

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TUSTIN UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015080076

DECISION

Parents on behalf of Student filed this amended due process hearing request with the Office of Administrative Hearings, State of California, on December 2, 2015, naming Tustin Unified School District. The matter was continued for good cause on January 20, 2016.

Administrative Law Judge Judith L. Pasewark heard this matter on February 23, 24, and 25, 2016, in Tustin, California.

Timothy A. Adams and Lauren-Ashley L. Caron, Attorneys at Law, represented Student. Mother and Father attended the hearing on behalf of Student.

S. Daniel Harbottle, Attorney at Law, represented District. Lori Stillings, Assistant Superintendent, attended the hearing on behalf of District.

Testimony was completed on February 25, 2016, and, at the request of the parties, the matter was continued to March 21, 2016, for receipt of written closing briefs. The record closed, and the matter submitted for decision on March 21, 2016.

ISSUES

Whether District inappropriately determined Student ineligible for special education programs and services at the (1) October 1, and October 22, 2014 individualized education

program team meetings; (2) November 4, 2014 IEP team meeting; January 28, 2015 IEP team meeting; and/or June 16, 2015 IEP team meeting.¹

SUMMARY OF DECISION

Student contends he meets the eligibility criteria for special education under the category of autism and/or language and speech deficit as set forth in the Individuals with Disabilities Education Improvement Act and California law.

District contends that while Student may have a medical diagnosis of autism, he no longer meets the statutory criteria required to find him eligible for special education. Additionally, Student does not meet the criteria for language and speech disorder. Further, even if he does meet the criteria, Student does not require a special education placement or related services because he can be appropriately educated with general education supports and accommodations.

This decision holds that while the information available to District at each IEP team meeting in question might possibly have been interpreted to support a determination that Student met the first part of the definition of autism for eligibility purposes, the evidence did not establish the second part that Student's deficits substantially impacted his education or receipt of educational benefit. Similarly, Student did not establish he required speech and language services, as his language skills were appropriate for a third grader. Finally, Student did not establish that he required specialized instruction and services which could only be provided by modifying the general education program.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a 10-year-old boy who resides with his parents within the boundaries of District. Student is currently in a fourth grade general education class at Peters Canyon Elementary School.

2. Student received a medical diagnosis of autism in 2007, and obtained speech and applied behavior analysis services through Regional Center of Orange County. District assessed Student as a preschool student, and commenced providing special education and

¹ The issues have been reworded for clarity of decision. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

related services on November 22, 2008, as a student with autistic-like behaviors.² Student attended District special day class programs for preschool and kindergarten. For the 2010-2011 school year, Student repeated kindergarten at Peters Canyon Elementary School in a general education classroom. Student exhibited excellent academic progress, and qualified for the gifted and talented education program.

3. Student's last agreed upon IEP from 2013, provided Student with placement in a general education classroom, with speech and language, occupational therapy and behavior intervention services.³ District also provided Student with the support of a behavior interventionist aide throughout his school day.

Parental Input

4. Mother testified at hearing to describe the family's concerns and disagreements with District's determination to terminate Student's special education services. Mother is a highly educated and articulate woman; however there appeared to be a subtle language disparity which resulted in misunderstanding. As example, Mother believed autism and autistic-like behaviors are the same thing. It is the family's position that Student has a medical diagnosis of autism. Regional Center provided Student with services based upon his autism. District initially assessed Student and found him eligible for special education based upon his autistic-like behaviors, and has provided Student with an IEP since age three. In a practical sense, nothing has changed with Student; he is still autistic, and therefore, he should still be eligible for special education services as a child with autism.

5. Student is very smart, but he cannot control his emotions. At home, he gets angry and overreacts. Student is behind in social interaction. He does not initiate conversation. He goes off topic. Student does not act appropriately in group or community settings, such as Cub Scouts.

6. Student has an eight-year-old brother, and they are very close. Both are gifted, but Student's brother is socially appropriate. This is a point of reference for Mother, as she compares typical behavior with Student's behavior. To the family, Student's behavior is not typical in any sense. Student is socially immature for his age. He has been bullied, but does not understand. He does not comprehend social cues or consequences. He defines everyone he knows or is acquainted with as his "friend," even without any social connection.

² The special education eligibility category of autistic like behavior before July 1, 2014, was found in California Code of Regulations, title 5, section 3030, subdivision (g). The present eligibility category is now autism in California Code of Regulations, title 5, section 3030, subdivision (b)(1). The special education eligibility criteria are different than the characteristics of Autism Spectrum Disorder found in the DSM-5.

³ An apparent typographical error on page three of the assessment report included specialized academic instruction as part of Student's IEP.

7. Parents obtained private services for Student outside of school. Student received applied behavior analysis services at home, as well as outside family therapy. While these private services have contributed to Student's improvements at school, none of this information was made available to District until January 2015.

8. Mother also noted Parents' confusion due to the errors and omissions in the 2014 triennial assessment report and subsequent IEP documents prepared by District, many of which appeared contradictory or made no sense.

2014 Triennial Assessment

9. District conducted Student's triennial assessment in the fall of 2014.⁴ The assessment report is dated October 1, 2014. Diana Yoo, school psychologist, led the assessment team and was primarily responsible for drafting the assessment report. Ms. Yoo has an educational specialist degree in school psychology, a master's degree in educational psychology, and a pupil personnel services credential in school psychology. Ms. Yoo also possesses a multiple subject teaching credential, and has previously been a third grade teacher.

10. District assessed Student in all areas of suspected disability. It was undisputed that Student's cognitive ability was in the very superior range; however, he demonstrated significant weaknesses in comprehension knowledge and long-term retrieval skills. Student's performances in both areas were significantly lower than predicted. Student's academic skills were proficient to very superior in all academic areas; therefore, academics were not considered an area of suspected disability for Student. Overall, taking account of all aspects of the assessments, the assessment team found concerns in the areas of social interaction with peers and atypical classroom behavior responses to sensory stimuli.

11. Ms. Yoo administered the Behavior Assessment System for Children, Second Edition, which is a multidimensional system used to evaluate both positive and negative behaviors of children in the home and school setting. Mother and Student's teacher, Julie Shattles, completed the rating scales. Ms. Shattles was Student's general education teacher for two years in a second/third grade combination classroom. She has a California multiple subject teaching credential, and a specialist instruction credential in special education (severely handicapped). Ms. Shattles previously taught special education classes, kindergarten through fourth grade, for students classified as severely emotionally disturbed.

12. Mother rated Student in the "at risk" range for hyperactivity, attention problems, atypicality, activities of daily living and functional communication. Ms. Shattles scored Student in the "at risk" range only in the area of withdrawal. According to Ms. Shattles, Student appeared to have some difficulty making friends and with peer interaction, however it was not a significant concern. Ms. Shattles found Student's social-

⁴ The validity of the triennial assessments is not at issue in this matter.

emotional skills not unlike other peers in second and third grade general education classrooms. She opined that 20 to 30 percent of third graders behaved similarly to Student.

13. Ms. Yoo also administered the Gilliam Autism Rating Scale-3, which is a screening instrument designed to identify individuals who have severe behavioral problems that may be indicative of autism. Again, Mother and Ms. Shattles completed the rating scales. Both Mother and teacher reported a “very likely” probability of autism spectrum disorder. Both observed behaviors related to social interaction, social communication and cognitive style. Ms. Yoo opined that Student’s high rating on cognitive style was attributed to his very superior intellectual ability rather than as a strong indication of an autism spectrum disorder. Mother reported a high number of behaviors associated with Student’s emotional response; his teacher did not report concerns in this area. Ms. Yoo concluded that although the ratings scale indicated a “very likely” probability of autism spectrum disorder, Student’s behaviors did not appear to be impacting him academically or in his social emotional development based on the totality of his current assessment results, observations and interviews.

14. Malena Casteel, autism program specialist, conducted Student’s behavior assessments and observed Student in the classroom, at lunch and during recess. Ms. Casteel holds a bachelor’s degree in psychology. She has previous experience as an applied behavior analysis senior therapist and trainer. As part of her current job, Ms. Casteel trains and manages District behavior interventionists, including Student’s aide. She also reviews behavior intervention tracking notes and data to verify accuracy.

15. Ms. Casteel administered the Childhood Autism Rating Scale-Second Edition, which was developed to help identify individuals who are demonstrating autism spectrum disorders. The rating scales scores represent observations by Ms. Casteel in the school setting and by Mother in the home setting. Ms. Casteel found Student to have minimal to no symptoms of autistic-like behaviors. Mother reported that although Student had made progress, he still exhibited mild to moderate problems with communication, emotions and social interactions, body movement, and play. He did not verbally advocate for himself. Mother reported Student had severe problems with conversations and sustaining interactions with others. Also, Student was overly sensitive to sounds, smells, and textures.

16. Ms. Casteel also administered the Social Skills Improvement System, which is a rating scale which enables targeted assessment of individuals to help evaluate social skills, problem behaviors, and academic competence. Mother, teacher, and Student completed this assessment. Mother rated Student average in the social skills subscales of cooperation, assertion and responsibility. She rated Student below average in the subscales of communication, empathy, engagement and self-control. Mother rated Student average in all subscales of problem behaviors. Ms. Casteel noted that when examining social skill deficits and behavioral problem excesses consistent with those typical of autism spectrum disorder, Mother rated Student as being in the average range. Ms. Casteel opined this suggested the behaviors and social concerns Mother observed were not consistent with those typical of autism spectrum disorder.

17. Ms. Shattles scored Student below average in the subscales of communication, empathy and engagement. In all other areas, Student scored in the average range. Of note, Ms. Shattles reported no social skills strengths or skills which Student knew and used consistently and appropriately. Ms. Casteel, however, determined that Ms. Shattles rated Student as being in the average range which suggested that at school Student did not demonstrate behaviors consistent with autism spectrum disorder.

18. Based upon the rating scores and observations, Ms. Casteel concluded that Student appeared to enjoy school both during academic time as well as during unstructured times like eating and play periods. Student demonstrated advanced skills in academics and play abilities. He had a desire to be social with his peers, and would initiate interaction with peers. He was well liked and involved with peers when appropriate. Student did not demonstrate complex conversations with his peers, but neither did his peers. Student had some difficulty understanding that how he treated others may make them feel sad. Student, however, remained involved with his peers and blended in well. As a result, Student did not present as having as many delays as would be *typical* of a student with autism.

19. Mother completed the Scales of Independent Behavior-Full Scale to determine Student's adaptive behavior skills required in everyday living. The assessment contained subscales for broad independence, motor skills, personal living and community living. Student's functional independence was age appropriate. When presented with age-level tasks, Student's motor skills, social interaction, communication, and community living skills were age-appropriate. Student's personal living skills were reported as limited to age appropriate. Overall, in the home setting, Student demonstrated normal problem behaviors which required intermittent support, about the same as other children his age.

20. Ms. Casteel administered the Autism Diagnostic Observation Schedule-2, which is designed to obtain information in the areas of communication, reciprocal social interactions, and restricted and repetitive patterns of behaviors and interests associated with a diagnosis of autism spectrum disorder. Module 3 of this assessment tool engaged Student in a series of activities involving interactive stimulus materials. Although this assessment is intended to be administered by one person, Ms. Casteel had Tiffany Cook, District speech and language pathologist, assist her by taking notes. Ms. Casteel emphasized however, she was the only one administering the assessment. Further, while multiple assessors are discouraged, it does not automatically invalidate the scoring. Ms. Casteel's observations were detailed; she was looking for nuances and patterns.

21. Overall, Student displayed a range of appropriate social responses as well as use of verbal and non-verbal behaviors for reciprocal social interchange. The quality of rapport appeared comfortable, but was not consistently sustained due to some pausing between turns. Student did not present with any highly repetitive utterances or echolalia throughout the assessment. No unusual sensory interests or other sensory-seeking behaviors were observed. Student did not present with hand and finger or other complex mannerisms. As a result, Ms. Casteel concluded Student's Module 3 results were consistent with a

classification of “Non-Spectrum,” which meant Student did not present as a child on the autism spectrum. The comparison scores further indicated Student displayed “minimum-to-no evidence” of autism spectrum-related symptoms as compared with children who have autism spectrum disorder and are of the same chronological age with similar language skills. Ms. Casteel found Student’s behaviors were typical of third graders.

22. Ms. Cook assessed Student’s pragmatic language and social skills utilized through language. She assessed Student’s pragmatics through clinical observations, standardized measures and discussions with the assessment team.

23. Ms. Cook administered the Test of Pragmatic Language-2, which examined Student’s response to a variety of social and language-based situations. When previously given this assessment in 2011, Student presented with significant difficulty understanding the request of the tasks of all items presented. In the current 2014 assessment, however, Student achieved a standard score that was within the above average range, thus revealing no further area of deficit.

24. Ms. Cook also administered the Test of Narrative Language, which measures the ability to use language to create stories and descriptions of events in Student’s daily life. The test involved both narrative comprehension and oral narration. Again, Student’s scores on these tests improved dramatically from 2011. Student scored in the very superior range on the current assessment.

25. Holly Van Meeteren assessed Student for occupational therapy needs. Ms. Van Meeteren holds bachelors’ degrees in occupational therapy and communication science and disorders. She is licensed as an occupational therapist, and is certified by the National Board for Certification in Occupational Therapy. Ms. Van Meeteren observed Student at his regular classroom desk. Student was able to follow all visual and verbal instructions to complete required tasks. Student demonstrated a “throat clearing” behavior during parts of the assessment and during “down time” when activities were being transitioned.

26. Ms. Van Meeteren administered the Beery-Buktenica Development Test of Visual-Motor Integration to help assess the extent to which Student could integrate his visual and motor abilities. Results of this test indicated that Student’s general visual motor integration skills, visual perception skills and motor coordination skills were within the above average to average range.

27. As part of the occupational therapy assessment, Ms. Shattles reported decreased penmanship in baseline writing line, written over letters and scribbled out letters. She also reported Student had difficulty with desk organization and social skills. Mother reported difficulty with fine motor tasks which required the use of both hands, such as clothing fasteners and tying shoe laces.

28. Based upon her observations, Ms. Van Meeteren found that Student's rate of handwriting and keyboarding skills were above average. Student's functional classroom skills were appropriate, and he was able to participate in all required tasks equal to his classroom peers. With the exception of tying his shoes, and difficulty with buttons, Student's self-help skills were appropriate and independent. Student's educational motor skills were found to be good to normal through clinical assessment of school activities. Student was able to ambulate throughout the school environment

29. Ms. Van Meeteren administered the Sensory Processing Measure to rate Student's behaviors and characteristics to sensory processing and social participation and praxis. The purpose of this assessment is to assist the occupational therapist in discerning if maladaptive behaviors are primarily influenced by sensory input, often associated with autism, and to assist the IEP team in developing reasonable accommodations or modifications based upon a student's individual sensory processing patterns or preferences.

30. Student scored in the "typical" range in the areas of vision, body awareness, balance, and motion. Student scored "atypical" in the areas of social participation, hearing, touch, planning, and ideas. Student's total score revealed a definite difference in the processing of sensory information within the educational environment. Ms. Van Meeteren, however, concluded that, "at this time," Student's sensory processing did not appear to be impacting Student's ability to access his education.

31. Ms. Shattles' ratings on the Sensory Processing Measure noted several atypical items which *could* have an impact on Student's ability to access his education. Ms. Shattles scored Student with occasional difficulties in the area of social participation, however Student could resolve peer conflict without intervention, enter into play with peers without disrupting ongoing activity, maintain eye contact during conversations, and shift conversation topics in accordance with peer interests. Ms. Shattles scored Student with frequent/occasional difficulties in the area of hearing, specifically noting his distress at loud noises, and his making excessive noise by singing, humming, clearing his throat, or yelling during quiet times or transitions. In the area of touch, Ms. Shattles noted Student showed distress when his hands or face were dirty, and he did not tolerate dirt on his hands or clothing. Further, Student was distressed by the accidental touch of a peer, or may not respond to another's touch. Student scored frequent/occasional in the area of body awareness due to chewing on clothing, pencils, crayons, and fingernails; Student also moved his chair roughly, and fidgeted when seated at a desk or table.

32. Of note, however, Ms. Shattles rendered an "always/occasionally" score to Student in the area of planning and ideas. Student showed poor organization of materials in, on and around his desk; he bobbed or dropped items when attempting to carry multiple objects; he did not perform tasks in proper sequence, failed to complete tasks with multiple steps, and had difficulty correctly imitating demonstrations. Student demonstrated limited imagination and creativity in play and free time, and played repetitively during free play. He would not expand or alter his activity when given the option. Ms. Van Meeteren concluded

that Student demonstrated atypical behavior responses to sensory stimuli in the classroom, and benefited from support with social interaction, hearing, touch, and planning and ideas.

33. The assessment team concluded Student made significant progress over the last few years. Although there were reported concerns by Parents and staff regarding Student's weaknesses in social skills and sensory processing, these deficits did not appear to significantly impact his educational performance and/or social interaction. Ms. Yoo emphasized Student's very superior cognitive abilities, and noted that "gifted children may develop asynchronously: their minds are often ahead of their physical growth, and specific cognitive and social-emotional functions can develop unevenly."⁵ Ms. Yoo determined Student's cognitive functioning was well above his maturity level which could lead to social behavior difficulties. Student's improvements in his overall social interactions with peers as observed and reported in the assessment, could be attributed to his developmental growth and maturity. Ms. Yoo concluded it was difficult to clearly state that Student's social emotional development was solely associated with his medical diagnosis of autism. "Gifted children can also have similar struggles with their social emotional development. Further, research states that hypersensitivity to sensory stimuli is common for both students who are gifted and also for those with autism."⁶

34. In summary, the assessment team determined Student did not appear to meet the eligibility criteria for autism. Although Student presented with weaknesses in social skills and sensory processing, they did not appear to be *significantly* impacting his educational performance or social-emotional functioning in the school environment. Further, Student did not appear to meet the eligibility for speech-language impairment. Student presented with no deficiencies in the areas assessed. There was an overall significant growth within his pragmatic language functioning. The assessment team recommended a series of strategies and accommodations which could be utilized in the general education classroom without special education services and supports.

35. Oddly, although it clearly discussed Student's ineligibility for special education, the October 1, 2014 assessment report marked the box "Student meets the legal criteria for eligibility for special education under the current guidelines as defined in the California Code of Regulations – Title, 5, section 3030." This error made no sense to Parents and, in their opinion, clouded the reliability of the assessments. Parents did not receive a copy of the assessment report for their review prior to the IEP team meeting on October 1, 2014. This suggested to Parents that District IEP team members did not review the assessment report, and simply predetermined District would terminate Student's special education services. Further, Parents did not receive a corrected copy of the assessment report until months later at the January 28, 2015 IEP team meeting.

⁵ As cited by Ms. Yoo, *National Association for Gifted Children*, <http://www.nacg.org>.

⁶ As cited by Ms. Yoo as Neinhart, p. 230, *Gifted Child Quarterly*.

October 1, 2014 IEP Meeting

36. Student's triennial/annual IEP meeting commenced on October 1, 2014. The various assessors presented their reports, which were then discussed by the IEP team. The IEP document determined Student was not eligible for special education. The IEP team agreed to reconvene the IEP team meeting to discuss parental disagreement with the termination of special education services. District IEP team members encouraged Parents to have Student's private psychologist observe Student during recess time at school. Student's special education services remained in stay-put⁷ at this time.

October 22, 2014 IEP Meeting

37. The IEP team met again on October 22, 2014, to further discuss parental concerns and objections to terminating Student's eligibility for special education services. The formal IEP document consists only of handwritten notes. Parents acknowledged Student had made great progress. Father emphasized, however, that Parents believed Student continued to need an IEP and services, specifically in the area of social skills due to Student's low frustration, tolerance, conflict resolution, and difficulty with complex conversation and social interaction with peers.

38. Father also reported Student's private psychologist recommended social skills training and counseling by the school psychologist. District offered to discuss the matter with the private psychologist and again offered to allow the psychologist to observe Student at school.

39. Parents discussed their concern regarding Student's unstructured time. Mother expressed concern that the behavioral intervention data sheets which she received every other week did not correspond to Student's version of his school day. District offered Parents an assessment plan for receptive/expressive language which would include observations and language sampling during recess and unstructured playtime.

40. District again explained that for a student to qualify for special education services, there needed to be a significant impact on his education. Based upon the assessment, District members of the IEP team continued to believe Student did not have any areas of need that impacted his education. Further, Ms. Shattles explained that District's Positive Behavior Intervention and Support Program, which was available to all general education students, was sufficient to address Student's behaviors.

41. Ms. Shattles is a coach in District's Positive Behavior Interventions and Supports program which teaches students positive behaviors and reinforces expectations. It

⁷ Stay put is a protective measure that requires a school district to retain a student in a current placement during the pendency of any dispute relating to a child's special education program unless parents and the school district mutually agree to another placement. (34 C.F.R. 300.518 (2006).)

consists of three tiers: (1) every student is involved in the basics, and earns gold tickets for positive behavior; (2) when more intensive intervention is needed, individual students can “check in and check out” and set goals for the day; and (3) a more severe level is generally reserved for high school students. Ms. Shattles informed Parents that Student could utilize Positive Behavior Interventions and Supports on the “check in” basis, although she did not believe he needed it. Ms. Shattles maintained her opinion that Student did not require special education services.

42. Brook Carreras, Principal at Peters Canyon Elementary School, also explained that Positive Behavior Interventions and Supports was a successful program, available to all students at Peters Canyon, which was designed to teach social behaviors and safety on campus to all students. Ms. Carreras considered this program to be an appropriate response to parental concerns regarding Student’s behaviors and emotions. Ms. Carreras was aware of one incident in which Student and another boy were sent to her office after a disagreement on the playground about game rules. Ms. Carreras spent about 15 minutes talking with the boys. Ultimately, both boys wanted to fix the problem and each apologized to the other. Positive Behavior Interventions and Supports program would handle Student’s issues similarly.

43. Parents felt District IEP team members were not listening to them during the meeting as their decision had already been made. Parents felt the IEP team meeting was merely a courtesy, and was not intended to debate the eligibility issue. In response, Parents also provided supplemental notes to the October 22, 2014 IEP team meeting, which expounded on the discussions during the meeting. Father brought up several issues for discussion; (1) the assessment acknowledged Student as gifted but did not consider Student as twice exceptional; and (2) the IEP team had not reviewed Student’s goals, and Parents did not agree that Student had met his goals. There were also questions regarding access to school counseling; however, Ms. Yoo explained that without special education eligibility, Student would not have access to school- based counseling.

44. Parents also presented several recent examples of Student’s continuing difficulties, involving inappropriate behaviors, social miscues and inability to advocate for himself or resolve conflict. No changes were made to the October 1, 2014 IEP document.

November 4, 2014 IEP Meeting

45. On November 4, 2014, an IEP team meeting was held to amend Student’s stay put services. As early as 2012, Ms. Yoo had suggested Student’s behavior intervention service aide be faded. Parents resisted this idea, and Student’s one-to-one aide remained in place throughout the school day. Based upon Student’s academic performance by November 2014, however, Parents requested that District suspend Student’s behavior intervention service during classroom rotations for math, spelling, library time and quiet reading time. The October 1, 2014 IEP document was thus amended and no other discussions or action were taken at this time.

Supplemental Speech and Language Assessment

46. Jane Ashpes is a speech and language pathologist with 25 years of experience. She has both a bachelor's degree and master's degree in speech pathology. She provided Student's group speech and language services in 2014. Ms. Ashpes administered Student's second speech and language assessment, and prepared the assessment report dated January 21, 2015. This limited evaluation was intended to assess Student in receptive language, expressive language and pragmatics, specifically, Student's pragmatic skills and narrative language skills as they related to peer interactions, and to reconsider eligibility in the area of speech and language disorder.

47. Ms. Ashpes conducted an observation of Student on the school playground during a 15 minute recess. She observed Student engaging in play with four other peers, which involved a non-specific kick ball game. Student participated with the other peers throughout the recess and he appeared to enjoy the game. When recess ended, Student engaged in the expected behavior of stopping, responding to the whistle, and lining up. He walked to the line with another peer with whom he engaged in conversation, occasionally laughing and gesturing until he returned to the classroom. Student did not need any prompts to stop talking when the teacher came out, while other peers needed several reminders to stop talking. Student's aide reported this was a typical recess for Student.

48. Ms. Ashpes conducted two observations of Student in the classroom during a small group project with three other peers. This was an unstructured activity which Student lead and directed. At the beginning of the first observation an aide was working with Student's group. Student and another child were distracted by other students, and the aide prompted all members of the group to continue with the task. Student participated at the same level as his peers. At some point, the teacher asked the aide to work on another project. Ms. Shattles prompted Student, and told him to be the leader of the group. Student appropriately led the group. He made suggestions; he agreed with peers on some items and defended his ideas if a peer disagreed. He joined in a joke and giggled with the group. Towards the end of the session, the aide rejoined the group and Student became less active in the activity. Student was observed to be more actively involved when the aide was not present to direct the group. During the observation, Student cleared his throat one time, and played with a small rubber cap for most of the session. Neither of these behaviors were distracting to the other participants in the group or stood out as significantly different.

49. On the next day's observation, the class was again engaged in a similar unstructured group project. Student had a specific job as "videographer" and actively participated with the group. Student was occasionally distracted by the apps on the iPad, and he played around with the iPad camera with another peer. He obtained the peer's attention by calling his name and sharing the pictures with him. Both laughed and engaged in the activity for several more turns, and both found the activity humorous. Student worked cooperatively with his group and occasionally helped another peer. He demonstrated some off task behaviors, particularly when distracted by the iPad, however, he was tallied to be on

task 71 percent of the time, compared to on task behavior at 65 percent for his other male peers.

50. Ms. Ashpes administered the Comprehensive Assessment of Spoken Language which is a norm-referenced assessment utilized to provide information about Student's oral language skills. In the core language composite portion of this assessment, Student's overall receptive and expressive language skills were in the average range. When broken down, however, Student's scores demonstrated weaknesses in understanding figurative speech, indirect statements, and using language in response to ambiguous situations.

51. On the semantics portion of the assessment, Student's scores indicated semantics was not an area of deficit, but rather was an area of relative strength for Student.

52. The syntax/morphology portion of the assessment and Student's oral language samples demonstrated Student's proper use of vocabulary and grammatical forms in spontaneous sentences. The results indicated syntax was not a deficit area for Student.

53. Student also participated in the pragmatics component of the Comprehensive Assessment of Spoken Language. The results indicated Student demonstrated some relative weaknesses in pragmatics; however it was not a significant deficit area for Student.

54. In addition, Ms. Ashpes utilized the Pragmatic Profile subtest of the Clinical Evaluation of Language Fundamentals-Fifth Edition, which is a checklist of speech intentions that are typically expected skills for social and school interactions. The Pragmatic Profile was completed during the two classroom observations of unstructured peer and adult interactions described above in Paragraphs 41, 42, and 43. Student's scores indicated his social language interaction skills were in the average range. He demonstrated strengths in interpreting nonverbal messages and in using nonverbal means to support communication. He also demonstrated strengths in giving and asking for information and in understanding humor and jokes at a level commiserate with his peers. Student demonstrated weakness in maintaining eye contact, especially when a visual distraction was present or he was focused on an upcoming event. He also demonstrated relative weaknesses in the area of understanding or expressing intentions. When viewing the results as a whole, overall, Student demonstrated appropriate social interaction with his peers related to the task.

55. In summary, Student's language skills, including morphology, syntax, semantics, and pragmatics were not significantly delayed on standardized assessments. Student demonstrated relative weaknesses in pragmatics, however, based on classroom and recess observations, Student did not demonstrate significant difficulty in understating or using spoken language to the extent it adversely affected his social interactions or his educational performance in group activities. Based upon speech and language assessment results, Student did not meet the legal criteria for eligibility for special education under the category of speech and language impairment. Student did not demonstrate significant impairment in the area of language or speech disorder specified by scores at least 1.5 standard deviations below the mean or below the seventh percentile, for his chronological

age or developmental level on two or more standardized tests in one or more areas tested. While Student's pragmatics score was below average, it was still within the 1.5 standard deviation. Further, based upon Ms. Ashpes's observations of Student, Student possessed normal social skills and behaved appropriately for a third grader. Based upon Student's performance in the classroom, Ms. Shattles concurred with Ms. Ashpes's findings; supports already existing in the general education classroom could meet Student's pragmatic needs.

January 28, 2015 IEP

56. The January 28, 2015 IEP team meeting was held to review Student's supplemental speech and language assessment completed by Ms. Ashpes. As the assessment report did not support a finding of eligibility for special education due to language or speech disorder, Ms. Ashpes shared a strategy to support Student and help him work through anger to maintain calm during recess when he perceived problems. Ms. Shattles also reported she used class discussion to work through social issues which arose in the classroom. With the exception of Parents, the IEP team members agreed that general education supports could meet Student's areas of weakness in pragmatics.

57. The IEP team members also discussed several clarifications and corrections to the triennial assessment report dated October 1, 2014. Specifically, in the report, Ms. Van Meeteren incorrectly scored the Sensory Profile Measure. The test protocols were corrected. Social participation and planning and organization areas of weakness should not have been factored into the score as sensory needs. Regardless, even with those areas factored into the determination of sensory needs, Student still did not meet eligibility for special education, and Student's sensory issues could be addressed in the general education program, not necessitating special education services. Further, it was an error that the October 1, 2014 IEP document marked Student eligible for special education. No changes were made to the October 1 2014 IEP, and District continued to find Student ineligible for special education instruction or services.

Mr. Candela's January 15, 2015 Report

58. On April 16, 2015, District held another IEP team meeting to discuss Pete Candela's independent education evaluation findings, observations, and report. Mr. Candela is a licensed marriage and family therapist. His practice is devoted to the treatment of individuals with autism, and therapeutic consultation with their families, with an emphasis on adaptive social behaviors, community integration, behavior management and independence. He also has extensive prior work experience at the University of California, Los Angeles Autism Evaluation Clinic and the University of California, Los Angeles Early Childhood Partial Hospitalization Program. Mr. Candela has provided Student and his family private therapeutic consultations since January 2014. District was not provided these assessment results, recommendations or any other information from Mr. Candela until April 2015. At hearing, Mr. Candela proved to be a solid and informative witness.

59. The January 15, 2015 report discussed Mr. Candela's administration of the Autism Diagnostic Observation Scale – Module 3 to Student. This assessment, which had also been administered by District, is a semi-structured, standardized assessment of communication, social interaction, and play or imaginative use of materials for individuals who have been referred because of possible autism or other pervasive developmental disorder. During the assessment, Student's speech was notable in its monotone quality; his affect was mostly flat. Student gave some eye contact, but overall, it was not well coordinated with facial expression to augment verbal communication. Student's theme of the play sequence of the assessment was mostly a boy seeking negative attention from his parents. When Mr. Candela attempted to join his play, Student ignored him, and continued with his own play sequence. When looking at pictures or stories and having to describe them, Student appeared to pay extra attention to extraneous information and sometimes missed more relevant content.

60. While Student was willing to participate in conversation, at time he tended to provide off-topic or irrelevant comments or make over-the-top, implausible statements. While Student was able to play with other children, he showed signs of some deficits in social cognition. In scoring this assessment Mr. Candela found Student met the autism spectrum cutoff for being on the autism spectrum, and met the more severe autism cutoff in socialization. Student's combined total score met the autism spectrum cutoff.

61. Mr. Candela also administered the Social Language Development Test – Elementary which is a diagnostic test of social language skills. However, not much information outside of subtest scores were provided in his report or discussed at the IEP team meeting. Student's total test scores fell in the average range.

62. Mr. Candela advised that given Student's diagnosis of autism, it was very important to monitor his adaptive social behavior particularly during unstructured time with peers, as it was an area of weakness for him. He believed a proactive approach would be most effective. Mr. Candela also believe that it should be determined to what degree Student was able to initiate and sustain reciprocal relationships with peers and provide support if necessary. At home and in the community, Student exhibited behaviors and deficits that impeded adaptive social functioning. Mr. Candela believed that if support was not required at the time it was still important to monitor Student's progress to make sure that he continued to be effective.

Mr. Candela's May 13, 2015 Report

63. Mr. Candela's May 13, 2015 report resulted from a settlement agreement between the parties, arising from a separate request for due process hearing. The purpose of the assessment was to observe Student at school, to provide recommendations for his program, with an emphasis on Student's social functioning on the playground.

64. Mr. Candela first observed Student during morning recess on April 14, 2015. Student engaged in a chase game with two peers, and participated throughout the recess

period. At one point, Student's group of boys laid down in the grass to "spy" on other boys playing soccer. When it was time to go back to class, Student lined up with the group and transitioned well back to the classroom.

65. When the students entered the classroom, they were instructed to get their materials ready for "writer's workshop." Student was a little slow to begin, so his aide prompted him to get his materials and transition to the carpet. Student attended to teacher instructions during this activity, and laughed appropriately at a joke made by his teacher. When asked to find a partner, Student did so, and the pair worked well together in generating ideas regarding persuasion.

66. The students were asked to return to their desks to begin their writing assignments. On his way back, Student engaged in "chit-chat" with a peer near his desk. Student's aide provided brief prompting as Student began his writing. Student did not volunteer to share his writing, but he did answer a direct question from his teacher.

67. The observation continued as the class went to lunch. Student sat next to a friend. Student climbed under the table briefly and then went back to his seat. The boys engaged in chit-chat until the friend moved to another table after Student passed gas. At that point, Student moved closer to another friend and began talking to him. When the group was dismissed to the playground, Student played with the same two boys as he did during the morning recess. They continued to engage in the game until transitioning back to class. Upon return to class, Student bounced on his seat as he settled in. The aide provided a prompt to get his book out as he had been instructed by his teacher.

68. Mr. Candela's second observation took place on April 21, 2015, exclusively during lunch recess. Student went to the soccer field with his same two friends. Student joined in the soccer game, and participated well during the game. The other two boys eventually laid down in the grass and "spied" on the soccer game as before, with Student frequently looking over at them. After the second observation ended, Student became upset and went to his two friends in line, grabbed one of their shirts and asked why they spied on him during the soccer game. The boys were separated by the teacher. Based upon Student's subsequent behavior, Mr. Candela concluded Student negatively interpreted the boys spying, and had difficulty managing his emotions in spite of the fact he had previously participated in the "spying" game himself.

69. Mr. Candela acknowledged Student had made good progress over the past few years. While there were many positives taken from the school observations, Mr. Candela felt it was also important to examine Student's pattern of behavior over a longer period of time. Mr. Candela reviewed Student's behavior data sheets since the beginning of the 2014/2015 school year. Mr. Candela noted that for high-functioning students with autism their deficits often lead to difficulty functioning in unstructured settings, an inability to apply learning from past experience, a lack of alternative problem-solving strategies, difficulties in putting events in context and reading the intentions of others, deficits in perspective-taking and theory of mind, and difficulty drawing inferences from the verbal and nonverbal behavior of

others. Breakdowns in these skill areas can often precipitate the acting out of more visible behaviors. While the behavior data reflected instances where Student managed effectively, it also showed times when he demonstrated less adaptive behaviors. These behaviors presented in the form of his verbal responses, misinterpretations/pragmatic issues, and his physical responses. The behavior notes referenced 13 inappropriate verbal responses, including screaming and use of inappropriate language; nine misinterpretations or pragmatic issues; and 14 incidents of inappropriate physical or aggressive responses.

70. Mr. Candela concluded that Student's inappropriate responses came as the result of qualitative differences in communication, socialization and pragmatic language associated with autism which inhibited Student's ability to utilize effective coping strategies in a fluid setting. Sometimes Student's responses resulted from his rigid belief system regarding rules and perceived fairness. At other times, it was the direct result of, or magnified by, a misunderstanding of verbal or nonverbal communication, including interactions of others. There were also times when a situation was made worse by Student's difficulty repairing interactions.

71. Mr. Candela further noted Student was not a child who typically displayed aggression. He opined there were a variety of reasons Student might become physical in unstructured settings as noted in the behavior data. Students with autism often are not able to use their words effectively and resort to using their bodies instead. This is particularly true when dealing with peers in a more fluid, emotionally-charged setting, where pragmatic skills as well as both verbal and nonverbal understanding are more difficult.

72. It was important to contrast the skills Student demonstrated in the classroom with what the behavioral data disclosed regarding his functioning on the playground. Ms. Shattles reported Student's classroom behaviors and skills were average or above. According to Mr. Candela, this supports the premise that the playground behaviors were the result of underlying deficits in pragmatics, communication, and social skills, which are associated with high-functioning autism. Student was more capable and consistent in controlled settings with more static information than he was in the natural environment.

73. Mr. Candela cited and supported several theories regarding high-functioning autism. "By definition, individuals with autism will have difficulty with social pragmatic function. It does not take formal testing to identify that a social pragmatic problem exists ... Passing a test such as the *Test of Pragmatic Language* can represent a false negative and exclude someone from needed support and intervention. Scoring within normal limits, however, on any of these tests does not mean that there is no pragmatic disorder, but rather that one of the components, under specific conditions, does not seem to be a major problem."⁸

⁸ Beverly Vicker, Speech and Language Consultant to the University of Indiana's Autism Research Center, "*Can Social Pragmatic Skills Be Tested?*" (www.iidc.indiana.edu).

74. In considering Student's current performance, Mr. Candela opined it was important to remember Student had benefited from the support of an aide. While Student performed very well much of the time with support, his demonstrated social, verbal and nonverbal deficits associated with autism affected his educational performance in terms of his independent social-emotional functioning. It was Mr. Candela's opinion that Student met the current autism criteria for special education. Further, he emphasized that Student was preparing to transition to the upper grades, which involved significant increases in both academic and social demands. Curriculum becomes more abstract, social skills are more sophisticated, and the playground environment is more complex. No one could predict how Student would respond in unstructured settings without an aide.

75. Mr. Candela concluded Student still qualified for special education under autism eligibility, and proposed a conservative approach to address Student's need for support. He recommended that data be collected regarding Student's functioning without intervention by the aide. This data would serve as a baseline for comparison to data collected in the upcoming year. The IEP team could then meet to discuss the findings and determine the appropriate level of aide support going forward, if any. This approach would give Student the opportunity to demonstrate his ability to consistently generalize his skills independently across settings.

76. Mr. Candela's opinion aptly described Student as a child with autism, and objectively reported his weaknesses during unstructured times. His conclusions, however, were not based upon *all* of the educational criteria necessary to find Student eligible for special education. Specifically, Mr. Candela offered no evidence to prove Student's weaknesses were sufficiently significant to mandate special education. Further, he offered no rebuttal to the supports District provided in the general education setting that would meet Student's needs.

June 16, 2015 IEP Meeting

77. The IEP team met on June 16, 2015, to review and consider Mr. Candela's observations and report. Although Mr. Candela agreed Student did not necessarily need one-to-one aide support, he did believe Student still needed supervision. He believed Student should still be considered eligible for special education services under autism, since he was high-functioning, but still unable to use pragmatics and language to problem solve and take perspective, and had verbal and nonverbal language deficits.

78. In response to Mr. Candela's concerns voiced during the IEP team discussion, Ms. Shattles pointed out that Student was able to problem solve at the same level as his classroom peers. Further, during recess time, two certified adults supervised the students. Peter's Canyon was a Positive Behavior Interventions and Supports school and there were systems in place for all children to deal with expectations and behaviors on the playground. Based upon her own observations and experiences with Student, Erica Charlton, Student's current speech and language pathologist, reported Student did not require speech and language services to access his education and interact with peers. Ms. Charlton also

observed that Student really enjoyed recess. He interacted with peers, waited his turn, shared, and played with a variety of children. Although her service notes reported several incidents of anger, social problems, and pragmatics difficulties, she indicated that Student had far more times when things went well.

79. Ultimately, District members of the IEP team proposed to follow Mr. Candela's recommendation of collecting further data commencing in October of 2015. Ms. Casteel opined that while Mr. Candela was uncertain if Student could be successful without an aide, it was also possible that Student would be successful. Ms. Shattles believed Student's education needs could absolutely be addressed in the general education classroom, as Student responded very much like his other peers. Ms. Shattles recommended that data should be collected on the typical peer classmates for comparison purposes. The IEP team also proposed collecting this additional data. Student would remain in his stay put status while data was collected, as District did not modify its October 1, 2015 determination of ineligibility. Parents subsequently requested that District temporarily terminate Student's one-to-one aide support during all class time. District was unable to collect further data as suggested, as Parent's did not consent to the IEP, and instead, filed for due process hearing.

Student's Expert's Testimony

80. Robin Steinberg-Epstein, M.D. testified as Student's expert witness. Dr. Steinberg-Epstein is the division chief of developmental behavioral pediatrics at the University of California, Irvine. She is also the interim director of the University of California, Irvine Child Development Research Center. She is highly qualified on the subject of pediatric autism, as is evidenced by her 13 page curriculum vitae. Dr. Steinberg-Epstein sees Student as a patient one to four times a year.

81. Dr. Steinberg-Epstein was passionate in her descriptions of Student. There is no doubt that Student is a high functioning autistic child. While she acknowledged it is possible for a child to be medically autistic and not qualify for special education services, Dr. Steinberg-Epstein opined that Student qualified for continuing special education services. She considered Student a twice exceptional student. Student's high cognitive ability was overriding his social and verbal and nonverbal communication deficits. Student was very literal. He needed special education services to navigate body language and social communication. Student's strengths lay in his cognitive abilities. His weaknesses were in his inability to understand concepts such as inference, body language or social cues. Dr. Steinberg-Epstein believed Student did not require a one-to-one aide; she believed he needed special education services and supports to help him navigate pragmatics, body language and social communication during unstructured times.

82. Dr. Steinberg-Epstein also reviewed the 2014-2015 assessments and assessment reports, including a review of documents and data collected by the aides. Dr. Steinberg-Epstein took issue with District's determination of Student's present levels of functioning. The assessors concluded that oral communication "was not an area of concern."

Dr. Steinberg-Epstein disagreed. While Student was high functioning, he still had significant deficits. He could answer questions, but he could not carry on a conversation.

83. Of primary concern to Dr. Steinberg-Epstein was District's determination that social-emotional areas "were not an area of concern." Student's present level notation indicated that although there were some concerns regarding Student's social interaction with peers, no significant behaviors were reported or observed. Dr. Steinberg-Epstein found this to be contrary to the information reported in the behavior intervention notes, which were available to District assessors, but not considered. The data sheets were replete with examples of Student's social and emotional deficits. Dr. Steinberg-Epstein counted at least 15 acts of aggression, most of which occurred during unstructured time. There were reported examples of Student's difficulties expressing himself with words and his poor perspective. The data sheets tracked incidents of Student's crying, facial stimulation and throat clearing.

84. Dr. Steinberg-Epstein contended District ignored some of the results on the Gilliam Autism Ratings Scale-3, in which both Mother and Ms. Shattles found a "very likely" probability of an autism spectrum disorder. It was important to Dr. Steinberg-Epstein that Ms. Shattles's scoring was only one point from finding Student in the "probable" range for autism. Further, both parent and teacher reported seeing behaviors related to social interaction and social communication.

85. Dr. Steinberg-Epstein questioned Ms. Ashpes' conclusions regarding Student's pragmatics. Non-literal language was important. As example on this test, the examinee must generate questions, requests, or expressions of gratitude or sorrow; must initiate conversation or turn-taking; and must judge the appropriateness of certain language in a given situation. On the Pragmatic Judgment subtest, Student obtained a standard score of 84, and a percentile rank of 14, making pragmatics an area of weakness for Student. Although the score placed Student in the low average range, Student specifically had difficulty when he needed to ask a question or make a statement based on the perceived feelings of a person scores.

86. Dr. Steinberg-Epstein acknowledged she had not observed Student in a classroom setting, nor had she ever spoken to Student's teachers or other District staff members. Her findings, therefore, are limited in value. While Dr. Steinberg-Epstein's testimony established Student had deficits associated with autism, she did not provide insight into the level of those deficits in comparison to Student's intellect, nor did she consider the general education programs or accommodations offered by District.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA⁹

⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

1. This hearing was held under the Individuals with Disabilities Education Act, 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)¹⁰ 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 an appropriate public education that emphasizes special education and related services designed to meet their unique needs 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, which meet state educational standards, and which conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "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; 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; Ed. Code, § 56363, subd. (a).)

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.)

4. 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 FAPE 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.]) As the Ninth Circuit held in *Mercer Island, supra*, the phrases "educational benefit," "some educational benefit," or "meaningful educational benefit," all refer to the *Rowley* standard.

¹⁰ All citations to Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

5. 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 FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; 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 to expansion of the issues. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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. 49, 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].) Here, Student has the burden of persuasion.

Student's Eligibility for Special Education and Related Services from October 1, 2014 to June 16, 2015

6. Student contends District inappropriately found Student ineligible for special education and related services as of October 1, 2014, as he continued to meet existing eligibility requirements for special education under the classifications of autism and language and speech impairment. District contends that during the time in question, Student was not “disabled” under applicable regulatory provision, in effect as of October 1, 2014. Further, any deficits Student displayed during this time were either (1) insufficient to satisfy any of the relevant regulatory eligibility criteria, and/or (2) were all appropriately addressed with general education interventions.

Eligibility for Special Education

7. Under the IDEA, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, 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).) Similarly, California law defines an “individual with exceptional needs” as a pupil who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code § 56026, subds. (a), (b).)

8. On the other hand, federal regulations require “each State must ensure that a FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.” (34 C.F.R. § 300.8 (c)(i).) Further, the IDEA requires that the term “unique educational needs” be broadly construed to include a disabled

child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 vs. B.S.*, (9th Cir. 1996) 82 F. 3d 1493, 1500.)

9. In broadly construing Student's unique educational needs, his status as intellectually gifted cannot be discounted. Intellectual giftedness is not a category of disability under the IDEA, and students are not IDEA-eligible on that basis alone. Gifted students, however, are still protected by the IDEA, and may qualify for special education if they exhibit one or more of the disabilities listed in the IDEA. The mere fact that a student is gifted does not disqualify him from eligibility for special education. Further, a student who is eligible as a student with a disability is eligible regardless of his academic success. (*Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).) As example, a gifted student may have high or above average academic scores, however this cannot automatically constitute ineligibility, if the student has deficits in other areas such as communication, pragmatics, and social-emotional skills.

10. On July 1, 2014, California Code of Regulations, title 5, section 3030, was revised and updated to align the regulation with existing federal statutes and regulations. The regulation now states:

(a) A child shall qualify as an individual with exceptional needs, pursuant to Education Code section 56026, if the results of the assessment as required by Education Code section 56320 demonstrate that the degree of the child's impairment as described in subdivisions (b)(1) through (b)(13) require special education in one or more of the program options authorized by Education Code section 56361. The decision as to whether or not the impairment requires special education shall be made by the IEP team, in accordance with Education Code section 56431(b). The IEP team shall take into account all the relevant material which is available on the child. No single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the child's eligibility for special education

11. In pertinent parts, the Education Code defines autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting 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. (Ed. Code § 56026, subd. (b)(1).)

12. It is clear Student remains a child with autism under a medical diagnosis of autism. Autism does not simply disappear; however, the intensity or impact of a child's deficits may change. Further, autism is a spectrum disorder, indicating a range of disability, some of which allow a child to appropriately function without special education. As a result, a medical diagnosis alone is not sufficient to support a finding of eligibility for special education. (*See, E.J. v. San Carlos Elem. Sch. Dist.* (N.D.Cal. 2011) 804 F. Supp. 2d 1024, 1032.) OAH cases have frequently supported a finding that a student with a medical diagnosis of autism who does not exhibit significant behaviors or deficits in the educational

setting, does not meet the specific eligibility criteria for autism. (See e.g., *Dublin Unified Sch. Dist. v. Student* (2006) Cal.Offc.Admin.Hrngs. Case No. 2006060896; *Parents v. Manteca Unified Sch. Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009060164).)

13. A student has a language or speech disorder if it is determined that a his disorder meets one or more of the following criteria: (1) articulation disorder; (2) abnormal voice; (3) fluency disorder; and/or (4) language disorder which is the inappropriate or inadequate acquisition, comprehension or expression of spoken language such that the student's language performance level is found to be significantly below the language performance of his peers. (Ed. Code, § 56333, subd. (d).) A finding of an expressive or receptive language disorder requires that the student score at least 1.5 standard deviations below the mean, or below the 7th 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.

Education Code Section 56203

14. Additionally, California law defines an individual with exceptional needs as one who, because of a disability "requires instruction and services which cannot be provided with modifications of the regular school program" to ensure that the individual is provided a [FAPE] (Ed. Code, § 56023, subd. (b).) Thus, there are many children who have varying ranges of weaknesses, deficits, areas in need of improvement, and disability who do not qualify for special education because they do not meet the narrow categories specified by law, ...including the requirement that the student's instruction or services cannot be provided with modification of the regular school program. "A child is not considered a 'child with a disability' if it is determined that a child need only a related service and not special education." (*W.H. v. Clovis Unified School District* (E.D. Cal 2009) 2009 WL 1605356, *21, citing 34 C.F.R. § 300.8(a)(2)(i).)

15. The Ninth Circuit Court of Appeals determined that a child may have a qualifying disability, yet may not be found eligible for special education, where the child's needs can be met with modification of the general education classroom. (*Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F. 3d 1009, 1107-1108, 1110.) The Court determined the due process hearing officer and the reviewing court looked to the child's above-average success in the classroom as shown by the child's grades and the testimony of teachers as evidence the child's needs could be met in a general education classroom without specialized education and related services. (*Ibid.*)

16. The crux of Student's eligibility remains in the two-pronged test of eligibility as described in Legal Conclusion 7above.

17. District does not contend that Student is not autistic. In some areas the assessment results support Student's contention that he has weaknesses in several areas which are typical of autism spectrum disorder. Taken on assessment scores alone, there is a very likely probability that Student is on the autism spectrum. Student's below average

rating scores raise concerns regarding functional communication, such as in the areas of empathy, engagement and communication. District does not dispute Student's weakness in social-emotional skills or pragmatic language. The behavior intervention data collected indicated Student had some difficulties during unstructured time and on the playground. When the multi-facets of the assessment are considered in their totality, including Student's history, teacher reports, and observations, the issue shifts from a diagnosis of autism to the degree of Student's deficits. As Ms. Yoo concluded, Student presented with weaknesses in social skills and sensory processing, but they did not *significantly* impact his educational performance or social-emotional functioning in the school environment.

18. Dr. Steinberg-Epstein passionately disagreed with District's finding of ineligibility. Based upon her review of Student's triennial assessment, there was more than enough information and examples in the assessment results to conclude Student needed continuing support to help him navigate pragmatics, body language and social communication during unstructured times. Dr. Steinberg-Epstein's expert opinion, however, begs the question of whether Student's deficits meet the statutory requirements for special education. Dr. Steinberg-Epstein validly suggested alternate conclusions which could reasonably be derived from the available assessment information, which supported the first prong of eligibility. Student has discernable deficits in verbal and non-verbal language, pragmatics, and social-emotional skills. Dr. Steinberg-Epstein did not, however, address the second prong of the argument, and discuss why Student's unique needs could not be addressed in a regular classroom as suggested by Ms. Shattles, or through general education accommodations and supports, such as the Positive Behavior Interventions and Supports program. Dr. Steinberg-Epstein made no inquiries of the District. She did not observe Student in the classroom or during unstructured times; she did not investigate general education accommodations or supports available to Student, such as the Positive Behavior Interventions and Supports program.

19. Instead, greater weight is given to Ms. Shattles's observations and opinions. Ms. Shattles was Student's teacher for two years, and had the most direct contact with him. Although she is currently a general education teacher, she has also been a special education teacher. In those portions of Student's assessment where she provided rating scores, she did not shy away from indicating a very likely probability of autism spectrum disorder. She also acknowledged several areas of atypical behavior and sensory deficits and organizational weaknesses. However, she found none of these deficits actually impacted Student's education. It remains undisputed that Student performed at or above grade level in all subjects while in her general education classroom. At hearing, Ms. Shattles enthusiastically reiterated her opinion that Student could appropriately access his education in the general education setting without special education and related services.

20. Ms. Shattles reported Student had occasional difficulties in the area of social participation, but Student could also resolve peer conflict without adult interventions, enter into play with peers, maintain eye contact, and shift conversation topics with peers. She acknowledged Student needed occasional redirection, however so did the rest of his classmates. In many ways, Ms. Shattles found Student's lack of social skills no different

from those of his classmates. Likewise, Ms. Casteel reported Student had a desire to be social with his peers, and could initiate interaction. He did not demonstrate complex conversations with his peers, but neither did his peers. All in all, Student did not exhibit as many deficits as would be typical of a child with autism. Student's behaviors were typical of third graders. Mr. Candela similarly observed Student in class. With minor prompting, Student attended to teacher instructions; laughed appropriately at a joke; and worked well with a partner during a writing assignment.

21. Parent's decision to terminate Student's aide support during class time, in spite of its availability under Student's stay-put IEP, is also significant. Termination of the aide during class supports a finding that District could continue to educate Student in a general education setting without specialized instruction or special education supports.

22. Admittedly, Ms. Shattles rarely observed Student during non-structured times. Here, Mr. Candela's observations of Student during unstructured times are most reliable. During observation of morning recess, Student engaged in games with peers the entire time. Student transitioned back to the classroom well. At lunch recess Student sat next to a friend, and engaged in "chit-chat" with him. When Student went to the playground, he again played with the same peers as before. On another playground observation, Mr. Candela reported Student joined in a soccer game and participated well. All of these observations support a finding that Student could age appropriately engage in social settings without assistance.

23. Although Dr. Steinberg-Epstein and Mr. Candela emphasized the behavioral incidents noted in the aide's data collection as examples of Student's continuing difficulties with social and pragmatic functions, they offered nothing to indicate these deficits could not be addressed in general education through accommodations such as coping strategies, behavior checklists or the PBIS program. Mr. Candela's suggestion of additional data collection, while appropriate, was based upon estimation of what might happen in the future. He was concerned that no one could predict how Student would respond in unstructured settings without an aide. This is insufficient to invalidate the IEP team's determination that Student's unique needs could be met in the general education setting.

24. In summary, the information available to District may have been sufficient to establish Student had autism defined as a developmental disability significantly affecting verbal and nonverbal communication and social interaction. However, these are areas of weakness and deficit which can continue to be monitored in the general education setting. The information provided to the IEP team in the assessments, discussions, and observations, reasonably and appropriately supported the IEP team's determination that Student's autism did not significantly impact Student's educational or social-emotional performance in the general education setting. Student's deficits did not impede his access to, or receipt of educational benefit. Further, Student failed to meet his burden of proof to establish that he required specialized instruction and supports to obtain educational benefit. Thus, Student was not eligible for special education under the category of autism.

Determination of Ineligibility at October 1, and 22, 2014 IEP Team Meetings

25. An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, “(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge.” (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

26. Legal Conclusions 1 through 24 are incorporated herein. Based upon the information possessed by District as of the October 1, and October 22, 2014 IEP team meetings, Student failed to establish that District inappropriately determined him to be ineligible for special education. The evidence did not demonstrate that Student’s deficits significantly impacted or impeded his ability to access his education or obtain educational benefit, thereby excluding him from eligibility criteria as defined in California Code of Regulations, title 5, section 3030, subd. (b)(1). Further there was no evidence to support a finding that Student’s unique needs required specialized instruction or services which could not be provided through the general education program.

Determination of Eligibility at the November 4, 2014 IEP Team Meeting

27. Legal Conclusions 1 through 25 are incorporated herein. On October 1, and 22, 2014, District determined Student no longer qualified for special education and related services. The sole purpose of the November 4, 2014 IEP team meeting was to amend Student’s stay-put services, at Parents’ request, to partially suspend Student’s one-to-one aide during academic classroom rotations. There was no discussion of eligibility, nor was any additional information presented. As such, District’s prior determination of Student’s ineligibility for special education remained appropriate.

Determination of Eligibility at the January 28, 2015 IEP Team Meeting

28. Federal and state law require that an IEP team must consider certain information, including the results of the initial or most recent evaluation of the child. (20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.324(a)(1)(iii) (2006); Ed. Code, § 56341.1, subd. (a)(3).) This procedure requires an educational agency to “consider” outside assessments of a child; it does not mandate that the agency incorporate recommendations from the assessments when developing an IEP. (*K.E. v. Independent School Dist. No. 15* (8th Cir. 2011) 647 F.3d 795, 805-806; *G.D. v. Westmoreland* (1st Cir. 1991) 930 F.2d 942, 947.)

29. Legal Conclusions 1 through 27 are incorporated herein. The January 28, 2015 IEP team meeting was held to review Student’s supplemental speech and language assessment and assessment report to reconsider eligibility under the criteria of autism and/or language and speech impairment.

30. As indicated in Legal Conclusion 11, a student qualifies for speech and language services if he/she exhibits a language disorder defined as an expressive or receptive language disorder in which he/she scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his/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.

31. Student did not qualify for special education and services under language and speech disorder. Ms. Ashpes administered appropriate assessments to measure Student's oral language skills. Based upon Student's scores, as well as observations of Student during both class time and unstructured time, Ms. Ashpes concluded Student's language skills were not significantly delayed. While Student's pragmatics score was below average, it was within the required 1.5 standard deviation. Further, the IEP team discussed strategies available to support Student in the general education setting to help him work through anger or maintain calm during recess. Ms. Shattles also reported on the use of class discussion to work through social issues which arise in the classroom. These strategies support a finding that the general education program could address Student's social and pragmatic language weaknesses. Student remained ineligible for special education.

Determination of Eligibility at the June 16, 2015 IEP Team Meeting

32. Legal Conclusions 1 through 30 are incorporated herein. The purpose of the June 16, 2015 IEP team meetings was to review and consider Mr. Candela's assessments and observations of Student. While the information provided by Mr. Candela provided a more exacting description of Student's deficits related to his autism, he did not establish Student's deficits significantly impacted or impeded his ability to access his education or obtain educational benefit. Mr. Candela's January 15, 2015 report specifically states, "If support is not required at this time, it will be important to monitor Student's progress to make sure that he *continues to be effective.*" (Emphasis added.)

33. Mr. Candela agreed Student did not necessarily need one-to-one aide support, but he still needed support. He found Student still unable to use pragmatic language to problem solve and take perspective. Given these opinions, he provided no information or insight as to the appropriateness of the PBIS program which was discussed as behavior and social accommodation for Student. Mr. Candela's observations of Student at school resulted in the acknowledgment that Student had made good progress and there were many positives taken from his observations. His concerns focused on suppositions and apprehensions of what might happen in the future, resulting in his recommendation to collect additional data on Student over a longer period of time. This recommendation, accepted by District, did not require a determination of eligibility for special education; it was a form of assessment to determine future eligibility. The information provided by Mr. Candela did not invalidate District's prior determination that Student was ineligible for special education and related services. Student therefore failed to meet his burden of proof that he remained eligible for special education and related services during the time at issue in this case.

ORDER

Student's request for 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 all issues.

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).)

DATE: April 12, 2016

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings