

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

In the Matter of:

OAH CASE NO. N2007100221

CHULA VISTA ELEMENTARY SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on April 15, 16, 17, and 18, 2008, at the San Diego Office of Administrative Hearings located in San Diego, California.

Sundee Johnson, attorney with Atkinson, Andelson, Loya, Ruud & Romo, appeared on behalf of Chula Vista Elementary School District (District). Deborah Wenbourne, District Coordinator, was present during the entire hearing. Courtney Cook, Coordinator of Pupil Services for District, was present during the entire hearing.

Margaret A. Dalton, Supervising Attorney for Special Education with University of San Diego Legal Clinics, and Katherine Allison, Legal Intern with University of San Diego Legal Clinics, appeared on behalf of Student (Student). Mariam Mojdani, Senior Law Clerk with University of San Diego Legal Clinics, also attended the hearing. Mother of Student (Mother) was present during the entire hearing. Student did not appear during the hearing.

## PROCEDURAL BACKGROUND

On October 4, 2007, District filed the request for due process hearing in this matter. On October 29, 2007, at District's request OAH issued an order that continued the initial due process hearing dates in the case. After granting several more continuance requests, OAH set the hearing to commence on April 15, 2008.

The administrative law judge (ALJ) opened the record on April 15, 2008. At the beginning of the hearing, the parties stipulated to exercise their rights to open the hearing to the public.<sup>1</sup> The ALJ received sworn testimony and documentary evidence during four consecutive hearing days through April 18, 2008. The parties requested, and the ALJ granted, an extension of time to keep the record open for the filing of written closing argument due by May 5, 2008, and any written reply by May 9, 2008. The parties timely filed their written closing and reply briefs by May 9, 2008.

On May 9, 2008, District also filed a motion to strike portions of Student's closing brief asserting that Student prejudiced District's due process rights by referring to a personal recording of the hearing in Student's closing brief. The ALJ held the record open to give Student the opportunity to respond to District's motion. On May 12, 2008, Student timely filed his opposition to District's motion to strike, the ALJ then closed the record, and the matter was submitted for decision.

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<sup>1</sup> The express purpose for opening this hearing to the public was to allow law students from the University of San Diego Law Clinics and employees from the Chula Vista Elementary School District, who were interested in education law, to observe the conduct of a due process hearing. The parties are commended for their social concern in promoting continued interest in this area of the law.

## DISTRICT'S MOTION TO STRIKE

District's motion seeks an order striking those portions of Student's closing brief which cite to specific testimony given during the hearing proceedings. District objects to Student's citation of specific testimony on the ground Student did not provide to the ALJ and to District any typewritten transcripts of the electronic recording as required by the California Rules of Court. District asserts that because it did not have any written transcript of the testimony, District was prejudiced in its right to refute any facts or information which Student included in its closing brief.

In support of its motion, District correctly describes Student's request, made on the first day of the hearing, to be allowed to tape record the proceedings for Student's personal use. District consented to Student's recording of the proceedings so long as the recording was used for personal purposes. The ALJ permitted personal recording of the proceedings noting that the official record of the proceedings would be the electronic recording being made by the ALJ to be maintained by OAH.

Student opposed the motion on the ground that Student did not use any personal recording of the hearing to make reference to testimony. Rather, Student had obtained an electronic verbatim record of the hearing proceedings from the official OAH recording of the hearing as authorized by law. (Ed. Code, § 56505, subd. (e)(4).)<sup>2</sup> This section provides the parties with the right to a written, or, at the option of the parents or guardians, electronic verbatim record of the hearing. In this case, Mother had opted for the electronic record rather than a written record.

District is correct that Trial Court Rule 2.1040 of the California Rules of Court (based on former Rule 243.9 (which was in effect prior to January 1, 2007) requires a party to "tender to the court and to opposing parties a typewritten transcript of the

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<sup>2</sup> All statutory citations to the Education Code are to California law.

electronic recording” being offered into evidence. As a preliminary matter, however, it does not appear that Student was offering into evidence any of the transcript cited in his brief. In addition, Rule 2.2 of the California Rules of Court provides that the Trial Court Rules only “apply to all cases in the superior courts unless otherwise specified by a rule or statute.” Education Code section 56505, subdivision (e)(4), is a specific statute addressing the official electronic verbatim record of this due process proceeding and renders the general provisions of the Rules of Court relating to trial courts inapplicable. Moreover, as the petitioning party in this proceeding, District has a right to a copy of the record from OAH as provided by the Education Code.

District’s motion to strike portions of Student’s closing brief citing to specific testimony from the due process hearing is therefore denied.

## ISSUE

District raised the following sole issue for decision at the Due Process Hearing:

Whether District’s offer of placement and services contained in the individualized education program (IEP) dated June 5, 2007, and amended on June 22, 2007 and September 10, 2007, constitutes a free appropriate public education in the least restrictive environment for Student?

## PARTIES’ CONTENTIONS

District contends District’s offer and placement and services for the 2007-2008 school year met Student’s unique needs and that its proposed program was reasonably calculated to provide educational benefit to Student. District contends that based on information available to the IEP team, Student’s placement in a mild to moderate special day class would afford greater educational benefit to him than placement in a regular education classroom with supplementary support and services. District also asserts that Student’s need for access to and interaction with typically developing peers could be

appropriately addressed with the placement and services offered for the 2007-2008 school year. District seeks an order that whether District offered Student a FAPE in the least restrictive environment should be resolved in favor of District.

Student contends District did not offer a FAPE to Student in its proposed IEP for the 2007-2008 school year. Student contends District's offer to place Student in a mild to moderate mentally retarded special day class with supplemental services did not provide an appropriate placement in the least restrictive environment. Student contends District could implement Student's IEP in a regular education first grade class with some modifications to the curriculum and with the assistance of an aide. As a result, Student argues District failed to meet its obligation to provide him with a FAPE in the least restrictive environment.

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. Student is a six-year-old boy who is currently in the first grade. He has been eligible for special education and related services because of his speech language impairments and autistic-like behaviors. At the time District filed its request for a due process hearing, Student was attending District's Salt Creek Elementary School (Salt Creek) located in Chula Vista, California. During the entire time period at issue, Student has resided with his Mother in Chula Vista within the geographical boundaries of District.

### BACKGROUND DURING THE 2006-2007 SCHOOL YEAR IN KINDERGARTEN

2. This case arises from the disagreement between Student and District over whether District's proposed IEP dated June 5, 2007, as amended June 22, 2007, and further amended September 10, 2007, constitutes a FAPE for the current 2007-2008 school year. To resolve the issue of whether District's offer constitutes a FAPE in this

case, District must show there was no procedural or substantive violation of the Individuals with Disabilities Education Improvement Act (IDEA). Student makes no claim of any procedural violation in this case. Rather, Student urges that District's IEP offers failed to substantively provide a FAPE to Student because District did not propose to educate Student in the least restrictive environment.

3. The most recent IEP for Student which is not in dispute is the IEP dated October 26, 2006 (October 2006 IEP). At that time, Student was five years old and attending the regular kindergarten class at Salt Creek with special education support and services. The IEP team had determined Student was eligible for special education and related services under the disability category of speech language impaired. In describing how Student's disability affected his involvement and progress in the general curriculum, the October 2006 IEP noted Student demonstrated expressive and receptive speech delays which impacted his ability to make progress in the general education setting without specialized instructional supports. Although District's IEP form allowed for both a primary and a secondary disability to be identified, the IEP team identified no secondary disability for Student at the time.

4. The October 2006 IEP noted deficits in Student's communication development. Student's receptive and expressive language skills were moderately delayed. At the time, Student demonstrated difficulty using noun-verb agreements, pronouns including "I," present-progressives, possessives, and simple compound sentences. He also exhibited receptive difficulty with simple "wh-" questions, word concepts (such as opposites, and spatial and quantitative concepts), following two-part commands, and classroom directions and rules. His articulation skills were moderately delayed and his pragmatic communication skills were rated poor (due to his difficulty with attending to tasks with his peers). The October 2006 IEP also noted Student's native language was Spanish.

5. The October 2006 IEP placed Student in the regular kindergarten class with supplementary supports and services. To support Student in the regular kindergarten class, Student received direct Resource Specialist Program (RSP) support four days per week for a total of 360 minutes each week. District provided this direct RSP support by an instructional assistant who was supervised by the credentialed special education teacher. In addition, District provided RSP consultation services to the general education teacher five days a week for a total of 120 minutes. District also provided language and speech services to Student on a pull-out basis in the language and speech room two times per week for 25 minutes per session. The program also provided for additional aide support to the classroom for three and a half hours per day, for five times per week. This resulted in Student being placed in the regular education environment for 59 percent, and the special education environment for 41 percent, during the time of his kindergarten school day.

#### REPORTS OF STUDENT'S ACADEMIC ACHIEVEMENT IN THE REGULAR EDUCATION KINDERGARTEN CLASS

6. District provided periodic reports on Student's progress during his kindergarten year. The evidence at hearing included both progress reports and report cards for Student during the 2006-2007 school year. The progress reports typically included a number designation on a scale from one to four and a narrative report. The key to the number designations referred to whether Student had made progress on his goals: a one represented "No Progress" on a goal; a two represented "partial Progress (1%-49% of goal met);" a three represented "Substantial Progress (50%-99% of goal met);" and a four was for "Goal Met or Exceeded."

7. Student's Kindergarten Progress Report dated March 22, 2007 (for the period from August 2, 2006, to August 1, 2007) showed only one goal with no progress. This was a prevocational goal for Student to stay on task for five minutes with not more

than 2 prompts. However, because Student required more than two prompts to stay on task at the time, his progress report showed a one for no progress on this goal.

8. The remaining goals all showed progress. For example, the Progress Report showed a three, for substantial progress, on the mathematics goal to count, recognize, represent, name, and order the number of objects. The Progress Report also showed a three, for substantial progress, on the speech and language goal to follow two-step commands. The narrative portion of the report stated Student "is making good progress....He watches others and looks for other visual cues."

9. On the speech and language goal for producing blend words with a cue, the Progress Report also showed a three, for substantial progress.

10. There was also a speech and language goal to use three- to four-word sentences with the appropriate pronoun, verb, and noun. The Progress Report showed a two, for partial progress, for this goal. The narrative portion of the report noted "making progress" for Student.

#### STUDENT'S UNIQUE NEEDS

11. In anticipation of Student's annual IEP review, Celeste Dungca (Dungca), school psychologist for District, assessed Student on May 23, 2007. Following her assessment, she prepared a written Psychoeducational Team Assessment Report dated June 4, 2007. At the time of her assessment, Dungca was in her first year of employment as a school psychologist for District. She first became aware of Student when she, and the psychologist she would replace at Salt Creek, attended an IEP meeting for Student shortly before the 2006-2007 school year began.

12. According to Dungca, Student was referred for the psychoeducational assessment by his Student Study Team due to concerns relating to his limited academic progress and socialization concerns raised by his regular education teacher in kindergarten. Dungca used a variety of procedures during her evaluation including



observation, interviews, review of school records, administration of several scales including the Leiter International Performance Scale-Revised (Leiter-R), the Childhood Autism Rating Scale (CARS), the Gilliam Autism Rating Scale (GARS), and considered diagnostic information provided by District's Autism Coordinated Education (ACE) Program team members, and the resource specialist and speech pathologist working with Student. Dungca observed Student's classroom behavior one time during kindergarten for a period of 20 minutes.

13. Dungca selected the Leiter-R because it is a non-verbal cognitive test which looks at fluid reasoning and visualization. She explained the instructions are given in a non-verbal pantomime way so it is suitable for children who may have severe speech and language difficulties. She has used this test upwards of 15 times and was familiar with its proper administration. Student's results on the Leiter-R showed a standard score of 88 for his full intelligence quotient (IQ), which fell in the low average range at the 21st percentile. Dungca believed the results of her testing were an accurate reflection of Student's abilities.

14. Dungca explained she selected the CARS because it is useful to look at the frequency of autistic-like characteristics as stated by the rater. She understood the CARS does not provide a diagnosis of autism but that it helps determine how often certain behaviors are seen. She has used this scale upwards of 20 times and was familiar with its proper administration. Dungca gave the CARS to Student's then current teacher, Phuong Tran (Tran), and to Mother. However, only Tran returned her completed forms to Dungca. The teacher results on the CARS showed behaviors that would fall in the severely autistic range. These behaviors rated by the teacher included difficulty relating to people, inappropriate visual and emotional responses for a child Student's age, fear and nervousness.

15. The GARS, also selected by Dungca, is another autism rating scale to help determine the frequency of autistic-like behaviors as seen by the rater. Dungca also gave the GARS to Tran, and to Mother. As with the CARS, only Tran returned her completed forms to Dungca. The results on the GARS, based on teacher response only, gave Student a standard score of 119 for his autism quotient. The autism quotient of 119 placed Student in the 90th percentile, which suggested Student had an above average probability of autism.

16. Based on her assessment, Dungca concluded Student met the criteria for a child presenting with autistic-like behaviors. Her Psychoeducational Team Assessment Report concluded that since Student “meets the criteria for a child with Autistic-Like Characteristics, [Student’s] speech and language difficulties are better explained by this handicapping condition.”

17. Dungca also observed Student two times during the current first grade year. One of the times was an informal observation of about 10 minutes but the second was a 45-minute observation that occurred about a month before the hearing when she accompanied Student’s autism specialist on a classroom visit. During this visit in March 2008, she observed Student moving through the regular first grade classroom routines. He transitioned well. He interacted and played with the other students appropriately. When recess was over, he went appropriately back to the line to return to class.

#### THE JUNE 5, 2007 IEP TEAM MEETING AND PROPOSED PROGRAM

18. District convened an IEP team meeting on June 5, 2007, for an annual review of Student’s program. School psychologist Dungca was present at this meeting and reported on her assessment. Based on her assessment, District members of the IEP team felt that the category of autistic-like characteristics better described Student’s disability. They believed the fact that Student had language needs that fell under the umbrella of autistic-like characteristics. District members of the IEP team also felt

Student demonstrated additional problems with socialization, social skills, and off-task behavior which fit under the autistic-like behaviors category. After discussing present levels of performance and goals for Student, there was a discussion of placement. District members did not believe regular education classroom would meet Student's needs. The District IEP team members recommended a special day class for students with mild to moderate disabilities in kindergarten to second grade (K-2 SDC) with supports and consultation.

19. Dungca explained the SDC would be appropriate for Student because he would benefit from a program that addressed his needs throughout the day, rather than with the pull-out model of service. She described District's mild to moderate K-2 SDC as a placement for students with a variety of disabling conditions. District's mild to moderate K-2 SDC has supported mentally retarded students as well as students with average intelligence who may have a significant learning disability. This SDC has also been a placement for students with attention deficit-like disabilities and students with speech and language impairments.

20. Courtney Cook (Cook), District's coordinator of pupil services, also attended the IEP team meeting. Cook recalled the eligibility discussion at this meeting. She explained District members of the IEP team did not believe the previous eligibility of speech language impaired was an adequate or a total picture of what Student's needs were, and that he demonstrated needs in academic and social skills as well. Based on this belief, District members of the IEP team asserted a more appropriate description of Student's disability would be the autistic-like characteristics of Student. Cook testified that District members of the IEP team made clear to Mother that the Education Code eligibility for autistic-like behaviors was not a diagnosis of autism from the medical community using the Diagnostic and Statistical Manual of Mental Disorders, Fourth

Edition (DSM-IV). Cook also testified that Mother agreed with the autistic-like behaviors eligibility because she agreed Student had social and language needs.

21. Before discussing new goals for Student, the IEP team discussed his progress on goals from the October 2006 IEP. Sometime in June 2007, Cook made a copy of the October 2006 IEP and placed a handwritten numeral in the bottom right area of each goal page to reflect Student's progress on each of the goals. Of the nine goals being worked on in the regular kindergarten class, Student had made no progress on two of his goals; had made partial progress on four of his goals; had made substantial progress on two of his goals; and had met one of his goals.

22. Goals and objectives were discussed and formulated at this meeting. Short-term instructional objectives for Student included: using the sentence structure "noun + is + v + ing"; following three-part related verbal commands; using objects to add sums to 18; giving his first and last name (separately) and birth month; being able to stay on task for five minutes with prompting; orally combine up to three sound elements to create recognizable words; writing dictated sentences containing CVC patterns with access to printed sight words; reading a pre-primer sight word list in random order; learning the rules to three new games and engaging in them appropriately with prompts; and using a visual cue to engage in recess activities with prompting.

23. To implement these goals, District proposed to discontinue Student's placement in the regular education environment. For his first grade program during the 2007-2008 school year, District proposed to place Student in District's SDC for children with mild to moderate disabilities in kindergarten to second grade. District offered that Student attend Wolf Canyon Elementary School (Wolf Canyon), a new school that was being built, because Student's neighborhood school at Salt Creek did not have an SDC. In addition to this SDC placement, District offered speech and language therapy two

times a week for 25 minutes sessions plus speech and language consultation one time a week for 15 minutes. District also offered autism support with social skills training one time a week for 30 minutes plus consultation from ACE Program team members to the teacher one time a month for 30 minutes. District also offered the mainstream program for social studies/science as available; supplementary aide support to the classroom; supplementary professional development to the aide by ACE as available and as needed.

24. At the conclusion of the meeting, Mother wanted an opportunity to review the proposed IEP and agreed to meet with the school psychologist at a later time.

#### THE JUNE 22, 2007 IEP MEETING AND AMENDMENT

25. The June 22, 2007 IEP team meeting consisted of Mother meeting with the school psychologist in person with Cook attending via telephone as District representative. District again offered the placement, support, and services that were proposed at the June 5, 2007 IEP team meeting. Mother did not consent to the IEP offer.

26. During this meeting there was also a discussion of Mother's concern that Student be retained in kindergarten for the 2007-2008 school year. Cook explained that the issue of retention had to be discussed with the principal at Salt Creek.

27. With no agreement on Student's IEP, the meeting adjourned and Mother received a copy of the proposed IEP and the meeting notes.

#### THE RADY CHILDREN'S HOSPITAL DEVELOPMENTAL EVALUATION REPORT FROM AUGUST 1, 2007

28. On August 1, 2007, Mother brought Student to the Developmental Evaluation Clinic at Rady Children's Hospital for assessment. Student's primary care physician had referred Student to the clinic for diagnostic clarification and recommendations for intervention. Christina Corsello, Ph.D., conducted the assessment of Student noting his then chronological age to be five years, nine months.

29. Dr. Corsello is a clinical psychologist who has been licensed in Michigan since 2002 and in California since 2006. She received her master's degree in clinical psychology in 1998 and her doctoral degree, also in clinical psychology, in 2000. She has been working in the field of autism and has held several clinical appointments since 1998. From 1998 to 2001, she was a behavioral consultant for the Developmental Disorders Clinic at the University of Chicago Hospitals, Department of Child Psychology. From 2001 to 2005, Dr. Corsello was Associate Director and a psychologist for the University of Michigan Autism and Communication Disorders Center. From 2005 to the present, she has been a clinical psychologist for the Developmental Evaluation Clinic at Rady Children's Hospital in San Diego. All of the research work Dr. Corsello has done has been with children with autism spectrum disorders. She has written articles on the diagnosis of autism spectrum disorders and is currently working on research at the Center for Adolescent and Child Research looking at assessment practices in the community. She is a certified trainer for the Autism Diagnostic Observation Schedule and has provided such training in the United States, Canada, England, Italy, and Australia.

30. As she undertook her assessment of Student, Dr. Corsello was aware that existing evaluations had mentioned the possibility of attention deficit hyperactivity disorder, speech and language delays, as well as characteristics of an autistic spectrum disorder. She administered a number of test instruments including the Child Behavior Checklist for Ages 1-1/2 to 5 (CBCL); the Vineland Adaptive Behavior Scales, Second Edition (Vineland); the Social Communication Questionnaire (SCQ); the Differential Ability Scales, Preschool Edition (DAS); and the Autism Diagnostic Observation Schedule, Module 2 (ADOS).

31. From her review of the assessment results, Dr. Corsello concluded the most appropriate diagnosis was a mixed expressive-receptive language disorder.

Student's expressive and receptive language were considered delayed as they fell between the 2-1/2 and the 3-1/2 age equivalent level. In contrast to this language delay, Student's nonverbal cognitive abilities were within the average range. She also found that Student had relatively strong writing skills suggesting Student had strong visual skills. He would perform better with written information and visually presented information. There was also a marked difference between his expressive and receptive language skills. He was able to attend to a story being read, could identify the days of the week, was able to use a computer, and he understood the purpose of a clock.

32. Dr. Corsello also noted Student enjoyed imitating things he has seen and what others do and phrases. These skills would be valuable in a classroom setting where Student could learn from the model behavior of other students. It would also be important for Student as he learns language from his peers. He was still learning language at the time of the assessment and good language modeling by teachers and peers, who were above his current language level, would be helpful in his school environment.

33. Although Student had exhibited some characteristics of autistic-like behaviors and attention deficit disorder, Dr. Corsello reported Student used gestures and facial expressions to communicate in an attempt to overcome his language deficits. He also could engage in imaginative and creative play schemes. He also could engage socially, enjoyed showing things to others, imitated others, and engaged in joint attention. She concluded Student did not demonstrate the social deficits necessary for an autistic spectrum disorder. In making her findings, Dr. Corsello recognized that she was using the DSM-IV criteria for her diagnosis and not the Education Code criteria for autistic-like behaviors. She understood that a student could qualify for special education as a student with autistic-like behaviors while not meeting the DSM-IV criteria for autism

spectrum disorder. In spite of this, the conclusions Dr. Corsello made relating to Student's language deficits and psychological profile are entitled to substantial weight.

34. In making recommendations for Student, Dr. Corsello believed that he should continue to receive special education services for his considerable delays in speech and language. However, because he has substantial strengths in social skills and imitation, she did not believe he should be placed in a class serving students with autistic spectrum disorders. And because Student did not have overall developmental delays, she did not believe he should be placed in a class serving children with such delays. She recommended he remain in the regular education environment with supports and services including classroom aide support and the maximum service recommended by knowledgeable speech and language specialists.

PSYCHOLOGICAL ASSESSMENT BY DR. MARTHA C. HILLYARD DATED AUGUST 17, 2007

35. On August 17, 2007, clinical psychologist Martha C. Hillyard, Ph.D., conducted a psychological evaluation of Student upon referral from the San Diego Regional Center for the Developmentally Disabled. Although Dr. Hillyard did not testify during the hearing, her written Psychological Assessment (Hillyard Report) dated August 17, 2007, was received into evidence. The Hillyard Report was a comprehensive assessment of Student consisting of a review of evaluations and scores from previous testing; administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), the Developmental Test of Visual-Motor Integration (VMI), the Vineland, and the GARS; interview of Mother; and behavioral observations.

36. The Hillyard Report showed that on the WPPSI-III, Student attained a verbal intelligence quotient (IQ) of 70, which was at the 2nd percentile, and a performance IQ of 98, which was at the 45th percentile. However, because of the size of the discrepancy between his verbal and performance IQ scores, his full scale IQ of 80



could not be regarded as very meaningful. On the VMI, Student received a standard score of 95, which fell in the average range. His results on the communication domain of the Vineland showed a receptive language age equivalent of three years, seven months, and an expressive language age equivalent of two years, 11 months. These results were consistent with those obtained by Dr. Corsello.

37. The Hillyard Report noted that behaviorally, Student presented “a rather complex picture.” He was socially responsive, affectionate, and showed social interest, but he also had reduced eye contact, difficulty with transitions, and some fairly mild behavioral rigidity with a mildly atypical interactive style. He had attention related difficulties including distractibility and trouble focusing. He was able to share and take turns and could play simple card and board games.

38. In summarizing the evaluation, the Hillyard Report concluded Student was a very complicated young boy whose previous psychological evaluations had ranged from expressive-receptive language disorder to autism. In considering a possible autistic spectrum disorder, the clinical impression was that Student was similar to many autistic children of his age in his language and communication functioning. However, he was much more socially responsive and interactive than most autistic children. He did not have any self-stimulatory or repetitive behaviors but did have a few mild sensory issues similar to those found in a wide range of children which was not thought to be specific to autism.

39. Recommendations from the Hillyard Report included consideration of placing student in a class specifically designed for children with language delays but who have otherwise average abilities. In the absence of such a class, the report noted Student had made satisfactory progress and gained academic skills in a regular education kindergarten class with the assistance of an aide. Based on such progress, the Hillyard Report concluded the same arrangement appeared to be appropriate for his

upcoming first grade year. In view of Student's continuing need for speech and language therapy, Dr. Hillyard also recommended a speech and language evaluation to fully explore his needs in that area.

DID THE IEP DATED SEPTEMBER 10, 2007, ADDRESS STUDENT'S UNIQUE NEEDS?

40. By the time of the September 10, 2007 IEP team meeting, District had reviewed several assessments<sup>3</sup> provided by Mother including the Rady Children's Hospital Report by Dr. Corsello and the Regional Center evaluation by Dr. Hillyard. Dungca attended this meeting and recalled that Cook reviewed the assessment reports provided by Mother during this meeting. There was also a discussion of a proposed behavior support plan (BSP) prepared for Student. The two areas of concern that the proposed BSP addressed were the violation of personal space of others and work refusal by Student.

41. The IEP team meeting comments reflect District team members noted their concerns over Student's "lack of academic progress." Testimony from District witnesses at the time of the hearing referred to a belief that Student could make more progress in the mild to moderate SDC than in the regular education setting.

42. District's September 10, 2007 IEP offer was essentially the same as the previous offer. District again proposed to place Student in an SDC for mild to moderate disabilities for grades K-2. District made clear that its offer included some mainstreaming time, including 60 minutes for lunch and recess and an additional 30

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<sup>3</sup> Testimony and the IEP team meeting comments show there was another evaluation presented by Mother for District's consideration, referred to as the Centro de Servicios (Tijuana) Assessment report. However, this report was not provided at the time of the hearing and was not entered into evidence.

minutes during the day. The only other change was that the SDC class would be located at Liberty Elementary School (Liberty) rather than at Wolf Canyon due to the large number of students enrolled at Wolf Canyon.

43. To describe the program offered for Student, District presented the testimony of Barbara Mages (Mages), the teacher of the class that District proposed for Student. Mages has been employed by District as a primary SDC teacher for students with mild to moderate disabilities since 1990. Before her employment with District, she was employed by the Los Angeles Unified School District for six years as a teacher for a mild to moderate SDC. She is currently assigned to Liberty. Her duties include setting up proper instruction for each student to meet their goals. She has never met Student and did not attend any IEP team meeting for Student.

44. Mages' class at Liberty currently has 12 students. The students in her class qualify for special education under a variety of eligibility criteria including autism (one student), mental retardation (two students), specific learning disability (four students), speech and language disability (four students), and other health impaired (one student). She described a typical day in her class which included large and small group lessons in all the subjects first graders would be expected to learn: language, reading, mathematics, story time, social studies, science, art, music, and physical education, with breaks for recess and lunch. She has the same textbooks as the regular education classes. Her classroom was staffed with three adults including Mages, an instructional assistant, and a student assistant.

45. In addition to describing the typical day, Mages reviewed the IEP goals in the September 10, 2007, IEP proposed by District. She was confident she could implement each of the goals for Student in her SDC. She noted that many of the goals proposed for Student were similar to goals that she was currently implementing for other students in her class. In talking about some of the student profiles currently in her

class, Mages candidly described the behavior problems of some students which involved attention seeking from other students as well as from adults. These behaviors included making faces, sounds, and noises in the classroom. Mages was able to redirect these students. In spite of this, she also has students who are good verbal models, some students who have good social skills, and some with good academic skills.

#### THE REGULAR EDUCATION FIRST GRADE CLASS FOR STUDENT

46. Student currently attends the regular education first grade class at Salt Creek pursuant to a mediated agreement with District. To provide information on how Student has performed among his regular education first grade peers, District provided testimony from Lynn Allinger, who has been Student's first grade teacher during the current 2007-2008 school year. Allinger has been a first grade teacher at Salt Creek for four years. Before teaching first grade she taught second grade at Salt Creek since she was first hired by District in 2000.

47. The first grade regular education class has 20 students. The typical school day starts with opening activities including attendance, announcements, and a daily language review sheet for 15 minutes. From 8:30 to 9:45 a.m. Allinger works on language arts followed by a recess period for 20 minutes. From 10:05 to 11:05 a.m., the class works on writing. There is a lunch period from 11:05 to 11:50 a.m. From 11:50 to 12:20 p.m. is reading and the English Language Development (ELD) program. Allinger works on mathematics from 12:20 to 1:15 p.m. The class then participates in physical education from 1:15 to 1:45 p.m. followed by word work for 15 minutes. From 2:00 to 2:30 is science or social studies, followed by a 15-minute period to review and close the school day. Student is generally pulled out of the class for RSP services in the morning during language arts and again after lunch.

48. Allinger explained Student participates in the English Language Development (ELD) program one day a week on Mondays. This involves small group

instruction, usually with three to five students, when she works on oral language with the students. She reported that Student was able to wait for his turn and responds to pictures like the other students in the group.

49. Student participates in mathematics in the regular first grade class. He quietly listens to the instruction by Allinger. He participates in the collaborative work, sometimes guided by the classroom aide. He always begins to work on the same worksheets as the other students, and sometimes moves to other worksheets or works on uncompleted work from other days with guidance from the aide.

50. Student also participates in physical education (PE) with the rest of the first grade class. He is shadowed by an aide just for safety and behavior concerns. Student participates in word work activities which involve the presentation of new spelling words and creating flash cards of high frequency words the class works on each week and he usually works on the same words as the other students. He also participates in science and social studies lessons and activities.

51. Allinger described Student's behavior in class as very good. She recalled that he had some incidents involving outbursts and touching others in the beginning of the year, but those behaviors have diminished.

52. As Student's first grade teacher, Allinger prepared his progress reports and report cards for the 2007-2008 school year. For the first reporting period in the fall of 2007, Allinger noted that Student continued to slowly progress, he could read more in small groups, and he sometimes responded to questions about the stories they read. He was also learning his addition and subtraction problems in mathematics.

53. For the second reporting period, which ended in February 2008, Allinger noted Student continued to progress slowly, could read almost half of the first grade sight words, and was successfully reading some of the beginning level books. Allinger also reported that by the middle of the school year, Student was reading about 26

correct words per minute, which is almost half of the 60 words per minute that students were expected to achieve by the end of the year.

54. Student's Progress Report dated February 28, 2008, showed a three, for substantial progress, on Student's IEP reading goal to identify letter sounds. On the writing strategy goal to correctly write all capital and lower case letters, the narrative notes show Student had progressed to writing 85 percent of his letters with spacing and formation at 45 percent accuracy. Other goals continued to show partial and substantial progress similar to the progress he achieved the year before in the regular education kindergarten class.

#### TESTIMONY BY INCLUSION SPECIALIST DR. SHARON LERNER-BARON

55. To provide additional information on how Student has performed among his regular education first grade peers, Student provided testimony from Sharon Lerner-Baron, Ph.D., who has been a licensed clinical psychologist in California for the past 10 years. Dr. Lerner-Baron provides outpatient individual, marital, family, and group therapy for children and adults in her private practice in La Jolla, California. In the area of education, her specialties include anxiety disorders, adjustment disorders, attention deficit hyperactivity disorder, autism, Asperger's syndrome, and learning disabilities. She has substantial experience with inclusion which is generally understood as the placement of a child with a disability with his or her chronological age peers in a regular education class. She has worked in a variety of positions with Kids Included Together (KIT) which supports programs that serve children with disabilities. Her positions with KIT over the past 10 years include being a consultant, a program coordinator, and most recently program director during which time she trained providers at over 42 San Diego and Imperial County recreational sites to include special needs children with typically developing peers. Back in her local community, Dr. Lerner-Baron has received a special

recognition award in inclusion from the Lawrence Family Jewish Community Center from 1999 to the present.

56. Dr. Lerner-Baron observed Student on April 10, 2008, at Salt Creek. The observation lasted for one hour and 10 minutes with a District staff member accompanying her at all times. The first thing Dr. Lerner-Baron saw was Student's class walking to the library. Student followed in line, appropriately and quietly. All the students, including Student himself, appeared to know the routine as they filed into the library and sat in front of the librarian, who was not the regular classroom teacher. Another group of children, possibly from another class, filed in behind Student's class for the reading session.

57. Separate from the reading session, another group of students were in the library behind some shelves. They were participating in a computer lab of some sort. Dr. Lerner-Baron explained that although this other group was behind some book shelves, it was possible to hear them, and the librarian even asked Student's class to be quiet for the other class. In spite of the noise coming from the computer lab group, Student was able to remain on task and pay attention to the story being read by the librarian.

58. Dr. Lerner-Baron continued to describe the library session she observed. After the librarian read a story, the students were allowed to select and check out books to read themselves. Student participated appropriately in the library routine like the other students in his class. This included raising his hand patiently to be able to get up to select his books, choosing two books to read, checking the books out, and sitting quietly while he participated during the silent reading time. In short, during the half hour of library activities, Student was able to follow routines, stay on task, and behave appropriately with the rest of the class. Dr. Lerner-Baron explained that, without knowing who Student was, if she had walked into the room while the librarian was

reading, she would not have been able to pick him out from the group of students in the library.

59. The same was true for Student as he moved back to the classroom for a literature lesson, transitioned to snack time, and then went to the playground for recess. With a little prompting from his aide, Student was able to do the things he was expected to do along with his classmates. His positive classroom interactions followed onto the playground. He played a game of sorts with another student going up and down the playground slide. He also participated with another student when they both carried the teacher's bullhorn to return it to a table when the lunch time was finished. The remaining transition to get back on line and return to the classroom went as smoothly for Student as with his other classmates. He appeared to handle change and transition well as he moved through his day. During her observation, Student did not resist change, did not tantrum or scream or push, and he did not throw himself on the floor.

60. Dr. Lerner-Baron also addressed Student's receptive and expressive language disorder. She opined that it was not only beneficial, but that it was essential, for Student to have appropriate role models without language deficits for his language development. She believed Student should be among typical peers with language skills that Student could imitate, peers who would have subtle cues that Student could learn from, and peers who did not have inappropriate language for him to imitate.

61. In reviewing District's proposed IEP for Student, Dr. Lerner-Baron also considered the SDC placement to include mainstreaming with typical peers at recess, lunch, and social studies as needed or appropriate. She saw difficulties with this proposal to contain interaction with typical peers to these limited times. She noted that recess and lunch are the loudest and most chaotic times of the day. They are also the times when students must pick up on the subtle social cues of social interaction. Contrary to popular belief, Dr. Lerner-Baron does not believe those times should be



used for limited mainstream interactions. She believes if those times are the only mainstreaming times, it is a setting designed for failure.

62. She also believes that if the only class that Student would attend with typical peers was social studies, such limited mainstreaming would also be problematic. She explained that when a student is going back and forth between a regular education classroom and an SDC, the student ends up not being a part of either class. She noted that when a student is brought into a class for one subject, and then sent back to the SDC for other classes, the student is not really part of the culture in that class.

63. Dr. Lerner-Baron described the concept of inclusion as an attitude, a philosophy, and a belief system rather than just a decision to place a particular student in a particular program. She explained that inclusion means a student is considered part of the community of the classroom as part of the entire school and the student is valued as a contributing member of that community.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, the District has the burden of persuasion in this case.

### FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT

2. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9).)

3. "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. 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 "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to

what was reasonable at the time, not in hindsight. (*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.)

5. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) This provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers. (*Department of Education. v. Katherine D.* (9th Cir. 1983) 727 F.2d 809, 817, cert. den. (1985) 471 U.S. 1117 [86 L.Ed.2d 260, 105 S.Ct. 2360].)

6. In light of this preference, and to determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class" and; 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

7. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes;

nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

#### DETERMINATION OF ISSUE

8. The dispute in this case concerns what is the least restrictive environment for Student. For the 2007-2008 school year, District offered to place Student in the mild to moderate SDC for students in kindergarten through second grade at Liberty. District asserts this is the least restrictive environment because it will afford greater educational benefit than in a regular education class. Student takes the position that the least restrictive environment was the regular education first grade class taught and located at his local neighborhood school at Salt Creek. Under the Ninth Circuit's decision in *Rachel H.*, the benefits, effects, and costs of placement must be balanced to determine the least restrictive environment.

#### A. ACADEMIC BENEFITS

9. The academic benefits of the K-2 SDC and the regular first grade class were nearly the same. Considering Student's average cognitive abilities, both settings would provide the language, reading, writing, math, and social skills instruction that Student needs during his first grade year. The curriculum was described as the same, with use of the same textbooks by the teachers.

10. When District offered the K-2 SDC at Liberty, the IEP Team had sufficient information that Student was capable of making progress in the regular education environment. The IEP Team had Student's kindergarten progress reports and report cards that showed Student was successfully making progress in the regular education environment. This progress was being achieved in spite of Student's delays in his

expressive and receptive language skills, articulation, and poor pragmatic communication skills. Student had made partial progress and substantial progress on his kindergarten IEP goals.

11. Much effort was spent on evaluating Student for what appears to have been the identification of his primary disability. School psychologist Dungca assessed Student in late May 2007 concluding that he met the criteria for autistic-like behaviors. She concluded that Student's speech and language difficulties were better explained by such a handicapping condition. Student's clinical psychologist Dr. Corsello assessed Student in early August 2007 at Rady Children's Hospital. She concluded that Student had a mixed expressive-receptive language disorder. She also noted that he did not demonstrate sufficient social deficits necessary for an autistic spectrum disorder and that a program for students with autistic-like behaviors, such as the SDC proposed by District, would not serve Student's needs. And the assessment by Dr. Hillyard in mid-August 2007 generally agreed with Dr. Corsello's findings that Student's language and communication functioning resembled that of some autistic children. However, Student was much more socially responsive and interactive than most autistic children. If a class designed for language delayed students was not available, Dr. Hillyard concluded the regular education setting, with speech and language therapy, would serve Student's needs.

12. Student's progress while placed in regular education for more than half his time at school during his kindergarten year provided a good indicator of how the IEP team could expect him to perform during the next year in first grade. Student demonstrated an ability to progress in the regular education setting, although it was at a generally slower pace than other students. Student's slower progress was due to deficits from his receptive and expressive language disorder. Student received substantial benefits in regular education and all of his IEP goals could be implemented

in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide. Student's progress reports, report cards, and teacher comments demonstrate Student made academic progress. His academic progress included learning to read, spelling test success, and repeated progress on his IEP goals.

13. District urged that the SDC would provide Student greater educational benefit than the regular education environment. But asserting greater educational benefit is not the test for the least restrictive environment. In the *Rachel H.* case, the court considered a full day mainstream classroom setting with supplemental services. Rachel was a second grader with mental retardation and had an IQ of 44. The court found Rachel received substantial benefits in regular education classroom and that her IEP goals could be implemented in the regular education setting with some modification to the curriculum and with the assistance of an aide. Student in this case is not mentally retarded, but has expressive and receptive language difficulties, articulation problems, and some autistic-like behaviors.

14. When a student with a disability is placed in a regular education classroom, the student is expected to achieve at a level commensurate with his or her ability and IEP requirements, with the assistance of appropriate special education and related services. The student is not necessarily expected to keep pace with the non-disabled students in the class or to achieve all the regular education requirements in order to be placed in the next grade level. Rather, the student with a disability is expected to move on to the next grade level upon achieving success in the classroom, as measured against his or her own IEP. Recognizing this, the *Rachel H.* case does not require any measurement of the individual student's progress, or the educational benefit received, against typically developing peers or grade standards. Rather, the test in the *Rachel H.* case recognizes the individualized focus of IDEA and examines a student's progress compared to the abilities, achievements, and IEP goals of that student.

Consequently, if the regular educational class with related services is sufficient to confer some educational benefit upon the student it constitutes the least restrictive environment. In determining whether a student receives educational benefit, the standard set by the United States Supreme Court in *Rowley* applies. In that case, the court explained a student must receive some benefit from a special education placement. The special education placement, of course, includes the specialized individual instruction, support, and services that may be required by the student. Here, Student clearly received educational benefit in the regular education setting during his kindergarten year.

#### B. NON-ACADEMIC BENEFITS

15. The non-academic benefits of the SDC and the regular class differ for Student. Student has a great need for typically developing language model peers to provide models for language and social development. While there is a possibility the SDC may have some students with typically developing language skills, Student's needs require more than that possibility.

16. Based on these differences in the SDC K-2 setting and the regular education first grade setting, the non-academic benefits tip in favor regular education. Student's non-academic progress includes having friends in class, enjoying playing games with his peers, and benefits from assistance with assignments and class activities with his peers. And non-disabled peers enjoy being with him. He looks to his peers for guidance, and imitates his typically developing peers' behaviors. The school psychologist noted Student demonstrates behavior that will aid his success in the classroom environment and his social skills continue to develop.

### C. EFFECT ON THE REGULAR EDUCATION TEACHER AND OTHER STUDENTS

17. No witness provided testimony that Student would have a negative effect on the teacher or other students in a regular education first grade. Testimony from classroom observation actually demonstrated that Student's behavior in the regular education environment was not a problem. To the contrary, there was testimony that unless someone pointed out Student in a group, his behavior was similar to other typically developing peers.

18. Student is not a classroom disruption. He does not monopolize the regular education teacher's time or attention. The testimony by Dr. Lerner-Baron showed that Student handles change and transition well as he moved through the day. Student did not resist change, did not tantrum or scream or push, and he did not throw himself on the floor. This consideration tips in favor of the regular education environment.

### D. COSTS OF PLACEMENT

19. No witness provided any testimony on the issue of the competing costs of these placement options for Student. As a result, this part of the balancing test does not impact the findings on the least restrictive environment for Student.

### E. BALANCE OF FACTORS FOR LEAST RESTRICTIVE ENVIRONMENT

20. In balancing the factors above, the evidence showed that Student would likely derive the same benefit from attending the regular education first grade class as attending the SDC. However, even if Student could receive more academic benefit from the smaller group settings and the more intense attention from the adults in the K-2 SDC, the balance tips in favor of the regular education setting when considering the non-academic benefits and the lack of adverse impact on the classroom teacher and other students. There is little doubt Student would receive more substantial non-academic benefit from the regular education setting than the K-2 SDC in view of the



benefits of such inclusion. Typically developing peers would provide language and social skill models for Student throughout the entire school day. Moreover, the benefits received would be in a critical area of need for Student due to his expressive and receptive language deficits. Student's ability and willingness to imitate others, coupled with his positive social skills, are good predictors he would benefit from such placement.

21. The academic and non-academic benefits that Student gains from his regular education classroom meet the educational benefit standard established by the Supreme Court. In view of Congress's stated preference for educating children with disabilities in regular classrooms with their peers, the Liberty K-2 SDC for mild to moderate disabilities offered by District is not the least restrictive environment in which to educate Student.

## ORDER

1. District's offer of placement and services contained in the individualized education program dated June 5, 2007, and amended on June 22, 2007 and September 10, 2007, does not constitute a free appropriate public education in the least restrictive environment for Student.

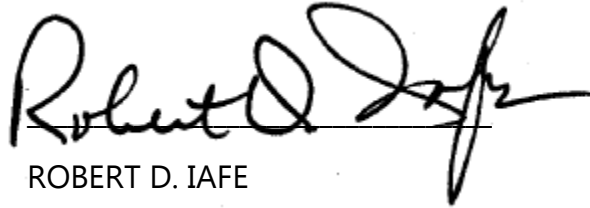
## PREVAILING PARTY

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. Student prevailed on the sole issue heard and decided in this case.

## 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 (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 28, 2008

A handwritten signature in black ink, appearing to read "Robert D. IAFE", written over a horizontal line.

ROBERT D. IAFE

Administrative Law Judge

Special Education Division

Office of Administrative Hearings