

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2013101124

DECISION

Parent, on behalf of Student, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 10, 2013, naming Los Angeles Unified School District. The matter was continued by stipulation of the parties on December 5, 2013.

Administrative Law Judge Eileen Cohn heard this matter in Van Nuys, California, on March 4, 5, 10, and 11, 2014.

Student's father and brother represented Student. Student's mother attended the hearing with Student. Spanish-language interpreter Bernadette Buckley provided Mother with simultaneous translation of the proceedings.

Attorneys Donald Erwin and Joanne Kim represented District. Francine Metcalf, due process specialist, attended the hearing on behalf of District on March 4, 5, and 10, 2014. Jose Salas, due process specialist, attended the hearing on March 11, 2014.

A continuance was granted for the parties to file written closing arguments and the record remained open until March 26, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

1. Did District deny Student a free appropriate public education at the October 11, 2013 individualized education program team meeting by incorrectly designating Student's eligibility for special education under the category of autistic-like behaviors, instead of speech and language impairment?
2. Did District deny Student a free appropriate public education at the October 11, 2013, IEP team meeting by offering an inappropriate placement in a special day class autism program, which also requires Student to change schools?

SUMMARY OF DECISION

Student contends that he should not have been found eligible under the category of autistic-like behavior, and based upon his erroneous eligibility, District offered an inappropriate placement. Specifically, District's assessment failed to account for the rating scales and observations of Student's classroom teacher, who did not observe Student to have deficits that met the criteria of autistic-like behaviors. Student further contends District failed to account for Student's severe speech and language deficits as an alternate area of suspected disability under the category of speech and language impairment. Based upon District's deficient reevaluation, Student contends that District offered him an inappropriate placement in a special day class designed for pupils who met the eligibility requirement of autistic-like behaviors. Student also contends the offer was inappropriate because it would require him to change schools, which Student contends will force him to leave a familiar environment where he has made friends. As relief, Student requests placement in Hoover Elementary School's special day class for specific learning disabilities.

District maintains that its assessment report met all the criteria for an appropriate assessment and identified all of Student's unique needs and suspected disabilities, including his speech delays. District maintains that based upon the assessment report the IEP team correctly concluded that Student met the criteria for autistic-like behaviors under the Education Code and that Student was offered an appropriate program regardless of Student's eligibility category. District maintains that its offer to place him in a special day class with higher functioning autistic pupils, where he will continue to be mainstreamed with typical peers for activities and academics, is appropriate.

For the reasons set forth below, although the IEP team incorrectly identified Student as eligible for special education under the category of autistic-like behaviors, Student failed to demonstrate that he was denied a free appropriate public education by District's failure to designate Student as eligible under the category of speech and language impairment, or because the program offered by District in the October 11, 2013 IEP was inappropriate. The October 11, 2013 IEP, which provided for placement in a special day class for higher functioning autistic pupils at a school near his home, mainstreaming for academics and other

activities, and related services including speech and language services and behavior support, was reasonably calculated to provide educational benefit in the least restrictive environment.

FACTUAL FINDINGS

1. Student was a nine-year-old male at the time of the due process hearing. At all relevant times Student resided with his parents (Parents) and younger sibling within the District. Student was eligible for special education services under the category of autistic-like behaviors, and provided speech and language services.

Initial Assessment

2. Student was first found eligible for special education in June 2010, when he was five years old, based upon a District psychoeducational report which concluded that Student exhibited autistic-like behaviors due to his weak expressive communication abilities, his inappropriate social interactions, a history of withdrawal and “some” ritualistic behaviors. District’s report identified unique needs arising from receptive and expressive language delays, delayed fine and gross motor skills, and a low average cognitive ability, with specific cognitive challenges due to weak memory, and verbal conceptual and oral skills. Student displayed relatively strong visual processing skills.

3. Student was also identified as an English-language learner. English-language learner status is rated from level 1, the least proficient, to level 5, the closest to complete English-language proficiency. At the time of the hearing, Student had been identified as level 2, with limited English-language proficiency.

4. Since the time Student was initially found eligible for special education, Student has received speech and language services as a related special education service, primarily to address articulation concerns. Within the last one to two years, speech and language services were delivered as a collaborative service where the classroom teacher joined with the speech and language pathologist, Student and a limited group of pupils, thirty to sixty minutes a week, depending on agreements reached with Parents at IEP team meetings.

2012-2013 School Year

5. Student attended second grade at Hoover, with aide support, in an alternative curriculum special day class for pupils identified with autistic-like behaviors. Hoover was not Student’s home school, but it was close enough for Mother to walk Student to and from home each day. Mother preferred to walk Student although District offered transportation from his home school to Hoover. Parents did not want Student to travel to school by bus because they maintained that he had been bullied by other pupils on the bus.

6. Student was the highest functioning pupil in his special day class; most other pupils were nonverbal, and wore diapers. Due to their relatively low-functioning skills, Student did not have peers to practice his pragmatic communication skills, reducing the efficacy of his collaborative speech and language services. Beginning in 2013, Student was mainstreamed for about half his day in a general education classroom for his academic instruction.

7. Susan Tokmakoff, District's speech and language pathologist, conducted District's triennial speech and language assessment on January 17, 2013, and recommended the IEP team discontinue Student's speech and language services. Ms. Tokmakoff based her recommendations on informal assessments of articulation, a "cursory" spontaneous language sample, clinical observations, teacher interview, and classroom observations. From the information she obtained and analyzed from these sources, she concluded that Student's articulation was within normal limits, his speech was clear, he adequately labeled the components of sentences, used four to six word utterances, and followed two-part commands. She concluded that Student's functional language skills were acceptable as he was able to express himself in sentences, request wants and needs, interact socially with peers, follow directions, and answer "wh" questions. She reported that Student mastered his speech goals, which were focused on his articulation challenges.

8. Ms. Tokmakoff, who testified at hearing, was an experienced speech and language pathologist, who possessed all the necessary credentials. She provided services to Student for three years beginning in kindergarten, including one-to-one pull-out services. Her observations at hearing that Student exhibited perseverative behaviors by repeatedly asking when he could return to his classroom were not memorialized in any recent reports or IEP's, which provided for the delivery of collaborative speech and language services in his classroom. Her testimony regarding Student's autistic-like behaviors was not given weight in determining whether Student's eligibility was appropriate, as it was based on behaviors which were not memorialized in her recent report, evident during collaborative classroom speech services, and outside her area of expertise. Ms. Tokmakoff's understanding of District's proposed placement in a special day class for high functioning pupils with autistic-like behaviors was given careful consideration based upon her knowledge of how pragmatic speech communication is integrated into the program.

9. Student's triennial IEP team meeting was held on March 22, 2013. District reaffirmed Student's eligibility for special education under the category of autistic-like behaviors, and offered to place Student at another school. Although not Student's home school, the distance to the offered school was equivalent to the distance between Student's home and Hoover. Student was offered transportation from his home school to the offered school.

10. Parents rejected District's offer and filed for due process in April 2013 in order to keep Student at Hoover.

11. On May 16, 2013, Student and District entered into a settlement agreement, resolving all special education disputes and issues through that date. As part of the settlement agreement, Student attended Hoover in the low-functioning autism special day class, with mainstreaming for academics, pending the completion of a psychoeducational “reevaluation.” As part of the settlement, District and Student agreed to discuss a “permanent” placement based upon the assessment results and Student’s unique needs.

June 3, 2013 IEP

12. Student’s annual IEP team meeting was held on June 3, 2013. The IEP team memorialized the settlement agreement. Parents requested that speech and language services be continued to improve his expressive language skills. District agreed to continue speech and language services even though Ms. Tokmakoff recommended that the services be discontinued. The IEP team also developed goals, which Parents approved, to provide Student several opportunities daily, during class time, to use the proper sentence structure, particularly, adjectives and prepositions.

13. In addition to speech and language, the June 3, 2013 IEP team, including Parents, confirmed Student’s unique needs and approved goals in several areas, including English-language arts, math, reading, writing, and behavior.

14. Jennifer Lewis, Student’s teacher in the autism special day class, attended the team meeting and reported that Student had behavior challenges due to a lack of experience with an appropriate peer group. Ms. Lewis reported Student’s positive attitude toward school, perfect attendance, and his ability to learn quickly. She reported his lack of aggressive or repetitive behaviors. She observed his friendliness, and attempts to make friendships with other pupils. She attributed his difficulties making friends with same-aged peers and his inappropriate interactions with them, to his placement in the special day class with pupils who were much lower than him academically and cognitively. She recommended that he be exposed to adult and peer behavior models.

15. The IEP team agreed upon a behavioral goal to assist Student with learning appropriate social interaction skills. The IEP team concluded that Student had behavior challenges due to a lack of social skills instruction or the absence of clear consequences for his behavior. A behavior support plan, identified as an early stage intervention plan, was developed to address Student’s difficulty with peer interaction and negative behaviors during unstructured time.

16. As part of his placement in the autism special day class at Hoover, as contained in the settlement agreement, the June 3, 2013 IEP offered Student mainstreaming for computer lab, field trips, and assemblies. Although not specified in the June 3, 2013 IEP, Student continued to be mainstreamed with general education and English-language learner students for academic subjects including math, reading, and writing, but Mother refused to allow Student to mainstream with general education pupils for recess and lunch. Student stayed with his lower functioning special day class classmates for recess and lunch.

2013-2014 School Year

17. Pursuant to the settlement agreement, Student attended third grade at Hoover. Student's aide escorted him to and from the class, and he remained in class without an aide.

18. Marina Salas, a general education and English-language learner teacher, who testified at hearing, had 28 years of classroom experience, and holds all required state credentials. Ms. Salas began working with Student in January 2013. During the 2013-2014 school year, Student mainstreamed with Ms. Salas's third grade class. Student begins his day with Ms. Salas, eating breakfast at 8 a.m., reading a book, but not interacting with other pupils. The other pupils knew him, but did not seek out his company. Student participated in the general education curriculum in a small group of other pupils who function, like Student, at a much lower academic level than their classmates. Student had difficulty focusing on his lessons, and required constant redirection. Ms. Salas observed certain behaviors not typical of pupils in her class, including, Student kicking other pupils, and then lying that the victim-pupil was the instigator, talking out of turn, getting out of his seat without permission, laughing at pupils for no reason, difficulty taking turns, and speaking to without facing the person.

19. In Ms. Salas's opinion, Student functioned at a first grade level. Based upon her year-long experience with Student and her credentials and experience, Ms. Salas's observations and testimony were carefully considered when determining whether District's October 2013 placement offer was appropriate. Ms. Salas was an experienced teacher, but she was not qualified to determine eligibility for special education. Ms. Salas's observations were not memorialized in District's October 2013 psychoeducational assessment or his IEP, and was given less weight when determining whether his eligibility designation was correct, as there was no evidence that the IEP team considered her input, and according to the assessments used by Steven Baker, Student's behaviors in her class, although inappropriate, were not behaviors typically associated with autistic-like behaviors, or necessarily atypical of same-aged pupils.

October 2013 Assessment

20. As required by the settlement agreement, school psychologist Steven Baker conducted a psychoeducational assessment, during late September and early October 2013, which he memorialized in his October 10, 2013 report. Mr. Baker administered a wide-range of formal standardized assessments and other assessment tools, reported teacher's observations, and observed Student in his autism special day class.

21. Mr. Baker reported that Student's cognitive ability was mainly in the low average or below average range, with relative average range strength on measures of visual perception and processing, and relative below average deficits in attention. Student's cognitive abilities were measured in the low average, below average, and well below average range on three out of four categories. Student's planning scores established his low average ability to prepare for, or complete, assignments, use appropriate rules to solve math

problems, and his disorganization. Student's attention scores, in the well below average range, established his limited ability to work for more than a few minutes on one thing, focus on assignments, resist distractions, listen to instructions, and obtain complete information to answer questions. Student scored in the below average range on successive processing, exhibiting challenges in following verbal instructions, blending sounds, syntax, pronunciation, sequencing events in a story, or following instructions. Student exhibited a relative strength, or an average score, in simultaneous planning, involving spatial processing, including tasks using blocks to build a design, seeing patterns, and understanding the "big picture."

22. Mr. Baker's report identified unique academic needs. Student's academic achievement was below that of his same-grade peers. Student's standard scores were low average in arithmetic, and spelling, and below average in reading. Student's performance in reading and spelling was equivalent to a first grader, and his performance in math was equivalent to a second grader. Student's overall academic English-language skills, when compared with that of same-aged peers, were negligible or level 1. Student's interpersonal skills, as measured by his ability to use language proficiently for everyday or social communication were still developing. Overall, Student had difficulty with tasks requiring more complex and cognitive academic language skills. Student demonstrated very limited, or well below average, English-language listening and speaking skills, language development, verbal reasoning, and language comprehension, equivalent to that of a three year, ten month old. Student's academic broad English ability, measured by his listening, speaking, reading, writing, and language comprehension skills, were comparable to a six-year-old. Student's reading ability, inclusive of his letter and word identification skills and comprehension of written passages while reading was comparable to a six year, nine month old pupil. Student's English writing, measured by his spelling, punctuation, capitalization, and word usage was comparable to a six-year-old pupil.

23. Mr. Baker's report identified possible audiological processing and oral language deficits and needs. Auditory processing skills include abilities related to interpreting and understanding oral communication. Mr. Baker referred Student to Liane Velazquez, District's bilingual psychologist, to administer a Spanish-language measure.

24. Ms. Velazquez's report confirmed that Student was extremely delayed in his ability to comprehend spoken language, even when administered in his native language. Student obtained scores in the one percentile or less in the areas of retention and reproduction of a series of verbal stimuli, word-finding ability, story comprehension and recall, and sentence repetition and encoding, which measured his name-finding ability. Overall, due to Student's low scores in Spanish, Ms. Velazquez concluded that Student would have difficulty meeting the auditory processing challenges of his age and grade level.

25. Mr. Baker recommended that oral instruction be supplied to Student with visual aids or accompanied by written instructions, that verbal instruction be repeated, that assignments be broken down into smaller segments, that frequent checks be made to ensure

Student understood instruction, that individual or small group instruction be used, and that the instructors avoid having Student listen to instructions and write at the same time.

26. Mr. Baker relied on rating scales completed by Ms. Lewis and Parents to determine Student's emotional status and eligibility. These scales memorialized their respective observations of Student's social-emotional status and adaptive behaviors for the purpose of assessing various behavior-related disorders, including emotional disturbance, attention, executive function, or autistic-like behaviors. From Ms. Lewis's ratings, Student was not "at risk" for disorders of emotion, attention, conduct, or autistic-like behaviors. Ms. Lewis noted positive behaviors such as adjusting well to new teachers and routines, making friends easily and Student was quick to join group activities. Ms. Lewis rated Student in the "at risk" range in social skills and functional communication. She observed that he was unclear when presenting ideas, had difficulty explaining rules of games to others, never showed interest in others' ideas, and never complimented or congratulated others. Parents rated Student "average" in all areas except for social skills, and functional communications, where they rated him "at risk." Parents noted some concerns, reporting e.g., that Student teased others, complained about being teased, was concerned about school work, never congratulated or encouraged others, and was never clear when telling about personal experiences.

27. Mr. Baker had Ms. Lewis and Parents complete a rating scale designed to identify characteristics common to autism, the Gilliam Autism Rating Scale-Second Edition. The Gilliam Autism Rating Scale relies upon the American Psychiatric Association's (2000) clinical definition of autism as "a pervasive developmental disorder that typically appears during the first three years of life", which affects a person's communication, cognition and social interaction." The Gilliam Autism Rating Scale measures behaviors according to three categories, social interaction, communications, and stereotyped behaviors. From her classroom observations, Ms. Lewis rated Student within the "unlikely" range of probability for autism. In sharp contrast, when Student is at home or in the community, Parents rated Student in the "very likely" range of probability for autism, observing that he smells objects, wants only certain foods, spins objects not designed for spinning, flaps hands in front of his face, repeats words out of context, looks away from the speaker, does not initiate conversations, and becomes upset when routines are changed.

28. To check whether Student met the eligibility requirements for autistic-like behaviors at school, Mr. Baker had Ms. Lewis complete another rating scale, the Autism Spectrum Rating Scale, which is designed to measure teachers' or parents' observations of characteristics associated with autistic-like behaviors. The Autism Spectrum Rating Scale references clinical criteria in the Diagnostic Statistical Manual. Ms. Lewis found few behavioral characteristics associated with autistic-like behaviors, and from her responses, the scores did not establish that Student met the necessary criteria.

29. Mr. Baker reported his own observations during testing and in Ms. Lewis's class. He observed Student making adequate eye contact and characterized him as being "somewhat social." He observed Student staying on task and focusing for a "moderate"

amount of time, abruptly terminating the task or interaction to stare, and refocusing only after he intervened. He observed articulation errors and monotonous or flat speech. During testing, a baby could be heard crying in the distance. Mr. Baker characterized Student's repeated reference to the baby's crying during testing, or his excitement at seeing his mother and sister waiting for him, as perseveration. He observed Student in Ms. Lewis's class following directions, working well with his aide, but making minimal eye contact with him, and requiring some assistance transitioning from one activity to another. He reported that Student did not appear to be bothered by loud noises or screaming from Ms. Lewis's pupils. He observed Student losing focus at some point in the lesson, as he did during testing, requiring redirection. Mr. Baker characterized Student's humming of a song being sung across the room as "echolalia."

30. Mr. Baker recommended to the IEP team that Student remain eligible for special education as a pupil with autistic-like behaviors on the ground that he displays many autistic-like behaviors including, the inability to use oral language for appropriate communications, self-stimulating, ritualistic behavior, an extreme preoccupation with objects or inappropriate use of objects or both, a history of withdrawal or relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood. He added that Student had auditory processing deficits. He did not consider a speech and language impairment or other areas of eligibility.

31. Mr. Baker considered the range of Student's unique needs and challenges including his deficits in attention, working memory, and oral language processing in his extensive list of instructional recommendations and strategies for IEP team consideration.

October 11, 2013, IEP Team Meeting

32. On October 11, 2013, Parents met with all necessary members of the IEP team to review Mr. Baker's re-evaluation, Student's progress on his goals, and his placement.

33. The IEP team, except Parents, adopted Mr. Baker's recommendation to continue Student's eligibility based upon autistic-like behaviors, without reviewing speech and language impairment or other possible eligibility categories.

34. The IEP team reviewed Student's academic skills. In addition to Mr. Baker's report, the IEP team had available the result of Student's achievement test, the Woodcock Johnson Test of Achievement, which confirmed Student's relatively delayed academic skills. Student had a strong knowledge of letter sound correspondence and word parts which allowed him to decode familiar and unfamiliar words, but his overall broad reading achievement was well below his third grade and age level. His reading comprehension skills were also poor as he could not retell the details and sequence of events, which are necessary skills for understanding and predicting the storyline. Student's scores in broad written language were low and confirmed that he had only a basic knowledge of subject and verb agreement and sentence structure. Together with his teacher's input, the Woodcock Johnson test confirmed that Student's reading and writing were at or slightly above a kindergarten

level. As his teacher relayed to the IEP team, Student had difficulty with age and grade level work requiring more than three or four word sentences, more than two or more sentences about a topic, or developing a topic through ideas that build about one another. Student required a visual organizer to organize topics. The results of the Woodcock Johnson test also confirmed that Student's struggles with language comprehension affected his math skills. Student had great difficulty with math word problems and became frustrated when working on these problems unassisted.

35. The IEP team reviewed and agreed on Student's present levels of performance, progress on goals and revisions of academic goals. Student's academic struggles were evident from his failure to meet his academic goals in writing strategies, reading fluency, expressive language, and math. The IEP team approved goals in expressive language, reading, math, writing strategies, and a behavior goal to support his academic endeavors which required Student to complete daily assignments with three or less verbal prompts for each assignment. The IEP team approved accommodations based on Mr. Baker's extensive list of recommendations.

36. The IEP team, including Parents, considered Student's off task behavior, particularly his pattern of losing focus and "staring off into space," as the singular atypical behavior interfering with his access to education because it reduced productivity, required instruction to stop it, and resulted in lost instructional time. The IEP team did not consider Student's behavior to be disruptive or negative to other pupils. The IEP team characterized Student's behavior as early stage, not moderate, serious or extreme. The IEP team attributed Student's inattention to tasks that were too long for him. The IEP team did not attribute Student's behavior to sensory needs and did not reference Student's peer interactions. Student's behavior support plan furthered Student's behavior goal.

37. The behavior support plan required shorter tasks, more time on tasks, redirection to start and complete work, preferred seating, visual aids, and interaction (not from peer models, but from the classroom teacher or staff) with modeling behavior, supportive words, including reminders or reinforcements with stickers for completing tasks, physical praise (high fives, smiles), verbal praise for encouragement and recognition of strengths, talents, and successes, including access to preferred activities like reading picture books.

38. District increased its speech therapy offer, based upon Parent's request, to 60 minutes per week. Speech therapy would continue as a collaborative service involving a small group of pupils in Student's autism special day class, his special education teacher, and the speech and language pathologist.

39. District's recommended placement was at another nearby elementary school called GRATTS, because the peers in Hoover's special day class were too low functioning for Student, and an alternative curriculum was used. Instead of an alternative curriculum, District's offered placement was comprised of pupils using general education core curriculum. Like his day at Hoover, at GRATTS, Student would spend a part of his day in a

general education classroom for reading, writing, and math, which also would address his status as an English-language learner, although the percentage of time was not clearly delineated in the IEP. District also offered mainstreaming opportunities for computer lab, assemblies, and math class.

40. District offered the high functioning autistic-like behaviors special day class at GRATTS because Student was in the low-average range of cognitive ability, but was a relatively good reader and would be in a classroom with other pupils that functioned at or above his level, in contrast to the Hoover alternative curriculum special day class. GRATTS provided a program that strives to advance pupil's pragmatic speech and social interaction. The class is very small, (four pupils at the time of the offer, five pupils at the time of hearing), with a total of four adults, including the teacher and aides, who are specially trained to model language and to address the pragmatic language and social skills deficits common to pupils with autistic-like behaviors. The class is highly structured and organized, and lacking in wall clutter, to reduce stimuli, and better keep pupils focused on tasks. With peers at his level, who are using core curriculum and are verbal, but have similar language deficits, Student would be able to practice using language to communicate. Social skills deficits common to pupils with autistic-like behaviors are addressed in the curriculum of the special day class, with role-playing and opportunities and facilitation of positive peer interactions built into the program. In addition, Student shared attentional challenges common to pupils with autistic-like behaviors, which are addressed in the class.

41. GRATTS was not Student's home school, but about the same distance from Student's home as Hoover. District offered transportation from Student's home school to GRATTS.

42. Parents agreed with Student's goals and speech services, but rejected District's eligibility determination and placement offer. At the time of the hearing, Student remained at Hoover.

43. Student, who testified at hearing, was comfortable at Hoover where he was familiar with his classroom aide, Carlos Velasquez. When given the opportunity at hearing to identify his friends, Student only identified Mr. Velasquez. Student wanted to remain at Hoover to be with Mr. Velasquez. Student expressed displeasure with his special day class placement at Hoover. When asked to describe what he disliked about the class, he demonstrated what troubled him most about the other pupils by repeating their pattern of head shaking, and holding his ears to show his response to the loud noises they made. Student appeared comfortable at hearing surrounded by his family and other unfamiliar adults, and with the assistance of Mother, was able to sit quietly for a long period of time in his seat.

District's Eligibility Determination

44. At hearing, Mr. Baker and Ms. Lewis elaborated on Student's eligibility determination. Mr. Baker, confronted with the contradiction between Ms. Lewis's

observations and the characteristics he described for autistic-like behaviors eligibility, explained that he reached his conclusion that Student should remain eligible due to autistic-like behaviors based upon historical data, Parent's rating scales, and by giving context to Ms. Lewis's observations as a teacher in a low-functioning class, where the pupils, with the exception of Student, were primarily nonverbal and were in diapers. Mr. Baker's opinion was not reflected in his report, and his decision to favor Parents' observations at home and in the community over Ms. Lewis's school-based observations memorialized in two rating scales was not persuasive or credible, especially given Ms. Lewis's expertise teaching pupils with autistic-like behaviors, and the premise that special education eligibility requires deficits that undermine Student's access to education, not home or community. Ms. Lewis is a qualified and experienced special education teacher who works closely with pupils with autistic-like behaviors. Her experience, knowledge, and compassion were evident at hearing. However, Ms. Lewis's testimony that her positive observations of Student's interactions did not conflict with autism-like behaviors eligibility was unpersuasive, as her testimony was not reflected anywhere in the IEP, and conflicted with her scores on two rating scales, and classroom observations. As such, Ms. Lewis's reports of her contemporaneous Student observations made at IEP team meetings and as part of his District assessments were given more weight than her hearing testimony.

Kaiser Evaluation

45. On January 23, 2014, Student was evaluated at Kaiser Permanente due to parental concerns about his speech and language delays, behavior, and District's identification of him as a pupil eligible for special education under the category of autistic-like behaviors. Kaiser's evaluation was conducted by a team of people, comprising the Kaiser Inter-Disciplinary Development Team. The team included a physician, a psychologist, a psychology intern, a licensed marriage and family therapist, an autism case manager, a speech and language pathologist, and an occupational therapist.

46. When Mother met with the Kaiser Team, Mother disclosed that her principal concern was Student's classroom placement. She considered Student's placement at Hoover's special day class inappropriate because, unlike Student, the other pupils were too low functioning, nonverbal, and given to behaviors like hand-flapping, that disturbed Student. Mother reported that Student asked her why the other pupils had these behaviors.

47. Dr. Kek khe Loo, who testified at hearing, supervised the Kaiser Team, reviewed the results of their evaluation and approved the report, is an experienced board certified developmental pediatrician. Dr. Loo relied on Student's educational history, and the Kaiser Team's testing and observations, and concluded that Student did not have autism spectrum disorder, as defined by the Diagnostic Statistical Manual, Fifth Edition. Dr. Loo also relied upon the results of a standardized assessment also used by school districts to evaluate pupils for autism, referred to as ADOS-2. Dr. Loo established at hearing that he had the qualifications and experience to diagnose children with autism spectrum disorder, and that the tests administered by the Kaiser Team and their collective observations and unanimous conclusion that Student did not qualify as a child with autism spectrum disorder

were the result of a comprehensive and thoughtful evaluation from competent and experienced medical professionals. The Kaiser Team's charge was diagnostic and medical. The Kaiser Team was not competent to make educational placement decisions. As such, the Kaiser Team report and related testimony was given great weight in determining Student's eligibility, unique needs, and speech services, to the extent the Kaiser Team report was consistent with the IDEA eligibility and free appropriate public education criteria, but little weight in determining Student's educational program or placement.

48. Jennifer Zinner-Rathwell, M.S., Kaiser's Speech and Language Pathologist conducted a speech and language assessment. Ms. Rathwell concluded that Student's pragmatic skills were severely delayed, or equivalent to the skills of a much younger, three year, nine month, child. Student could provide his name, age and say farewell to his parent, but had difficulty providing a name for a dog, requesting cookies, providing a polite response to a question, and expressing gratitude and regret. Student did not often understand the questions presented even after the prescribed repetition.

49. From her observations of Student's behaviors during testing, Ms. Rathwell did not see signs common to autism spectrum disorder. Student demonstrated good eye contact and attention, and was cooperative. Ms. Rathwell considered his play skills "delayed, but not "atypical."

50. Ms. Rathwell concluded that Student required continued speech and language services to work on speech goals to address: two step commands, production of simple sentences describing an action picture with correct grammar, and socially appropriate responses to simple questions, and an articulation goal focused on the "th" sound.

51. Dr. Loo, with input from the Kaiser Team, concluded that Student did not meet the criteria for autism spectrum disorder, but was language impaired, and had learning difficulties. He recommended that Parents pursue District psychoeducational testing to "clarify" whether Student had a learning disorder.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA¹

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A free appropriate public education means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s individual education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (“*Rowley*”), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a free appropriate public education articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a free and appropriate public education. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free

and appropriate public education to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511 (2006); Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof.

Issue One: Whether District denied Student a FAPE by designating Student's eligibility under the category of autistic-like behaviors instead of speech and language impairment?

5. In Issue One, Student contends that District erroneously designated Student's eligibility under the category of autistic-like behaviors, instead of speech and language impairment, and as result, failed to provide Student a free appropriate public education.

6. District maintains that Student was appropriately designated under the Education Code, which governs eligibility determinations, not the Diagnostic Statistical Manual relied upon by the Kaiser Team. District further maintains that Student failed to meet his burden of proof that its offer of placement, the only part of the IEP offer in dispute, regardless of Student's eligibility determination, denied Student a free appropriate public education. District maintains that the offered GRATTS placement was a free appropriate public education in the least restrictive environment. Based upon the following analysis, Student did not meet his burden of proof that District denied Student a free appropriate public education by failing to identify the appropriate eligibility category for special education.

7. For purposes of special education eligibility under the IDEA, the term "child with a disability" includes, but is not exclusive to, a child with autism, speech or language impairments, intellectual disability, a specific learning disability, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) A child is eligible for special education services if an IEP team determines that the child meets one of the educational eligibility categories, and if the IEP team determines that the adverse effects of the disability cannot be corrected without special education and related services; that is, that the degree of impairment "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, §§ 56026, subd. (b); 56333, 56337; Cal. Code Regs., tit. 5, § 3030.)

8. Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, which

adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (34 C.F.R. § 300.8(c).) A student is eligible in California for special education and related services if, among other things, he “exhibits 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; and (7) Self-stimulating, ritualistic behavior. (Cal. Code Regs., tit. 5, § 3030, subd. (g).)²

9. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.) Similarly, under federal law, a speech or language impairment means a communication disorder, including a language impairment that adversely affects a child’s educational performance. (34 C.F.R. § 300.8(c)(11).) The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria: (A) The child scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics; or (B) The child scores at least 1.5 standard deviations below the mean or the score is below the seventh percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of 50 utterances which is recorded or transcribed and analyzed, and the results included in the assessment report. (Cal. Code Regs., tit. 5, § 3030, subd. (c).)

10. A child’s eligibility category is not dispositive of the issue of whether a child received a free appropriate public education. As long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. The IDEA provides:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in . . . this title and who, by

² Section 56846.2 of the Education Code, which sets forth a similar but not identical definition of a “pupil with autism,” applies by its terms only to the chapter of the Code containing it, which addresses autism training and information and establishes an advisory committee. That definition is not an eligibility standard.

reason of that disability, needs special education and related services is regarded as a child with a disability . . .
(20 U.S.C. § 1412(a)(3)(B).)

The United States Department of Education has advised that “a child's entitlement is not to a specific disability classification or label, but to a [free appropriate public education].” (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) A properly crafted IEP addresses a student’s individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category “substantively immaterial”]. The decision following a due process hearing can only be made on substantive grounds based on a determination of whether the child received a free appropriate public education. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(1).)

11. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a free appropriate public education under the IDEA, a school district’s offer must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate that children with disabilities are educated with non-disabled peers. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a); see *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 [adopting four part test to determine whether general education appropriate].)

12. The methodology used to implement an IEP is left up to the school district’s discretion so long as it meets a pupil’s needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley*, 458 U.S. 176, 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student.

13. Whether a pupil was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” (*Ibid.*) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; *Christopher S. v. Stanislaus*

County Off. of Ed. (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.)

14. In Issue One, Student showed that District failed to appropriately designate Student's eligibility category for special education, but Student failed to prove by a preponderance of the evidence that Student's erroneous eligibility category deprived him of a free appropriate public education.

15. The IEP team determines eligibility. In this case, the basis of the IEP team's eligibility determination was the singular reliance upon Mr. Baker's reevaluation report and opinion. Mr. Baker's qualifications, his fulfillment of his obligation to prepare a report based upon the settlement agreement, his administration of assessments, adherence to test protocols, or his consideration of Student's English-language learner status, were not contested. However, Student showed at hearing that Mr. Baker's finding that Student met the criteria of autistic-like behavior was fatally flawed based upon inconsistencies between his assessments and Ms. Lewis's observations. Mr. Baker found little support for Student's eligibility under the criteria of autistic-like behaviors in Ms. Lewis's observations and her rating scales. On two separate rating scales, Ms. Lewis found that Student did not meet the criteria of autistic-like behaviors based upon her relatively long-term school-based experience with Student. Ms. Lewis's rating scales established Student's conduct at school, not at home, as Parents' rating scales purported to do. Thus, it did not make sense for Mr. Baker to ignore Ms. Lewis's observations in favor of Parents, to not administer rating scales to other educators or school staff, or to not pursue other well-recognized standardized assessments, like the ADOS. At hearing, Mr. Baker's dismissal of Ms. Lewis's observations due to the relative functioning level of his special day classmates, was not memorialized in his assessment report, and unreliable given Ms. Lewis's experience and training. Further, there was no evidence that Ms. Salas's observations at hearing of Student's kicking and lying, were considered by Mr. Baker at the time of his report or communicated to the October 2013 IEP team, or were relevant to an autistic-like behaviors eligibility determination. Likewise, there was no evidence that Ms. Tokmakoff's historical observations during one-on-one speech were observed recently during collaborative speech, or ever communicated to Mr. Baker or the IEP team.

16. Mr. Baker's admitted reliance on his own observations and "historical data" did not compensate for ignoring Ms. Lewis's observations. Mr. Baker's observations during testing did not support autistic-like behaviors eligibility. He characterized Student as "somewhat social," and reported Student to be following directions, but requiring redirection, and not being bothered by loud noises from the low functioning classmates. Nevertheless, he elevated isolated conduct into autistic-like behaviors. For example, he characterized Student's humming of a song as evidence of "echolalia," and his sensitivity to a crying baby during testing or excitement of seeing his mother, as perseverative behavior. Significantly, Mr. Baker did not reconcile his observations with that of Ms. Velazquez, who reported that Student did not evidence any autistic-like behaviors.

17. As the evidence revealed, Student's so-called "pervasive" behaviors were primarily limited to his language and speech delays, which restricted his ability to communicate, and to his attention. Notably, as established in the behavior support plan and observations, these behaviors required refocus, but did not rise to the level of extreme withdrawal. There was no evidence at school of pervasive perseverative behaviors, or sensory and motor issues, that are hallmarks of autistic-like behaviors. Student was sensitive to noise but it was not pervasive, according to Mr. Baker's own observations. Further, notwithstanding the date of the Kaiser Team's evaluation, it relied on information and assessment measures available to the IEP team at the time of the October 2013 IEP, and before, and confirmed that Student's behaviors were not consistent with autistic-like behaviors eligibility. The Kaiser Team's report was given more weight than Mr. Baker's assessment report in determining the validity of District's eligibility determination, due to the collective experience of the KID team, the consistency between its observations and that of Ms. Lewis, and its use of a standardized assessment tool.

18. Despite District's erroneous eligibility designation, District's IEP offer of October 2013, provided Student with a free appropriate public education. (See 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(1).) Mr. Baker's report establishes, and the IEP confirms, that the IEP team, including Parents, identified Student's unique needs, present levels of performance, goals, behaviors, placement and services. Mr. Baker provided an extensive list of recommendations for accommodations and supports to address Student's unique needs, including audiological processing deficits, which were adopted by the IEP team. Parents agreed to District's offered goals, and behavior support plan, accommodations, and requested increased speech and language services, which District's IEP team members approved.

19. Parents' disagreement with District's offer of placement in the GRATTS' core curriculum autistic-like behaviors special day class did not obligate District to place Student in their preferred placement at Hoover. Student failed to show by a preponderance of the evidence, that GRATTS was an inappropriate placement. On the contrary, the evidence showed that Student's unique language and social communication needs, at the time of the October 2013 IEP, were best served at GRATTS because Student would have ongoing opportunities for adult and peer interaction, including a peer group for speech and language services. Further, Student's attention challenges were addressed by the small teacher to student ratio, his behavior support plan, and a classroom environment designed to reduce distractions. Student failed to provide sufficient evidence that Student's pragmatic communication challenges, which were addressed in the curriculum of the GRATTS' special day class, would be similarly addressed in the Hoover specific learning disabled special day class where there was no evidence that he would have curriculum focused on using expressive language, a teacher or aides trained and working daily with pupils with language deficits, or a peer group with which to practice speech.

20. Districts are entitled to select the methodology for addressing Student's needs, and here, Student did not provide evidence that the methodology used in the GRATTS placement was inappropriate for a pupil with his profile. Notably, Dr. Loo's report did not

recommend any particular educational placement, and the Kaiser Team admittedly was not qualified to recommend any particular educational placement.

21. Student did not provide any evidence that GRATTS' core curriculum special day class placement with mainstreaming was not the least restrictive environment. Student does not contest his placement in a special day class or the degree of his participation in a general education class. There was no evidence a specific learning disabled special day class would have been a less restrictive environment than the program at GRATTS, especially if the time in general education was the same. As in Hoover, Student would be placed in a special day class, and continue to participate in a general education classroom with same-aged and typical peers for part of the day. As such, District's offer was in the least restrictive environment.

22. In sum, District's eligibility determination of autistic-like behaviors was erroneous. However, Student did not meet his burden of proof that Student was denied a free appropriate public education in the least restrictive environment based upon District's erroneous eligibility determination.

Issue Two: Did District deny Student a FAPE by offering an inappropriate placement in a special day class autism program, which requires Student to change schools?

23. In Issue Two, Student contends that District's placement offer at GRATTS denied him a free appropriate public education for the same reasons alleged in Issue One, and for the additional reason that it requires Student to change schools. District disagrees with Student for the same reasons it raised in response to Issue One and further denies any challenge to Student's transfer to another school site as Hoover was not Student's home school. To the extent the arguments are the same, the legal citations in Issue One apply to the analysis of Issue Two and the result is the same. Therefore, the remaining issue is whether District denied Student a FAPE by offering Student a program at a nearby school which was a similar distance from his home school as the school Student was attending.

24. In determining the educational placement of a child with a disability a school district must ensure, among other things that the placement is as close as possible to the child's home, and unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled. (34 C.F.R. § 300.116.)

25. As set forth in Issue One, Student failed to show by a preponderance of the evidence that District's offer of placement in a core curriculum autistic-like behavior special day class denied him a free appropriate public education in the least restrictive environment. In addition, Student failed to prove that changing his school of attendance to GRATTS from Hoover would deny him a free appropriate public education. Student failed to provide any evidence that he had made friendships with peers that necessitated that he stay at Hoover. On the contrary, there was no credible evidence that Student had a peer group in his current Hoover special day class, or in his general education classes. The uncontradicted testimony of all witnesses, including Student, was that his Hoover special day class was not his peer

group, and did not provide him with any opportunity to advance his severely delayed expressive and pragmatic communication skills. When Student was given an opportunity to testify about his friends, he only mentioned his aide, Mr. Velasquez. The GRATTS placement offered more opportunity to make friends as he would be with a verbal peer group in his special day class, and still offered mainstreaming opportunities for him to participate with typical general education pupils. Further, GRATTS, like Hoover, is not Student's home school, and was about same distance from Student's home. Like his placement at Hoover, District offered Student round trip transportation from his home school.

26. In sum, Student failed to meet his burden of proof that Student's placement at GRATTS was a denial of a free appropriate public education in the least restrictive environment.

ORDER

Student's requested relief is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on the two issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: May 1, 2014

/s/
EILEEN COHN
Administrative Law Judge
Office of Administrative Hearings