

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

In the Matter of:

RIVERSIDE UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007020300

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Riverside, California, on September 25 through 28, 2007, and October 15, 2007.

Ricardo Soto, Attorney at Law, represented Petitioner (District). Stephen N. Morford, Ed.D., attended the hearing on behalf of the District.

Student's mother (Mother) and father (Father) represented Student.

The District filed a Request for Due Process Hearing on February 9, 2007. The District's first request for a continuance was granted on March 1, 2007, and subsequent continuances were granted for good cause. The matter was submitted and the record was closed on October 15, 2007.

ISSUE

May the District exit Student from special education without parental permission.

## CONTENTIONS OF THE PARTIES

The District contends that as of December 14, 2006, during Student's second grade year, Student no longer required specialized education and related services despite having an autism spectrum disorder. The District reasons that Student had been academically and behaviorally successful in a general education placement where, despite having an instructional aide available to him, Student required no assistance. Mother and Father disagree. Mother and Father reason that Student could not be as academically and behaviorally successful as reported by school personnel because Student had never had the level of preschool services recommended by the local Regional Center in 2002 and Mother and Father continued to observe autistic behaviors at home or in the community. Mother and Father believed that Student's disorder caused him not to use the bathroom at school, resulting in stomach pains, that Student engaged in socially inappropriate behaviors at school such as "roaring" like an animal, and that Student had unaddressed occupational therapy needs such as an unusual pencil grasp.

## FACTUAL FINDINGS

1. Student is an English-speaking, 8-year-old Caucasian male with an autism spectrum disorder, who, at all relevant times resided within the District.<sup>1</sup>
2. Individual program plans (IPPs) for Student had been prepared by the Inland Regional Center (IRC) on September 19, 2002 and September 15, 2004. The September 15, 2004 IPP was prepared during a time that Mother had withdrawn Student from school. (See Factual Findings 5 and 9, below.) The IPPs reflect that Mother and Father reported behavioral issues such as lip or toe biting, hitting others,

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<sup>1</sup> At the hearing, the District did not contest that Student had been diagnosed with autism or Asperger's Syndrome

behavioral outbursts and discomfort when others were too close to him. Student's parents also reported in the IPPs that Student was hypersensitive to some foods and textures, demonstrated decreased pain sensitivity, and had motor skills clumsiness.

3. Student was initially found eligible for special education at an IEP held on November 13, 2002, and was placed in a special day class (SDC) in a District preschool. No related services were provided under the November 13, 2002 IEP. On June 7, 2004, a transition IEP was held regarding Student's transition from preschool to kindergarten. The IEP team recommended that Student be exited from special education and be placed in a general education kindergarten class. Father signed the IEP, but testified at hearing that he did not understand that this would exit Student from special education.

4. Mother did not agree with the June 7, 2004 IEP because of concerns that Student would not be able to transition to general education. On July 9, 2004, mother signed an addendum to the June 7, 2004 IEP that provided an instructional aide for Student, with a follow-up meeting to be held prior to July 31, 2004 to discuss Student's progress.

5. Student attended Franklin Elementary School for kindergarten beginning in July of 2004.<sup>2</sup> Student was enrolled for a few days before being removed by Mother, who did not feel Student had sufficient transition support.

6. An IEP team meeting was held on July 29, 2004. To accommodate Mother's concerns regarding the transition to general education, the District indicated that Student would be eligible for special education. The IEP proposed a special day class (SDC) placement with gradual mainstreaming to regular education. Mother did not consent to the IEP. The IEP contained the following goals to be achieved by July 29,

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<sup>2</sup> Prior to the 2006-2007 school year, Franklin was on a "track" system in which students alternated their attendance, resulting in school being in session for Student in July.

2005: 1) Student would independently print his first and last name; 2) Student would follow teacher directions and take his turn with no more than one reminder four out of five trials; and 3) Student would be able to identify his feelings and express them using language.

7. An IEP team meeting was held on October 18, 2004, to discuss Student's placement. The IEP team recommended a general education placement with instructional aide support. Mother did not consent.

8. An IEP team meeting was held on March 8, 2005, at which time Mother consented to an amendment to the July 29, 2004 proposed IEP. The amendment provided for placement in a general education kindergarten with instructional aide support. The amendment addressed Mother's concern that Student should go to the bathroom on a schedule, with adult assistance for wiping. Student was permitted to use an alternate bathroom on campus. The IEP amendment also stated that Student will "receive social skills training during his school day, starting the week of March 28, 2005."<sup>3</sup>

9. Student began attending kindergarten at Franklin Elementary School (Franklin) in March of 2005. Student was placed in a general education kindergarten class with the assistance of instructional aide Sheila Rodriguez (Rodriguez). No other related services were provided to Student. Rodriguez's testimony was credible in all areas because she had daily contact with Student in a school setting over a period of

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<sup>3</sup>At hearing, Mother testified that she interpreted this as an offer of social skills training as a related service, whereas District witnesses interpreted this reference in the IEP as a more general reference to the curriculum. Because this decision is limited to the IEP team recommendation to exit Student from special education in December of 2006, this decision need not, and does not, decide the meaning of this IEP term or whether services were provided in conformance with it.

years.

10. During kindergarten, Rodriguez saw that Student needed minimal support. Student's school work was not modified in any way and Student did not require support to socialize with the other children. Student would raise his hand to ask the teacher questions or request permission to go the bathroom. Rodriguez accompanied Student to the bathroom, but did not follow him in. Student needed some assistance with wiping himself after using the toilet and occasionally wet his pants, sometimes up to once a week.

11. Joanne Lasky (Lasky) had Student in her first grade class at Franklin from July of 2005, through June of 2006. Lasky saw that Student only occasionally needed help from Rodriguez with writing tasks. Lasky did not see Student requiring help with social interactions at any time. Although Rodriguez would accompany Student to the bathroom, Student was capable of going by himself and would do so when Rodriguez was on her lunch break. At recess, Student appropriately took turns playing basketball and handball with the other children. At no time did Lasky see Student experiencing difficulties with the other children. Lasky gave Student grades of "advanced" or "proficient" in all areas. Student showed "strong performance" in all "behaviors that support learning" including getting along with others, following rules, working cooperatively in groups, and seeking help when needed. Based on testing administered to all students, Student was found to be eligible for the Gifted And Talented Education (GATE) program for second grade. Given her experience with Student, Lasky persuasively testified that he would have been successful in general education even without the support of an instructional aide.

12. During first grade, Student needed Rodriguez's help approximately one time per week. Student would participate in group work with other children and enjoyed taking turns playing handball during recess. The only assistance Student sought at recess was to have Rodriguez rule in his favor on whether the handball was

out of bounds. Student would ask to go to the bathroom when he needed to, and never complained of stomach pains.

13. Michelle Hill (Hill) taught Student's second grade GATE class from August 28, 2006 through June 21, 2007. Hill was persuasive in her opinions regarding Student because she had experience working with children with autism in a District SDC. When Student started in Hill's class, he could write well, followed directions, worked well with other students in groups and did not show any indication of being frustrated, anxious or overwhelmed. It was immediately apparent to Hill that Student did not need Rodriguez's help in the class. By December of 2006, Student was working well in small and large groups and was able to help other children who needed assistance with school work. At most, Student required redirection when he stated to another student, "you got the lowest grade in the class." Hill did not see Student having any difficulties at recess. Student had no difficulty rotating out of Hill's class for instruction in other areas such as art, music or physical education. Like the other children, Student would ask permission to go to the bathroom and would go by himself. Student achieved grades of "advanced" or "proficient" in all subjects, and showed "strong performance" in all behaviors that supported learning such as including getting along with others, following rules, working cooperatively in groups, and seeking help when needed.

14. The students in Hill's class were new to Student. The GATE class was selected from students who had previously been enrolled in other first grade classes and prior to the 2006-2007 school year, Franklin had used a "track" scheduling system where not all children were in school at the same time. Student blended in well with the other Students and Hill did not observe Student having any difficulties with social interaction.

15. In Hill's classroom, Rodriguez sat in the back of the room, close to Student. Student did not want Rodriguez's help and would direct any questions to Hill. Student participated with other children in small group activities and mainly sought

Rodriguez's help for handball court rulings. As in first grade, Student would ask permission to use the bathroom and did not report stomach aches.

16. Father accompanied Student on a school field trip to a zoo while Student was in second grade. Father did not see Student have any difficulty with the bus ride and did not see Student being teased by fellow students. Student talked and interacted with another student throughout the trip and did not make any unusual noises like an animal "roar."

17. Sarah Johnson (Johnson), taught Student in a third grade GATE class for approximately 18 days during the 2007-2008 school year. Johnson's observations of Student were consistent with those of Lasky and Hill. Johnson saw no problems with peer interactions or toileting. Student was advanced in math and reading, and his writing was average when compared to his other skills. Student never complained of stomach aches.

18. During the brief time that Student was in the third grade prior to the hearing, Rodriguez saw that Student had no problems with his school work or relating to typical peers. Student continued to request permission to use the restroom. In Johnson's class, Student, like his typical peers, would request permission to use the bathroom by making eye contact with the teacher and making a sign language "b" for bathroom.

19. While enrolled at Franklin, Principal Jean Aklufi (Aklufi) saw Student in class or at recess for a few minutes a week. Aklufi perceived that Student was indistinguishable from his typical peers and saw no unusual behavior. Aklufi never saw Rodriguez assisting Student in any way. Although Aklufi's observations of Student were limited, they corroborate the testimony of Rodriguez, Lasky, Hill and Johnson.

20. Student's older brother (Brother) was in the sixth grade at Franklin during the 2006-2007 school year (Student's second grade year). Brother described that Student enjoyed handball and was good at hitting the ball. Toward the end of the

school year, two of Brother's friends had laughed in a school bathroom after hearing Student grunt, groan and pass gas in a toilet stall. Brother also observed another incident prior to the start of the school day where a sixth grader made fun of Student for roaring after losing to the older student at handball. Brother described that outside of school Student: kicked, bit and punched his siblings; resisted eating meat and vegetables; ate his boogers; and resisted using toothpaste.

21. Student's 18-year old sister (Sister) accompanied Student to school at the beginning of the 2007-2008 school year (Student's third grade year). Sister saw a female student walk away from Student while he was stomping his feet and using a deep voice while talking about his summer vacation to Sea World and the zoo.

22. Student testified at hearing. Student turned and made eye contact when spoken to by the ALJ, counsel for the District or his Mother. Although Student's eye contact was not always sustained, he would reestablish eye contact with the speaker during questioning or instructions. Student demonstrated that he understood the difference between telling the truth and telling a lie and understood all instructions and questions. During lulls in testimony or questioning, Student occasionally tapped his feet, patted his hands against his thighs, or slid down in his chair. Student sometimes used large emphatic hand gestures while speaking, particularly when he was excited about something like being named "star of the week" at school. Student's behavior at hearing was not so unusual as to support an inference that he needed assistance to function in a general education placement without assistance.

23. Student varied his pitch and cadence when speaking, and occasionally threw his head back and took an exaggerated deep breath before speaking. However, Student admitted that he was speaking this way at the hearing because he felt like it, and that he did not speak this way in school or when he was assessed by Franklin school psychologist, Matthew Perry, Ed.D. (Dr. Perry).

24. Student ate dinner at home by sitting in a chair with his body cocked to



the side. Student did this so that he could see the television. This behavior does not support an inference that Student had unaddressed needs at school.

25. Student could make a very realistic-sounding lion roar, which he demonstrated at hearing. Student was proud of his ability to do this and used it when he was mad at people. He recalled three students teasing him about it in first grade. At some point while enrolled at Franklin, Student was punched by a peer during lunch. Student described an incident where he was crying at home because a female peer did not want to play with him. A male student had lied to Student by telling him that the female peer liked him and wanted to be around him. Student also recalled one incident where a fellow student said he had bad breath.

26. Student's general curriculum at Franklin included the "Mega Skills" program, a series of ten lessons at the beginning of the school year regarding social skills, appropriate peer interactions, kindness, respect and cooperation. The "Mega Skills" program included lessons on how to deal with conflict with other students such as telling other children to stop bothering you and walking away from conflict. The program also included reading and writing assignments on the topics.

27. Student's fingers appeared reddened from nail biting. It also appeared that Student may have had some flecks of blood on his fingernails from picking at slightly bloody chapped skin on his lips. Student did not do these activities during the hearing, and Student did not appear to be in distress. There was no evidence that these behaviors interfered with school performance.

28. Student admitted that he did not rely on Rodriguez for help and did not seek out her assistance. Student would use the bathroom when Rodriguez was on her lunch break. Student did not like Rodriguez because she took him to the bathroom, ruled against him in handball and would not let him cut in lines even when there was a gap.

29. Student recalled one incident where he wet his pants in kindergarten

because he “didn’t have time to ask to go to the bathroom” and had laughed hard. However, during first and second grade, Student would ask to use the bathroom at school. At school, Student would urinate and sometimes defecate in the school bathroom. Student did not need help to go to the bathroom.

30. Mother was concerned that Student was not relieving himself at school. She described Student coming home, collapsing to the floor and complaining of stomach pains from not relieving himself. Student corroborated Mother to some extent by recalling that on some occasions he reported that his belly hurt when he came home from school. In December of 2006, Mother requested that school personnel keep a “log” of all of Student’s bathroom visits. Rodriguez and Hill complied, relying on Student to tell them if he went “number one” or “number two.” When Rodriguez was keeping the toileting log requested by Mother, Student reluctantly reported on the result of his bathroom trips. Student admitted that he sometimes tricked his father by telling him that he had gone to the bathroom when he actually had not, but denied tricking school personnel about whether he had gone or not. Student was never disciplined at school for asking to use the bathroom. Hill and Rodriguez never heard Student complain of stomach discomfort. Mother’s health concerns regarding toileting, although very important to her, were not persuasive because they were contradicted by school personnel and Student himself, who reported that Student did use the bathroom at school.

31. A few weeks prior to the hearing, Student discovered some drops of blood in his underwear. Father took Student to an urgent care facility. Mother believed that Student retained his urine because he could not feel pain and that ultimately, Student developed a urinary tract infection because of this. However, Father, who had taken Student for treatment, testified that Student had been prescribed antibiotics as a precaution, but that a urinary tract infection had been ruled out by a lab culture. The blood drops had only occurred once and no doctor had ever provided an explanation

to Mother and Father of where the blood drops had come from. In light of the above, and in light of Student's testimony that he urinated in the school bathroom, it cannot be inferred that Student had a medical problem that was caused by an inability to use the bathroom at Franklin.

32. Father described that at home or in the community, Student would growl and fight with his siblings for trivial reasons. Father did not believe the reports of school personnel regarding Student's behaviors at school and believed that Student did not know how to properly interact with same-age peers. As an example, Father related that at a back- to-school ice cream social at the start of the 2007-2008 school year, Student spent his time playing handball at various courts on the school campus and demonstrated his "roar" to a little girl.

33. Based on the 2002 recommendations of IRC, Mother believed that during the 2006-2007 school year, Student should have been receiving behavioral interventions for toileting, biting and hitting, as well as occupational therapy and sensory integration therapy. Mother reasoned that because the District had never provided such services, Student must still require them. Mother had not observed an improvement in Student's social skills while Student was enrolled at Franklin, however, Mother had not observed Student in the general education environment. Mother was also concerned about Student biting his fingernails and toenails at home. Mother believed that Student could not feel pain and that Student required therapy to correct an irregular pencil grasp.

34. At the beginning of the 2006-2007 school year, Hill told Aklufi that Student's IEP was out of date. Aklufi visited Hill's classroom, saw Student functioning well there, and questioned the need for an aide. The District discovered that Student had not had an IEP team meeting or assessments since prior to March of 2005. The District had failed to conduct Student's triennial IEP, which should have been held in November of 2005.

35. On October 24, 2006, Mother signed her consent to assess Student in: academics, cognitive development, language/speech, social-emotional/behavioral development, self-help, and health. The assessment form provided an opportunity for Mother to indicate whether she had additional assessments or information that she wanted to have considered prior to the assessment or whether she wanted to meet with District employees to discuss the assessment plan prior to approving. Mother did not indicate that she had additional information or that she wanted further explanations prior to signing her approval.

36. As part of the assessments, District Inclusion Specialist Deborah Emett (Emett) observed Student in Hill's class. Emett was a credentialed school psychologist who had experience with autistic children as a teacher and instructional aide. During two multi-hour observations of Student, Emett observed Student's behavior to be on-task and appropriate at all times. In particular, Emett observed Student on a day when Hill was not present and her class had been combined with another. Emett saw Student help another child by answering the child's question about school work. Emett saw that Student's written work product was proficient for his grade level. Emett concluded that Student did not require the help of an instructional aide and was "functioning beautifully" in a general education classroom.

37. District Resource Specialist Becky Higginson administered the Woodcock-Johnson Test of Achievement – III (WJ-III) to Student on November 3, 2006. The WJ-III is normed against a same-age population of students without disabilities. All of Student's scores were above his grade level at the time.

38. Speech and Language Pathologist Michelle Mahdavi (Mahdavi) assessed Student on November 14, 15 and 28, 2006, using both observation and standardized testing. Mahdavi possessed a Master of Science degree in speech and language pathology and was licensed in California. Mahdavi had experience working with high-functioning children with autism who were being included in general education. Upon

Mahdavi's first visit to Student's class, she could not distinguish him from his typical peers. Mahdavi did not note the type of behavioral characteristics that she would have expected to accompany a diagnosis of autism. All standardized tests were given in conformance with the manufacturer's instructions. On standardized testing in semantics, morphology/syntax and pragmatics, Student was age-appropriate in all areas. Although she noted a slight lisp on "s" and "z" sounds, Student could correct it when the sound was modeled for him. In addition, on the Comprehensive Assessment of Spoken Language, Student achieved a standard score of 113 and percentile score of 81 on the pragmatic judgment subtest. The pragmatic judgment subtest measured whether Student could formulate the appropriate response in social situations. In light of Student's scores and Mahdavi's observations, she persuasively concluded that Student would not qualify for special education on the basis of speech and language impairment, nor would Student require speech and language therapy as a related service.

39. Dr. Perry assessed Student in the areas of cognitive ability and processing ability on October 31, 2006 and December 12, 2006. Dr. Perry possessed an education doctorate in school psychology and was a California licensed school psychologist. All standardized testing by Dr. Perry was given in conformance with the manufacturer's instructions. At the time of hearing, Dr. Perry was assigned to a District school where he worked with two SDCs for children on the autism spectrum. Dr. Perry's testimony was direct and knowledgeable and he maintained a friendly and open demeanor, even when subjected to cross-examination.

40. Prior to the assessment, Dr. Perry reviewed the available information regarding Student, including a 2002 report from the IRC that was prepared when Student was three years, five months old. The IRC report diagnosed autism and reported that Student had such behaviors as delayed speech, use of jargon words, repetition and difficulty with speech, limited gestures, delays in self-help skills,

aggression and toenail biting. The IRC report, either on its own, or when considered as part of Dr. Perry's assessment, is not persuasive evidence that Student required specialized education and related services in December of 2006. The IRC report may have been accurate in 2002, but sheds no light on Student's needs as of 2006, given the four year time difference.

41. Dr. Perry spoke to Hill, who did not report any social or emotional concerns regarding Student. Mother completed the Gilliam Autism Ratings Scale (GARS), which required Mother to report the frequency and types of behaviors that she observed in Student. Contrary to the observations of school personnel and Dr. Perry, Mother reported that Student had behaviors such as agitation with changes in routine, aloofness, inappropriate crying, ritualistic behaviors, hitting or biting self, flapping hands, spinning objects not meant for spinning, babbling, repetitive speech and looking away from someone speaking to him. The GARS indicated an "average" likelihood that Student had autism.

42. During testing in Dr. Perry's office, Student established a rapport with Dr. Perry, made eye contact, engaged in conversation and even made a joke by saying, "This is complicated, Doc." Dr. Perry noted that Student's social interaction abilities were advanced for his age, which was not atypical of GATE students. During observation of Student in a classroom setting, Student followed directions, listened attentively, worked independently, participated in a "choral response" answer to Hill's question, and was observed to whisper back and forth with another child. Dr. Perry noted that Student appeared to rebuff help from Rodriguez.

43. On the Wechsler Intelligence Scale for Children, fourth edition (WISC-IV), Student demonstrated a high average full scale IQ of 119, with strengths in verbal comprehension and working memory. Student's lowest score was an "average" standard score of 100 in processing speed. The WISC-IV verbal comprehension subtest, on which Student achieved an above-average scaled score of 14, included

questions that assessed Student's ability to judge socially appropriate responses. Dr. Perry also reviewed Student's scores on the WJ-III. Based on the above, Dr. Perry concluded that autism was not impacting Student's cognitive abilities or academic achievement.

44. On the Bender Visual Motor Gestalt Test II, Student achieved the following standard scores/percentile scores: Design Copy – 101/53 and Design Recall – 116/86. Student used an unusual pencil grip, using his second and third fingers to support the pencil, with his index finger supporting the pencil above his grasp. Dr. Perry had no concerns regarding Student's visual-motor coordination because the test results were "average," and Student could perform the tasks required of him despite his unusual pencil grip. Dr. Perry's conclusion was corroborated at hearing. Although at hearing Student demonstrated the unusual pencil grasp noted by Dr. Perry, Student quickly produced a legible writing sample without difficulty.

45. Dr. Perry plausibly explained that he did not do any specific assessment of Student's self-help or adaptive skills because all observations of Student at school by school personnel, including Dr. Perry, showed no concerns in these areas.

46. Overall, Dr. Perry concluded that Student did not require special education because his autism was not interfering with his cognitive ability, his academic achievement, his ability to interact with peers or his overall ability to function at school. Dr. Perry's opinion was persuasive because it was corroborated by the testimony of Lasky, Hill, Rodriguez and Johnson, who had extensive time to observe Student in the general education environment. Dr. Perry's conclusion was also supported by Student's testimony at hearing, in which he demonstrated that he could understand and carry on conversations and that he knew the difference between speaking in funny voices and acting "normal." Student persuasively explained that he was bored at the hearing and was using funny voices, but that during the assessment by Dr. Perry and while attending school, he acted "normal."

47. An IEP was held on December 14, 2006. The District had sent a written notice to Mother in Student's backpack, but Mother had not received it prior to the date of the IEP. Mother was telephoned on the date of the IEP.

48. Despite the miscommunication about the date and time of the meeting, Mother attended the December 14, 2006 IEP team meeting. Although Mother noted the lack of notice on the IEP team meeting notes, she nonetheless participated in the meeting by providing her input. With the exception of Mother, all of the team members recommended that Student no longer qualified for special education because he was succeeding so well in his general education placement without relying on an aide and without any related services. Mother disagreed, and based on the 2002 IRC assessment and her experiences with Student at home, expressed a concern that Student might be subjected to teasing by typical peers, required assistance with toileting, had difficulty with handwriting, and required social skills help because of his autism. Mother also stated her disagreement with the speech and language assessment based on her observation that Student sometimes spoke too rapidly or mumbled and needed to be asked to repeat himself to be understood.

49. Mother and Father had Student assessed by Cynthia Norall, Ph.D., (Dr. Norall) on September 4, 2007. Dr. Norall did not testify at hearing and no evidence of her qualifications was presented.

50. Dr. Norall's assessment is not persuasive evidence that Student required specialized education and related services as of December 14, 2006. Dr. Perry reviewed Dr. Norall's assessment and raised numerous valid criticisms of it. For example, Dr. Perry noted that on the Comprehensive Test of Non-verbal Intelligence (C-TONI), Student performed better on "sequencing" tests that included social information, indicating proficient social development. On Dr. Norall's administration of the Visual Motor Index, Dr. Norall reported that Student scored in the first percentile, a score so low that if true, Student would be unable to play handball or write down what he saw



on a classroom chalkboard. Dr. Perry's opinion regarding the inaccuracy of Dr. Norall's assessment of Student's motor functioning was corroborated by testimony from Student, Brother, his teachers and Rodriguez that he excelled at handball and by Student's school performance, which showed no major deficit in writing skills. Dr. Perry also noted that on the Test of Problem Solving, third edition, and on the Wide Range Achievement Test, fourth edition, Student's lowest scores were all within the average range. The behavior inventories contained in Dr. Norall's report were based on Mother's subjective observations of Student in the community and included reporting of behaviors or incidents that had occurred years prior to the date of Dr. Norall's assessment. Dr. Norall did not contact anyone from Franklin or obtain information about Student's behavior in a school setting. Finally, Dr. Norall's report was generated in September of 2007, nine months after the December 14, 2006 IEP team meeting.

51. Mother had withdrawn Student from Franklin as of the first day of hearing on September 24, 2007.

## CONCLUSIONS OF LAW

1. The District contends that as of December 14, 2006, Student was no longer eligible for special education because despite having a clinical diagnosis of autism or Asperger's Syndrome, Student did not require specialized education and related services in order to receive some benefit from the education being afforded him in the general education environment. Student contends that as of December 14, 2006, Student should have continued to be eligible for special education based on his diagnosis of autism, because the IRC recommended services in 2002 that were never provided by the District, and because Student exhibited autistic behaviors at home and in the community.

2. As the petitioning party, the District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

3. A student is eligible for special education if he or she is a "child with a

disability” such as autism or autistic-like behaviors, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b); 5 C.C.R. § 3030, subd. (g).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401(a)(29); 5 C.C.R. § 3001, subd. (ac).) “Related services” (referred to as designated instruction and services or DIS in California) are defined as transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a); 5 C.C.R. § 3001, subd. (z).) A child is not considered a “child with a disability” for purposes of the IDEA if it is determined that the child only needs a “related service” and not special education. (34 C.F.R. § 300.8(a)(2)(i).) The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of a school district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

4. Hood v. Encinitas Union School District (9th Cir. 2007) 486 F.3d 1099, 1107- 1108, 1110, demonstrates that a child may have a qualifying disability, yet not be found eligible for special education, because the student’s needs can be met with modification of the general education classroom. In Hood, 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 that the child’s needs could be met in a general education classroom without specialized education and related services. (*Ibid.*)

5. Before a child may be found ineligible for special education, the local educational agency must conduct an assessment of the child, in all suspected areas of disability. The IEP team or other qualified professionals must review existing data regarding the child and determine, with input from the parents, what additional data are needed to determine questions regarding whether a child is a child with a disability, the present levels of academic performance and developmental needs of the child, whether the child needs or continues to need special education and related services, or whether modifications to the IEP are required to enable the child to meet annual goals. (20 U.S.C. §§ 1414(c)(1)(A) & (B); Ed. Code, § 56381, subds. (b) & (c).) Parental consent must be obtained for any reevaluation. (20 U.S.C. §§ 1414(c)(3); Ed. Code, § 56381, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, § 56381, subd. (h).)

6. Upon completion of the assessment, the determination of whether the child is a child with a disability must be made by a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) A local education agency may

request a due process hearing when there is a disagreement about a proposal to change the special education eligibility of a child. (See Ed. Code, § 56501, subds. (a)(1) & (a)(2).)

7. Here, prior to the December 14, 2006 IEP team meeting, Student was assessed in all areas of suspected disability. Student participated in all general education activities and successfully played sports like handball that required hand-eye coordination and gross motor coordination. Although Student used an unusual pencil grasp, he demonstrated proficiency in writing. Student did not exhibit any type of clumsiness or balance problems at school. Accordingly, there were no areas of suspected disability that would have required assessments in areas such as occupational therapy, physical therapy or adapted physical education. (Factual Findings 11, 12, 13, 14, 15, 16, 19, 20, 22, 27, 28, 29, 36, 37, 38, 42, 43, 44, and 45.) As to the psychological, educational and speech-language assessments that were conducted, a variety of assessments were used including standardized testing and observations. Mother provided input to Dr. Perry. The assessments were not racially or culturally discriminatory because Student was an English speaker who was not a member of a minority group. As testified to by Dr. Perry and Mahdavi, who were both qualified to administer the standardized assessments they gave, the assessments were used for the purpose for which they were valid and were administered in conformance with the manufacturer's instructions. (Factual Findings 1, 38, 39, and 41.) Mother was given an opportunity to provide additional information or assessments and to meet with District employees prior to agreeing to the assessments, but declined to do so. (Factual Finding 35.)

8. Although there was some confusion about giving Mother notice of the December 14, 2006 IEP team meeting, Mother did attend and participated by providing her input to the IEP team about her views of Student's special education needs. (Factual Findings 47 and 48.)

9. Although Student has a diagnosis on the autism spectrum, as of the December 14, 2006 IEP team meeting, Student did not require special education and related services that could not be provided with modification of the regular school program. Student demonstrated that he was able to succeed in the general education environment in kindergarten, first grade and in a second grade GATE cluster class. Not only did Student have academic success, but his classroom behavior was appropriate, as was his social interaction with his peers during the school day. Specifically, Student was able to work independently and in groups, he followed teacher instructions, and he interacted with his peers both in class and at recess time. (Factual Findings 1, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 26, 28, 37, 38, 39, 41, 42, 43, 44, 46, 49 and 50.) The 2002 and 2004 IRC IPPs and/or reports were not persuasive evidence of Student's needs in 2006 because they predate 2006 by many years and were unrelated to Student's in-school behavior and performance. In addition, the 2004 IPP is not persuasive evidence of Student's educational needs because it was created after Mother had withdrawn Student from school in July of 2004. The few isolated incidents of possible teasing at school, and Student's behaviors at home that may or may not relate to autism, did not demonstrate that Student required special education and related services in second grade, particularly when there was no evidence that the incidents or behaviors resulted in behavioral or educational problems for Student at school. Similarly, Mother's concern regarding Student's toileting needs was not supported by the evidence, and even if it was, could be addressed by providing an accommodation at school without the need for specialized instruction or related services. (Factual Findings 2, 5, 9, 20, 21, 24, 25, 27, 29, 30, 31, 32, 33, and 40.) Finally, the independent report by Dr. Norall was not persuasive evidence that Student required special education and related services because it was not based on any information about Student's behavior in school. (Factual Findings 49 and 50.)

10. In conclusion, the District met its burden of demonstrating that prior to

making a decision regarding special education eligibility, Student was assessed in all areas of suspected disability and that the determination of whether Student was eligible for special education was made by an IEP team that included Mother. In addition, the District met its burden of demonstrating that as of the December 14, 2006 IEP team meeting, Student was no longer eligible for special education because despite his diagnosis of an autism spectrum disorder, he did not require special education and related services that cannot be provided with modification of the regular school program. (Legal Conclusions 2 through 9.)

## ORDER

Student may be exited from special education effective December 14, 2006.<sup>4</sup>

## 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, the District was the prevailing party on the sole issue presented.

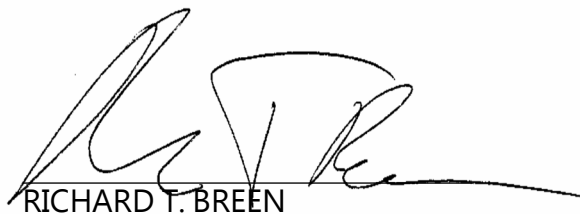
## RIGHT TO APPEAL THIS DECISION

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

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<sup>4</sup> This Decision does not address Student's future eligibility for special education. Further, although Student may have been exited from special education on December 14, 2006, "stay put" applied to Student until Mother withdrew Student from school as of September 24, 2007. (See Ed. Code, § 56505, subd. (d); Factual Finding 51.).

DATED: November 2, 2007



RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division