as Student does, talk in a loud voice, and have difficulty writing their names with a tripod grip. What matters, she testified, is whether the students could be successfully redirected to desirable behavior and performance, and she is experienced in doing that successfully.

31. Heskett credibly testified that if she becomes concerned that she might not be adequately handling a problem student on her own, there are many resources available to her. In such a case she frequently consults her grade level partner teachers and other teachers. She sometimes involves an on-site resource program specialist, school psychologist, or principal. At the District level, she also has access to a speech teacher and a behaviorist. So far she has found these resources effective in dealing with problem students. If she were to exhaust all these resources unsuccessfully, she could formally request the convening of a Student Study Team (SST), which consists of a parent, a speech teacher, a psychologist, and other specialists. An SST team would then produce strategies for dealing with the student. There was no evidence that these resources would be insufficient to assist Heskett in successfully educating Student in her regular education kindergarten class, or in modifying his program to meet his individual needs. All these resources are part of the District's regular education kindergarten program, not functions of special education.

32. The information before the IEP team on September 29, 2006, described above, amply supported the District's determination that Student, notwithstanding any deficits, could adequately be educated in the regular education environment and was no longer eligible for special education.

33. At the September 29, 2006 IEP meeting, the District members of the IEP team considered and ruled out Student's possible eligibility for special education on two grounds: a speech and language deficit, and autistic-like behaviors. The District's determination that Student was no longer eligible for special education because of a deficit in speech and language was clearly correct, and is not challenged here; Student no longer argues he is eligible on that ground.

*Mother's arguments for eligibility due to autistic-like behaviors*

34. In order to be eligible for special education because of autistic-like behaviors, a student must display any combination of several autistic-like behaviors, such as: an inability to use oral language for appropriate communication; a history of extreme withdrawal or relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood; an obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects or both; extreme resistance to controls; peculiar motoric mannerisms and motility patterns; or self-stimulating, ritualistic behavior.

35. Orally and in a letter submitted to the meeting, Mother protested the District's view that Student was no longer eligible for special education. She wanted him to receive speech therapy, OT, and special classes to advance his social ability and verbal and nonverbal communications skills. Her claim that Student was still eligible for special education focused on his display of autistic-like behaviors. She reported her own observations, made mostly at home, that Student had a hard time maintaining social interaction, eye contact, and body awareness. She described difficulties with his speech, the writing of his name, tracing, buttoning, and weaknesses in other fine motor skills. These observations were not consistent with what the District members of the IEP team saw at school, or with the District's assessments.

36. In her letter and at the meeting, Mother also argued that four professional opinions showed that Student was still eligible for special education because of autistic-like behavior. The first was an assessment by Children's Hospital of Oakland (CHO) on June 8, 2005, when Student was 33 months old. The report did not support Mother's argument. The CHO assessment reported the results of three normed tests, including the Childhood Autism Rating Scale (CARS). CHO found Student's skills were mostly age-appropriate, though he was lower than average in speech and language. On the CARS, Student was moderately abnormal in his reaction to pain, fear of other children, and level of energy (Student's was "boundless"). He reversed some pronouns. His total score on the CARS was "in the non-autistic range and ... not consistent with a disorder on the autism spectrum." CHO did recommend that a S/L disorder "should be ruled out," that Student be made eligible for

Regional Center services because of low socialization and possible language disorder, and that a S/L evaluation be administered.

37. The CHO report was one reason the District had admitted Student to the SDC in SY 2005-2006. But it had little to do with Student's eligibility 15 months later. As S/L therapist Fong's September 2006 assessment showed, Student had made so much progress in a year that his S/L skills were all age-appropriate, and above average by most measures. Moreover, although nothing was ruled out in the CHO report, it did strongly suggest that Student was not eligible under the category of autistic-like behavior.

38. The second professional opinion cited by Mother was by an unnamed physical therapist at Kaiser Hospital in Union City, who found on January 16, 2006, that Student demonstrated the skills of a 19-month-old child and needed occupational therapy. Student introduced no evidence in support of that claim, and has not pursued it here.

39. The third professional opinion cited by Mother was the finding of an unnamed physician in Daly City on January 31, 2006, that Student displayed the symptoms of Pervasive Development Disorder, a disorder on the autism spectrum. Student did not rely on that opinion at hearing, or introduce evidence regarding it.

#### *The Kaiser Report*

40. The fourth professional opinion cited by Mother was the report of Liza Stevens, a psychologist at the Kaiser Permanente Autism Spectrum Disorders Center, whose written report (the Kaiser report) the District had received the day before the IEP meeting. In that report, psychologist Stevens diagnosed Student as having Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), a disorder at the high-functioning end of the autism spectrum according to the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (DSM-IV). Of the DSM-IV's twelve diagnostic categories indicating autism, Stevens found that Student displayed marked symptoms in five areas: 1) impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interactions; 2) lack of social or emotional reciprocity; 3) marked impairment (in individuals with adequate speech) in the ability to initiate or sustain a conversation with others; 4) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus; and 5) apparently inflexible adherence to specific, nonfunctional routines or rituals.

41. Stevens reached her conclusions through eight evaluation procedures: review of patient records; a clinical interview with parents; a completed parents' orientation packet; direct behavioral and developmental observation; a developmental history questionnaire; an "[a]ges and [s]tages" questionnaire; a parent and teacher report from the Developmental Behavioral Checklist (DBC); and administration of the Autism Diagnostic Observation Schedule (ADOS).

42. Because the IEP team received the Kaiser report only a day before its meeting, and at that time had no consent to exchange information with Kaiser, it could not discuss the report with its author.<sup>3</sup> However, psychologist Pelletier took the Kaiser report home the night before the meeting, considered it, and rewrote her own assessment in order to address it. The IEP team thoroughly considered the Kaiser report at its meeting the next day, but justifiably did not agree with its conclusions for the reasons that follow.

43. While Stevens made a psychiatric diagnosis, the IEP team made an educational determination. Each had a different focus and purpose, and proceeded in different ways. The IEP team took no position on the accuracy of Stevens's diagnosis of PDD-NOS; its concern was not with his symptoms but with the educational relevance those symptoms may have had. Mother's statements to the IEP team, and the Kaiser report, together established that Student did in fact display a combination of autistic-like behaviors in the home. At minimum, they showed that student displayed an extreme resistance to controls, and peculiar motoric mannerisms and motility patterns. The District does not argue that Student did not display this combination of behaviors at home. The IEP team properly focused instead on whether, notwithstanding his deficits, Student could be satisfactorily educated in a regular education classroom, considering the resources available and any modifications that could be made for Student there. That question was not addressed by Stevens, who testified that how Student was doing in school would not influence her assessment, because her criteria were diagnostic, not educational.

44. The Kaiser report relied almost exclusively on non-school sources of information. At least five of Stevens's eight sources of information relied primarily on information from parents, acquired at home and in other non-school environments. Most of Kaiser's recommendations were for facilitating social communication and play in the home. The nine-page report contained very few mentions of Student's behavior at school. Steven's own observation of Student, over six hours on one day, occurred in a clinical setting. Stevens agreed with District witnesses that a student may not perform as well in that setting as he might at school, with people he knew. Some members of the IEP team, by contrast, had observed Student in school for a year.

45. As the District was already aware, there was a striking difference between Student's behavior at school and at home. Student's SDC teacher Jensen, who testified that Student had no more, or more serious, tantrums at school than other children his age, was aware that at home he sometimes threw himself on the floor and screamed. Jensen had had repeated conversations with Mother about the need for schedule and routine at home, and the need to be consistent at school and home. Psychologist Pelletier had noted the sharp difference in reported behavior at school and home in her assessment. Notes of a later IEP meeting state that Mother "acknowledges she caters to [Student's] whims, desires and needs." Thus information about Student's behavior at home was of less help than usual to the IEP

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<sup>3</sup> Mother executed a consent form, and Fong tried several times during the fall to contact Stevens by telephone and fax, but was unsuccessful in speaking to her directly.

team in determining how Student would do in a regular education classroom.<sup>4</sup> Information about Student's behavior in a school was worth far more to the IEP team in its determination than information about his behavior anywhere else.

46. The only information Stevens had from Student's school setting was obsolete. It came from Jensen's answers to questions on a form she had filled out for Kaiser in January 2006, based on her recollections over the previous semester. Stevens did not identify in her report any information as coming from Jensen, although, in several passages, she prefaced a finding with the words "[i]t is reported that ... ," and some of these were references to information Jensen had supplied. Jensen knew, and told the IEP team, that her January 2006 answers, based on her fall 2005 experiences with Student in the SDC, did not reflect her views in September 2006. Jensen recognized that some of the deficits identified by Stevens had existed in the previous school year; that is why she reported them on Kaiser's form. But Jensen believed they had been addressed and corrected well before the September meeting, so the information she had supplied was obsolete by the time Stevens relied on it in May, and was even more so by September. At hearing, Jensen reviewed each of the five symptoms relied on by Stevens to arrive at her diagnosis, and testified that none of them was accurate, at least in school, by September 2006. For example, Student no longer displayed an inability to communicate nonverbally with his peers, inadequate eye contact, or flat expression. He had occasional tantrums, but they were neither as frequent nor as dramatic as Stevens described; he did not throw himself on the ground and scream. His tantrums and adverse reactions to changes in routine were no more frequent or serious than those of others his age.

47. Most of the other information in the Kaiser report was, in the District's view, also obsolete. Parents' reports to Stevens began with incidents that occurred when Student was 11 months old. In discussing Student's language deficits, Stevens relied in part on a District assessment from May 2005, and an IEP from September 2005. Fong did not believe that Stevens's description of Student's language abilities was correct by September 2006. She agreed, as Jensen had, that some of the deficits identified by Stevens existed in the previous school year, but believed that they had been addressed and corrected by September, by which time Student's communications and social skills were age-appropriate. Fong also thought that some of the language difficulties discussed by Stevens, such as pronoun reversal, were common, age-appropriate, and not below the level of Student's peers. These were matters she was better qualified to determine than Stevens. Psychologist Pelletier summarized the view of the District members of the IEP team by testifying that, although they carefully considered the Kaiser report, the student they knew in September 2006 was not the student reflected in that report.

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<sup>4</sup> On April 26, 2007, after the request for hearing in this matter was filed, Mother's psychologist/advocate Jacobs visited Jensen's SDC to observe Student. She reported that she saw there almost none of the troubling behavior she had seen at Newark Community Center (NCC). At hearing, she attributed this difference to the fact that Student was in an SDC, not a regular education class, but no evidence supported that distinction. On cross-examination, Jacobs admitted that the assistance she thought appropriate for Student in an SDC would also be available in a well-run regular education kindergarten class.

48. The Kaiser report's educational recommendations were generic and not tailored individually to Student. The report suggested that Student be given intensive instruction for 25 hours a week in a program for children with autism spectrum disorders, and defined numerous elements of such a program. Those recommendations were summaries of the guidelines of the National Research Council (*Educating Children with Autism* (2002)), and were made by the Kaiser Center's diagnosticians whenever they determined that a student had a disorder on the autism spectrum.<sup>5</sup> Psychologist Pelletier testified that, by the time of the September 29, 2006 IEP meeting, the District had seen many reports from the Kaiser Center, including reports from Stevens, that were "remarkably similar" to Stevens's report on Student. The District introduced in evidence a redacted copy of a Kaiser report by Stevens on another District student, which in the language of its recommendations was in many places identical, and in the rest nearly identical, to Student's Kaiser report. Pelletier had also assessed the student whom the comparison report concerned, and testified without contradiction that his disability was significantly more serious than Student's, and his educational needs quite different. Pelletier testified that students with autism are on a spectrum, and their needs can be very different, so "boilerplate" recommendations not addressing a student's unique needs are not particularly helpful.

49. Stevens testified that the recommendations she made in Student's report were deliberately generic. It was her practice, and Kaiser's, to make educational recommendations in that form because, as she candidly admitted, "I'm not an educator," and making specific educational recommendations was not within her area of expertise. She testified that, in her report, she did not make or intend to make any judgment concerning Student's eligibility for special education. She thought that as long as an IEP team considered her report, she had done her job.

50. As set forth above, because the Kaiser report was only diagnostic, relied mostly on obsolete, non-school-based information, and made generic recommendations not tailored to Student's unique needs, the District was justified in declining to change its recommendation based on that report. Since the team considered all of the relevant information before it, and the other information before the team amply demonstrated that Student could be educated satisfactorily in a regular education classroom notwithstanding his deficits, the District's determination at the September 29, 2006 IEP meeting that Student was no longer eligible for special education was appropriate when made.

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<sup>5</sup> The only two educational recommendations that specifically mentioned Student concerned language and occupational therapy, neither of which is at issue here.

*The December 19, 2006 IEP Meeting*

51. Since Mother did not agree with or sign the September 29, 2006 IEP proposal,<sup>6</sup> the District convened another IEP meeting on December 19, 2006, hoping to persuade her to sign. At that meeting, Mother reported that Alice Cinciarula, one of the two staffers of Student's fall NCC group, had told her that Student had been screaming, refusing to participate, and refusing to follow directions. Mother stated that when she went to NCC to observe Student, she saw the same behavior that Alice had reported to her. Mother also stated that Student had been behaving similarly at home.

52. The District was already aware of Mother's assertions that Student was not doing well at NCC, and had investigated the claim repeatedly. On October 4, 2006, Jensen, Student's SDC teacher and case manager, met with Cinciarula and Evelyn Simmons, the other staffer of Student's fall group at NCC. They told her he was doing "great" there; that if they had not known of his background, they would not have suspected he had a disability; that he played well with other children; and that they wished more of their children behaved like he did. They did mention that he behaved sometimes as if he "owned" a toy, but said that such behavior was not uncommon in his age group.

53. On October 12, 2006, Jensen had observed Student at NCC for more than an hour and had written a report describing his behavior there. Jensen's observations were in all respects consistent with the comments of Cinciarula and Simmons on October 4. On Jensen's visit, Student was social and cooperative, spoke quietly, played appropriately with others, and behaved properly with adults.<sup>7</sup> On December 1, Jensen called NCC to check on Student again. Simmons told her he was doing "terrific," that he had many friends with whom he played appropriately, and that he participated well in group activities. She reported that NCC staffers had not seen Student engage in any negative behaviors since he left Whiteford. In each of Jensen's contacts with NCC staff, she offered to assist them with Student in any way they would find useful. In each, NCC staff told her no assistance was needed.

54. The District correctly did not change its ineligibility determination at its December 19, 2006 IEP meeting. It was justified in declining to act on Mother's representations that NCC staff were concerned and complaining, because those

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<sup>6</sup> Mother testified that Student was forced out of Whiteford as a consequence of the District's ineligibility determination. District witnesses testified that they believed Mother accepted the ineligibility determination and voluntarily removed him. Since Student seeks no relief from the District, it is unnecessary to resolve that dispute here. At Mother's request, Student returned to Jensen's SDC on March 15, 2007, pending the outcome of this proceeding.

<sup>7</sup> Student contends that, at minimum, the District should have given him some sort of gradual transition plan to ease his move away from special education. However, Jensen's report, her information from NCC staff, and all the other relevant evidence showed that Student's first weeks away from Whiteford were trouble-free. Mother's advocate Hilary Jacobs was later to report that Student "[i]nitially ... did quite well ..." at NCC. At hearing, Jacobs called Student's first few weeks at NCC after leaving Whiteford a honeymoon period. Thus there was no evidence that Student needed a transition plan.

representations were inconsistent with the many reports Jensen had gotten directly from NCC staff, as well as with Jensen's own observations.<sup>8</sup> The IEP team again discussed the stark difference between Student's behavior at school and at home, and Mother was again urged to impose some structure, predictability, and discipline into Student's life at home.

*The February 21, 2007 IEP Meeting*

55. In January 2007, Jensen was still concerned with the disparity between what Mother told her was happening to Student at NCC and what the NCC staff told her. Jensen called NCC on January 9, and was told that the staff were still not troubled by Student's behavior. He occasionally resisted when asked to do something, but not to the degree that staff had a major concern. They reported that he was within the average range of functioning for his age group. On January 15, Jensen wrote to NCC staff confirming that conversation, but mentioning that Mother, to the contrary, had been telling the District that NCC staff were reporting serious problems to her. Jensen therefore asked NCC staff to let her know if in fact such concerns existed, and renewed her offer to help if needed. NCC staff did not respond to the letter. In late January, Student was transferred to a new group at NCC for the spring. Jensen called his new lead staffer, Debra Longarini, whose report on Student's progress was consistent with the earlier reports from NCC staffers.

56. On February 5, 2007, Mother wrote to the District, confirming that at her request the District had called an IEP meeting for February 21. In her letter Mother restated many of the positions she had previously taken. She criticized the District for failing properly to assess Student for social pragmatics, and claimed that Student was experiencing "severe regression" in his "general education program" at his "private preschool."<sup>9</sup>

57. The IEP meeting on February 21, 2007, lasted about ten minutes and did not address substance. The District had mailed a notice to Mother that it would be represented at the meeting by an attorney, and appeared with an attorney, but Mother stated she had not received the notice. Jacobs refused to proceed, and another meeting was scheduled for March 14.

*The March 14, 2007 IEP Meeting*

58. Mother and her advocate, Hilary Jacobs appeared at the March 14, 2007 IEP meeting and urged that the District reconsider Student's eligibility on a number of grounds. The District considered all the grounds advocated by Mother and Jacobs, but did not alter its determination that Student was no longer eligible for special education and could be adequately educated in the regular education environment. It was correct in doing so.

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<sup>8</sup> At hearing, Cinciarula confirmed Jensen's testimony about their meeting and conversations, agreed that she had told Jensen Student was doing well, and reiterated that NCC staff needed no help in handling Student.

<sup>9</sup> There was no evidence produced at hearing that Student had regressed during this period. Jensen testified she noticed no regression when he returned to her SDC in March.

59. The only new information before the IEP team in March was a psychoeducational evaluation of Student by advocate Jacobs, purporting to act in the role of neutral and objective school psychologist.<sup>10</sup> Jacobs's evaluation was based on record review, medical and developmental history, parent interviews, and on Jacob's own 90-minute observation of student on February 14, 2007, at NCC (Student's "preschool setting"). In the preface to the report, Jacobs claimed that she had also used "[n]on-standardized assessment instruments," and "[s]tandardized assessment instruments (when appropriate)," but there was no reference later in the report to the use of any such tools.

60. Jacobs's report of her observations at NCC was far more negative than that of any previous assessor. She found him unengaged in activities and anti-social with his peers. She reported he maintained poor eye contact, had trouble with representational play, failed to interact with adults or other children, played only by himself, rapidly licked his lips, inappropriately fondled a washing machine, refused direct instructions, and was frequently irritated or disturbed. She concluded that he demonstrated significant difficulties with auditory comprehension,<sup>11</sup> fine motor tasks, social engagement, and classroom functioning, all difficulties characteristic of children on the autism spectrum. She found that his NCC program did not meet his unique needs, and that the "best" program for him would be a small, structured, specialized setting.

61. Jacobs's report shows that her opinion that Student could not adequately be educated in a regular education classroom was based wholly on the assumption that Student was not doing well in the "general education" environment of his NCC "preschool." However, the evidence showed that NCC was not a general education environment or a preschool. It is part of a recreational facility, licensed only as such, that operates under the authority of the Recreation Department of the City of Newark, and contains groups for children, senior citizens, and others. The staff of Student's group are not trained or licensed as teachers. Most staffers happen to have high school diplomas, but that is not a job requirement; as one NCC staffer put it in her testimony, the minimum requirement for working there is simply a willingness to show up and do it. Jacobs admitted at hearing that she was unaware that the NCC group was not a school, had no license, and had no trained teachers or other educational resources. Thus her central premise was unsupported by the evidence. The District was not aware, at its March 2007 meeting, that NCC was not a

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<sup>10</sup> Jacobs has been a school psychologist since 1994, and has worked in that role for the Alameda Unified School District, the Milpitas Unified School District, and the Sunnyvale School District. She has considerable experience assessing children, and in working with children on the autism spectrum. She now operates a consulting business called Jacobs' Ladder.

<sup>11</sup> Jacobs testified that she based this conclusion only on the fact that Student did not act on instructions when she observed him at NCC. She admitted on cross-examination that Student heard and followed instructions well when she observed him in Jensen's SDC. On the Preschool Language Scales, fourth edition (PLS-IV), administered to Student by Fong, Student scored in the 75th percentile in auditory comprehension. Jensen testified that Student always responded to her questions and instructions right away. Thus there was no substantial evidence that Student suffers from an auditory processing delay, and Student does not pursue the argument in his closing brief.

preschool. It was aware, however, that Jensen had repeatedly contacted three of the four NCC staffers who worked with Student at NCC, and had received consistent reports from them that contradicted Jacobs's observations.<sup>12</sup> The District properly relied more on the reports from NCC staffers who saw Student three days a week for months than on Jacob's impressions from her one 90-minute visit.

62. Jacobs was aware that not every student on the autism spectrum is eligible for special education, and conceded in her report that Student was probably not eligible because of autism. Her conclusion was:

While [Student] may not meet the strict criteria for the educational classification of Autism, he clearly has educationally related needs due to his disability. Thus, additional classifications such as speech and language impairment, specific learning disability, or other health impaired should be investigated. The educational classification of Autism is more characteristic of individuals on the moderate to severe end of the autism spectrum. [Student] ... is most likely on the moderate to mild end of the Autism spectrum.

63. The District members at the IEP meeting on March 14, 2007, had several reasons for finding Jacobs's arguments unpersuasive. Jacobs was Mother's advocate before and after her observation of Student. The conflict between the two roles was apparent, and emerged from the tone and language of Jacob's report. The District properly discounted Jacobs's professional opinion because of her conflicting advocacy role.

64. Jacobs's report from her NCC observation focused almost entirely on possible symptoms of autism, yet she admitted in the report that Student "may" not be eligible for special education under that category. The District was entitled to conclude that if even Mother's advocate doubted that Student displayed sufficient autistic-like behaviors to qualify for special education, he was not likely to be eligible under that category.

65. A student may be eligible for special education in the category of other health impaired if he has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affect his educational performance.

66. Since Jacobs's report suggested that Student's possible eligibility in the category of other health impaired should be "investigated," the IEP team considered

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<sup>12</sup> In May 2007, while this matter was pending, Mother wrote a letter setting forth Student's alleged behavioral difficulties at NCC for the signature of NCC staffer April McCane. McCane's report on Student's conduct at NCC was much more negative than those of the other three NCC staffers. However, McCane's views were not before the IEP team at any of its meetings, and therefore are not relevant to the District's determination. McCane and Longarini testified at hearing that Student "may" have difficulty adjusting to kindergarten, but those views were not before the IEP team, and the NCC staffers were without qualifications to advance them persuasively.

eligibility on that ground. However, there was no evidence before the IEP team that Student was eligible for that reason. There was no evidence, on March 14, 2007, or at hearing, that Student lacked strength, vitality, or alertness. There was substantial evidence to the contrary.

67. Jacobs also suggested that the IEP team consider whether Student was eligible for special education due to a speech and language impairment or a specific learning disability. However, there was no evidence before the IEP team that would have justified a finding of eligibility under either of those categories, and Student does not argue otherwise here.

68. Psychologist/advocate Jacobs's report and arguments were properly regarded by the District as unpersuasive for the reasons set forth above. Since that was the only new information before the IEP team, the District appropriately stood by its previous determination.

69. In determining that Student was no longer eligible for special education, the District considered all the relevant material before it. The determination was correct when made, and was properly not altered by anything the District subsequently learned at or before the IEP meetings of December 19, 2006, February 21, 2007, or March 14, 2007. The District's determination that Student was no longer eligible for special education was therefore appropriate.

## CONCLUSIONS OF LAW

### *Burden of Proof*

1. The District, as petitioner, has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 56, 62 [163 L.Ed.2d 387].)

### *Elements of a FAPE*

2. Under the IDEA and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) 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).) "Related services" are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd.(a).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690], 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*, 458 U.S. at p. 198.) School districts are required to provide only 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; see also, *M.M. v. School Bd.* (11th Cir. 2006) 437 F.3d 1085, 1102-03.)

4. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

#### *Requirements for Assessments*

5. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

6. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) Under federal law, an assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) In California, a test must be selected and administered in order to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure ..." (Ed. Code, § 56320, subd. (d).)

7. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) In assessing a possible language or speech disorder, a student's "difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist ..." (Ed. Code, § 56333.)

8. Tests and assessment materials must be validated for the specific purpose for which they are used; 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 this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

9. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (c),(f).) Federal law also requires that the child "is 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 a suspected disability, such as, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (34 C.F.R. § 300.304(c)(4); 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.)

10. *Resolution of Issue No. 1:* Based on Factual Findings 3-25, and Legal Conclusions 1 and 6-10, the District's assessments were appropriate. The assessments complied with statutory requirements. They addressed every area related to Student's disability that the District had reason to suspect might exist, including social and emotional status. The District assessed Student for educational needs related to social pragmatics, both through the GARS test and by inquiry into the specific deficits Student is alleged to have.

#### *Least Restrictive Environment*

11. Federal and state law require a school district to provide special education in the least restrictive environment (LRE). A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of [his] disabilities is such that education in regular 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); Ed. Code, § 56364.2, subd. (a).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) The Supreme Court has noted, however, that IDEA's use of the word "appropriate" reflects Congressional recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.)

#### *The requirement that a disabled student must need special education to be eligible for it*

12. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment "who, by reason thereof, needs special

education and related services." (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).) State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose "impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) Special education is defined as "specially designed instruction ... to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program ..." (Ed. Code, § 56031.) Accordingly, "[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized." (Ed. Code, § 56303; see also, *Hood v. Encinitas Union Sch. Dist.* (9th Cir. 2007) 482 F.3d 1175, 1184 [finding student with specific learning disorder properly placed in regular education under previous version of California statute].)

#### *Determination of eligibility by the IEP team*

13. California Code of Regulations, title 5, section 3030, first paragraph, requires that an IEP team determine eligibility for special education. It provides, in relevant part:

The decision as to whether or not the assessment results demonstrate that the degree of the pupil's impairment requires special education shall be made by the individualized education program team ... [which] shall take into account all the relevant material which is available on the pupil.

#### *Categories of eligibility for special education*

14. A student on the autism spectrum is eligible for special education if he meets two sets of criteria. First, the student must display any combination of the following autistic-like behaviors,

to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.

(Cal.Code Regs., tit. 5, § 3030, subd. (g).) Second, the student's assessments must demonstrate "that the degree of the pupil's impairment ... requires special education ..." (Cal. Code Regs., tit. 5, § 3030, first paragraph.) Federal regulations define autism as "a developmental disability significantly affecting verbal and nonverbal communication and

social interaction, generally evident before age three, that adversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(1)(i).)

15. A student is potentially eligible for special education in the category of other health impaired if he:

has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affect[] [his] educational performance.

(Cal. Code Regs., tit. 5, § 3030, subd. (f); see also, 34 C.F.R. § 300.8(c)(9)). To be eligible, that student's assessments must also demonstrate "that the degree of the pupil's impairment ... requires special education ..." (Cal. Code Regs., tit. 5, § 3030, first paragraph.)

16. *Resolution of Issue No. 2:* Based on Factual Findings 25-69, and Legal Conclusions 1, 5, and 11-16, the District's determination that Student was no longer eligible for special education, made at its IEP meetings on September 29 and December 19, 2006, and February 21 and March 14, 2007, was appropriate. All current assessments and ample other evidence before the IEP team demonstrated that did not display autistic-like behavior to the degree that he required special education to address that deficit, and that he did not qualify in the category of other health impaired. It also demonstrated that Student could be adequately educated in a regular education classroom.

#### ORDER

1. The District's assessments were appropriate.
2. Student is no longer eligible for special education.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 9, 2007

A handwritten signature in black ink, appearing to read "Charles Marson", written over a horizontal line.

CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division