

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

LA MESA-SPRING VALLEY SCHOOL
DISTRICT.

OAH CASE NO. 2009050311

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in San Diego, California on June 24, 25, 28, 29 and 30, 2009.

Student was represented by attorney Ellen Dowd. Student's father (Father) was present on the first day of the hearing, and his mother (Mother) was present throughout the hearing.

La Mesa-Spring Valley School District (District) was represented by attorney Sarah L. Sutherland of the law firm of Miller, Brown & Dannis. Gayle Coonce, the District's special education director, and Heather DiFede, special education coordinator from the District, were also present.

Parents filed their request for due process hearing on May 7, 2009. The parties filed written closing briefs on August 3, 2009, and the District filed a written rebuttal on August 7, 2009.¹ The matter was submitted on August 7, 2009.

The following witnesses testified during the hearing: Mother, Heather DiFede, Luana Rasmussen, Rhonda Manion, Dayon Higgins, Jill Nasman-Moore, Robyn Dubrow, and Ingrid Gonsalves.

ISSUES²

- (I) Did the District deny Student a free appropriate public education (FAPE) by failing to conduct an appropriate assessment?
- (II) Did the District deny Student a FAPE by failing to find him eligible for special education services under the eligibility category of autistic-like behaviors at the January 30, 2008 and April 30, 2008 Individualized Education Program (IEP) team meetings?
- (III) Did the District deny Student a FAPE by failing to find him eligible for special education services under the eligibility category of autistic-like behaviors at the September 10, 2008 IEP team meeting?

¹ The District filed simultaneously a motion to strike and a closing brief. District's closing brief made arguments as to the applicability of several legal authorities cited by Student in his brief. District's motion to strike contested several facts cited by Student. The motion to strike is denied, but the pleading is deemed to be part of its closing brief.

² The issues have been re-framed for the purposes of this decision.

(IV) Did the District deny Student a FAPE by failing to have a general education teacher in attendance at the April 30, 2008 and September 10, 2008 IEP team meetings?

PROPOSED RESOLUTION

Parents' proposed resolution is that Parents be reimbursed for the cost of Student attending a nonpublic school in the amount of \$31,026.70.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student is a seven-year old boy, who was born on June 22, 2002. Student resided within the boundaries of the District from September 2007 until he and his family moved outside of the District on September 15, 2008.

2. Mother testified that Student had a history of inflexibility, difficulties socializing with peers, and frequent temper tantrums that were long lasting. Student was uncomfortable in large groups at church and become withdrawn and would not participate during children's assemblies which contained between 50 and 120 children.

3. Student attended preschool at the Children's Center at San Diego State University from 2004 through the end of school year 2006-2007. Student had difficulty socializing and with his impulse control. Parents enrolled Student in the kindergarten at Mt. Helix Academy, a private school, for school year 2007-2008. Student was enrolled in the Mt. Helix summer kindergarten prep program. Because of his difficulties getting along with peers, failure to follow directions, and his behavior problems, Student needed too much attention from the teacher and he was not permitted to enter the kindergarten. His teacher, Mike Hanlon, suggested to Parents that Student may have a learning disability.

4. Parents then enrolled Student at the Balboa City School (BCS), a certified nonpublic school, located in San Diego. Because BCS did not have a kindergarten, Student was placed in a first grade class consisting of five students. Because Student continually refused to do homework, BCS eliminated homework from Student's program.

5. In early September 2007, Parents contacted the District requesting that a special education evaluation be completed on Student. Ingrid Gonsalves, a resource specialist³ at the Loma Elementary School,⁴ explained the process for eligibility for special education and set up a meeting of the Student Study Team (SST) at Loma. Mother informed Gonsalves that she did not believe that public school was an appropriate place for Student because he would need a lot of adult intervention to stay on task. She also felt that the large groups at lunch and recess would cause Student to become withdrawn.

6. On October 3, 2007, Parents attended a meeting of the SST at Loma Elementary School. Luana Rasmussen, a school psychologist; Gonsalves; and Jill Nasman-Moore, a speech and language pathologist (SLP) attended from the District. Student's current teacher at BCS, Yvonne Jaramillo, was invited but did not attend although she emailed Gonsalves with her impressions of Student. The group was told that Student's areas of strength were that he was smart, verbal at home, had good language skills, creative, artistic, and he was performing at grade level in his first grade class. Student's areas of concern were that he had difficulty in transitioning, was inflexible, had difficulty expressing his wants and needs, often threw tantrums, and

³ A resource specialist is a credentialed special education teacher who provides individual or small group remedial-type instruction.

⁴ Loma Elementary School was Student's neighborhood school.

would become frustrated often. The SST also discussed characteristics of autism and Asperger's Syndrome and gave printed material on autism to Parents. The SST referred Student for a special education evaluation. Parents requested that Student be assessed in the area of autism.

7. In order for a child to be eligible for special education, a child must have an impairment that requires instruction, services, or both, which cannot be provided with modification of the regular school program so as to enable the child to benefit fully from instruction. For a child to be eligible for special education under the category of autistic-like behaviors, a pupil must exhibit "any combination of the following autistic-like behaviors, to include, but not limited to: (1) an inability to use oral language for appropriate communication; (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy to early childhood; (3) an obsession to maintain sameness; (4) extreme preoccupation with objects and/or inappropriate use of objects; (5) extreme resistance to controls; (6) displays peculiar motoric mannerisms and motility patterns; and (7) self-stimulating, ritualistic behavior.

THE FIRST DISTRICT EVALUATION

8. On October 5, 2007, Gonsalves forwarded to parents a Notice of Procedural Safeguards and an Evaluation Plan listing the following areas to be evaluated: academic achievement, psycho-motor development, language/speech communication development, cognitive functioning, social-emotional/adaptive behavior, health review, and autism. Parents consented in writing on October 31, 2007.

9. On December 10, 2007, Parents requested that the District conduct further evaluations by an occupational therapist. A supplemental evaluation plan was forwarded to Parents, who signed their consent on January 9, 2008. At Parents' request, the IEP

meeting scheduled for December 19, 2007 was postponed to permit completion of all evaluations. At the time of testing, Student was five years, 10 months of age (5-10).

Health and Developmental History

10. Mother provided the District with a health and developmental history. She indicated that Student achieved motor and language milestones in the average range. She stated that Student is generally happy, sensitive, strong willed, but he is also aggressive, easily frustrated, and throws fits when under stress.

The Speech and Language Evaluation

11. The speech and language evaluation was conducted by Nasman-Moore, a District SLP. Nasman-Moore has a B.A. in speech pathology and audiology and a M.S. in education, speech pathology and audiology. She holds a California credential in clinical or rehabilitative services in language, speech and hearing as well as a certificate of clinical competency. She has been a speech pathologist since 1986 and has been with the District since 1987. Nasman-Moore administered the Expressive Vocabulary Test (EVT); Boehm Test of Basic Concepts-Revised (BTBC-R), which measures a child's receptive skill level and understanding of verbal instructions; and the Goldman-Fristoe Test of Articulation. In the EVT, Student scored in the moderately high range. In the BTBC-R, he was in the 97th percentile as a kindergarten student and a 75th percentile when scored as a first grader. In the Goldman-Fristoe, Student demonstrated appropriate tongue mobility and placement, had age appropriate voice and fluency and made appropriate eye contact. On January 9, 2008, Nasman-Moore took language samples from Student. Student made eye contact with her and had proper inflection, tone and intonation and his affect was not flat like typically observed in Asperger children. He appeared to understand the subtleties of social communication and taking turns and had knowledge of social norms and rules. In her report, the evaluator

concluded that Student “may display awareness of his surroundings that may distract or shift his focus during learning activities,” and that Student did not demonstrate any speech and language deficits and that his skills were within the range of a normal functioning five year old.

OCCUPATIONAL THERAPY EVALUATION

12. At Parents’ request, Student was evaluated by a registered licensed occupational therapist, Stacey Marshall. Marshall administered the Bruininks-Oseretsky Test of Motor Proficiency-2d Edition (BOT-2), Handwriting Without Tears-The Print Tool and the Short Sensory Profile. Marshall concluded that Student “does not require educationally-based OT services” in that he scored in the above average range on the fine motor subtests of the BOT-2 and in the above average range on handwriting. Although she noted that Student’s sensory behaviors do not seem to affect his ability to learn in the classroom, Marshall noted in her report that, at home, he appears distracted if there is a lot of noise and seeks movement which interferes with routines.

PSYCHO-EDUCATIONAL EVALUATION

13. Rasmussen conducted the psycho-educational evaluation. She received her B.A. in psychology and an M.A. in education-school psychology in 2006. During school year 2006-2007, she was a school psychology intern with the San Diego Unified School District. Rasmussen received her California Pupil Personnel Services credential in June 2007. Since August 2007, Rasmussen has been a school psychologist with the District assigned to three of its elementary schools. In conducting her evaluation, Rasmussen reviewed Student’s records, interviewed Mother, made observations of Student during testing, and administered the following tests: Woodcock Johnson Tests

of Achievement, 3rd Edition (WJ III);⁵ Beery Developmental Test of Visual Motor Integration, 5th Edition (VMI-5); test of Visual Perceptual Processing Skills, 32d Edition (TVPS-3); Test of Auditory Processing Skills, 3rd Edition (TAPS-3); Kaufman Ability Scales for Children, 2nd Edition (K-ABC-2); Autism Diagnostic Observation System-Module 2 (ADOS);⁶ Gilliam Autism Rating Scale, 2nd Edition (GARS-2); Conners' Rating Scales-Revised Edition-Short Form; and Behavior Assessment System for Children, 2nd Edition (BASC-2).

14. During the parental interview, Mother stated that Student was playful, loves to read, and was really good at math and fractions. But, she also stated that Student had difficulty transitioning, was inflexible, hates to admit when he is wrong, had problems following directions, refused to do homework, and refused to do things in repetition. During observations, Rasmussen noted that Student initially refused to maintain eye contact or respond to her. After being allowed to draw and with Mother present, Student began to grow more comfortable making eye contact and speaking to Rasmussen. After several test sessions, Student threw a tantrum and was quieted down by Mother after promising to do a requested activity.

15. In the WJ III, Student scored at average or above in all subtests and within the "superior" range in calculation, applied problems and writing sample. In the VMI-5, Student scored in the 94th percentile with an age equivalency of seven years-one month. He was in the "high average" range in the TAPS-3 and average range in the TVPS-3. Student was in the "above average" intelligence range in the K-ABC-2 with

⁵ Gonsalves, a resource specialist who possesses both regular education and special education teaching credentials, administered the WJ III.

⁶ In her written report, Rasmussen lists the test name as Autism Diagnostic Observation Scale.

global scales scores in the average range for sequential processing, above average in mental processing index and nonverbal index, and "superior" in simultaneous processing.

16. The BASC-2 are rating scales designed to diagnose a variety of emotional and behavioral disorders in children. The BASC-2 was given to both Mother and Student's teacher, Yvonne Jaramillo. In Mother's rating, Student was "at risk" in the areas of hyperactivity, aggression, atypicality, social skills, externalizing problems, adaptive skills, and behavior skills. In the teacher ratings, Student was in the "at risk" range only in social skills and attention problems. The Connors' rating scales are designed to rate a child for ADHD (attention deficit hyperactivity disorder) and were administered to Mother and Jaramillo. Mother rated her son with "significant concerns" in opposition, cognitive problems/inattention, and in the "borderline" range for hyperactivity. Jaramillo rated a "significant concern" only on opposition and "possible significant problem" on the ADHD index.

17. The GARS-2 is a standardized questionnaire which evaluates the probability as to whether a child exhibits behaviors and symptoms of autism. The questionnaires were given to Mother and Jaramillo. An autism index score of 69 or less indicates an "unlikely possibility" of autism, 70 to 84 indicate a "possibility" and 85 and above indicate a "very likely possibility." Jaramillo scored Student on the autism index at 72 while Mother's score was 76. There are three subscales which are scored from one to 10 with scores in the one to three range being "unlikely," four to six being "possibly" and seven or more "very likely." Jaramillo scored Student at seven in stereotyped behaviors, six in communications and four in social interactions. Mother's scores were five in

stereotyped behaviors, six in communications and eight in social interaction.⁷ In her report, Rasmussen points out that both teacher and parent observed autistic-like behavior such as tantrums when given directions, avoiding eye contact, withdrawal, remaining aloof, staring at hands or objects, acting stand-offish in group situations, and failure to initiate when it is required in games and activities. Although Rasmussen reported incorrectly the results, she clearly stated that Student displayed behaviors related to autism, and she did conclude that Student “displays some Autism characteristics.”

18. The ADOS is a standardized measurement which involves the examiner engaging the child in different social interactions formally. The test comprises three domains: social interaction, communication, and the combined communication-social interaction. The ADOS requires that a child meet or exceed each of the autism thresholds in each domain to be found to be on the autism spectrum. Rasmussen rated Student as meeting the autism spectrum cut-off in the area of social interaction and the combined communication-social interaction but not in the area of communication. Thus, Student meets the classification of “Nonspectrum.” Rasmussen also noted that she did not detect the presence of stereotyped behaviors and restricted interests which must also be present to meet the full criteria of Autism Spectrum. In her written report, Rasmussen reported that “while [Student] does not meet the criteria for Autism specifically, he does show some behaviors and symptoms of related disorders such as Asperger’s Syndrome.”

⁷ In her written report, Rasmussen used the term “below average” in lieu of possibility. She corrected her mistake in an addendum report dated April 30, 2008, and stated that Student is displaying behaviors related to Autism.

19. Rasmussen found that Student was not eligible for special education as he “does not meet the eligibility criteria for Autism.” She did note that Student’s academic skills are in the above average to superior range, and that he “is able to complete the curriculum at the first grade level despite being of Kindergarten age.” She recommended that “Parents may want to share test results with a pediatrician to further examine possible difficulties with attention or Autism like behaviors.” She also recommended that Student be taught alternative ways to deal with stress and anger, teach him acceptable ways to communicate displeasure, frustration and anger, teach him techniques to control his anger, provide him visual schedules, implement non-verbal prompts when he strays off task, and use various modalities when giving him directions. Rasmussen’s conclusion was based on the failure of Student to meet the five factors of autistic-like behavior eligibility category. (See Factual Finding 7 and Legal Conclusion 9.)

RASMUSSEN’S QUALIFICATIONS TO ADMINISTER THE ADOS

20. Student contends that the District failed to conduct a proper psycho-educational assessment of Student because Rasmussen was not qualified to administer the ADOS. Student cites to the errors in the written report and that Rasmussen was not trained to administer the test by the ADOS publisher, Western Psychological Services (WPS). As to the former, Rasmussen utilized the wrong terminology in describing her results and did not change the results obtained. As to the latter, Student relies on the WPS website section on ADOS Frequently Asked Questions.⁸ WPS states that the ADOS examiner should “[h]ave prior education, training and experience that includes exposure

⁸ The ALJ took official notice of the document.

to Autism and PDD” (Pervasive Developmental Disorder),⁹ take “the WPS in-person clinical training or use the WPS Training Video/DVD and accompanying materials,” and practice using the ADOS in cases that are not part of formal evaluations. Student offered no further evidence to support his position.

21. The District has utilized ADOS at least since 2002. Rasmussen was trained to administer ADOS by another District school psychologist, Robyn Dubrow.¹⁰ Dubrow learned how to administer the ADOS from another District school psychologist in 2002. Dubrow knew of no formal training requirement to administer ADOS in 2002. She has administered the test approximately 25 times and between 15 to 20 times at the time she instructed Rasmussen in October 2007. Dubrow explained that it was the industry practice that when there is a requirement for a test to be administered only after special training then that test can not be purchased unless the training session is included. She knows of no such requirement by WPS as it relates to the ADOS. Dubrow explained that school psychologists are specifically trained to administer, interpret, and know how to use accompanying manuals of psychological tests. The ADOS scoring is “unique” as it is based on observations made by the examiner and the examiner’s responses to a series of questions, which are then scored. She cautioned that the ADOS does not test for ritualistic behaviors so that a diagnosis of Autism can never be based solely on it. Dubrow also consulted with Rasmussen when she administered ADOS on one or two

⁹ PDD is a behavioral disorder of speech, communication, social retardation, and repetitive type of compulsive behavior. Autism and Asperger’s Syndrome are forms of PDD.

¹⁰ Dubrow has a B.A. in psychology and an M.S. in school psychology. She received her pupil personnel credentials in 2001 and has been a District school psychologist for over eight and a half years.

prior occasions. Dubrow believed that Rasmussen was competent to administer the ADOS.

22. Student failed to meet his burden that Rasmussen was not qualified to administer the ADOS. Rasmussen was a credentialed school psychologist who is trained and qualified to administer psychological testing to students. Rasmussen was subject to cross-examination and appeared knowledgeable and competent as a school psychologist even though she may lack experience. Student failed to produce any evidence to rebut Dubrow, and Dubrow is experienced and qualified. The ALJ gave her testimony great weight.

JANUARY 30, 2008 IEP MEETING

23. On January 30, 2008, an IEP team meeting was convened at the Loma Elementary School. Attending were Parents; Mary Beason, the Loma principal; Gonsalves; Rasmussen, Nasman-Moore; Marshall; and Stephen Parker, BCS principal. Jaramillo was invited but did not attend although she sent a report by email. The assessment team reviewed their evaluations of Student. Parents were informed that a school psychologist evaluates a child for eligibility for special education and is not qualified to diagnose children. Parents were advised to share the test results with a doctor for the purpose of diagnosing Student. Rasmussen recommended that Student is not eligible for special education as he does not meet the category for autistic-like behaviors based on the teacher and parent rating scales and there is no handicapping condition which impacts Student's ability to learn. The other District IEP team members agreed with Rasmussen's recommendation in that Student did not require specially designed instruction to benefit from his education as demonstrated by the academic testing, which showed Student in the high average to superior range, and his performance at BCS. Parents stated that they may have misunderstood questions on the rating scale and responded inaccurately which may have affected the results. Parents requested further testing as a

result. Parents requested to take the paperwork home to review before signing the IEP. Later, Parents did not consent to the IEP.

DISTRICT'S SECOND EVALUATION

24. On January 5, 2008, Rasmussen forwarded a new evaluation plan and Notice of Procedural Safeguards to Parents. The plan called for the SLP to administer the Clinical Evaluation of Language Fundamentals-4th Edition Pragmatics Profile and Pragmatics Checklist in the area of Language/Speech Communication Development. The school psychologist proposed administering the Asperger Syndrome Diagnosis Scale (ASDS), conduct interviews, and observe Student. Parents consented on March 5, 2008.

25. Rasmussen interviewed both Mother and Jaramillo. Mother was concerned that Student does not always greet people, fails to follow instructions, unable to control his emotions, and his lack of social skills hinders his ability to make friends. He also "freaks out" in large crowds and is sensitive to noise so that she can not vacuum in the home. Student's fits have decreased since being put on a gluten-free diet, although the fits recently increased which Mother attributes to the family selling their house and plans to move. She believes that he is on the Autism Spectrum based on his behavior. Jaramillo modifies class assignments and homework because of his age. She was concerned with his off task behavior. Recently, she found him to be more off task than usual. In class, he rarely raises his hand and he seems comfortable in groups of two to three but becomes quiet in larger groups. She noted that he rarely responds to her greetings. During group activities in the park, he often sits by himself.

26. Student was observed three times as part of the District's second evaluation. He was first observed on April 11, 2008, by Rasmussen. Also, present was

Dayon Higgins, who represented Parents.¹¹ Student followed teacher instructions and was taking a math test when a fire drill occurred. Student followed instructions although he lost his shoe. After retrieving it, he went back to his position. At the end of the drill, Student returned and finished the test. At lunch, Student socialized with a friend.¹² On April 18, 2008, Student was observed by Rasmussen, Nasman-Moore and Higgins. Student was observed for an hour and a half commencing at 11:00 a.m. and concluded after lunch and free-play. Student appeared focused, alert, appropriately interacted with peers and teachers, and maintained appropriate eye contact.¹³ Nasman-Moore observed that BCS is directly under the landing flight path of San Diego International Airport. During the half hour lesson which was observed, nine flights passed with significant jet noise. Yet, Student was not distracted and maintained his focus throughout. Rasmussen observed Student at BCS on April 28, 2008. Student was

¹¹ Higgins is the parent of a student in the Upper School of BCS and is a volunteer parent advocate who assisted Parents.

¹² Higgins testified based on notes she took from the visit. In her version, Student constantly appeared distracted and fidgety. She also observed that Student became engrossed in playing with a ruler and then a pencil grip, wandered around the class, and ate lunch alone. Higgins attended the April 30, 2008 IEP and was present when Rasmussen related her observations. Higgins admitted that she never shared her observations with the IEP team. Because of the failure to discuss her observations with the IEP team and that she had little independent recollection of events without reading her notes, the ALJ did not give great weight to her testimony.

¹³ Higgins noted that even though Student was "off task," the teacher was able to get him to respond to questions.

noncompliant with teacher instructions. He sat in the rear of the class and read a book after being instructed to sit with the class. He was observed socializing with another boy from the class appropriately. She also observed him playing in the sandbox. Student got in a spat with some of his peers in the sandbox but then appeared to be playing with others appropriately.

27. Nasman-Moore administered the CELF-4, which evaluates a child's language performance including introducing appropriate topics of conversation, responding and offering expressions of affection, and demonstrating an understanding of group or school rules. The test is comprised of 52 questions and was completed by Father, Jaramillo and the SLP. Responses to the questions are based on observations as to activities by the child and are answered as "never," "sometimes," "often," "always," "not observed" (NO) or "not appropriate" (NA). If a scorer answers with one NO or NA per group (there are three groups), the total score can not be computed. Here, both Jaramillo's and Nasman-Moore's scores could not be computed. Father's score of 73 indicates that Father observes deficits in Student's social language skills. Father indicated that 57 percent of the social skills measured were "never" observed. Some of the behaviors that Father indicated Student never displays were (a) observes turn-taking in classroom or social situations, (b) adjusts and modifies language based on situation, (c) participates and interacts appropriately in structured group activities, (d) responds appropriately when asked to change his actions, and (e) asks for help from others. Both the SLP, based on her observations, and Jaramillo indicated "often" or "sometimes" for all these areas. Thus, Nasman-Moore concluded that Student's social interactions vary largely according to environment, situation and the participants.

28. Rasmussen administered the ASDS, which is designed to assist in identifying children who manifest characteristics of Asperger's Syndrome. ASDS produces an Asperger Syndrome Quotient that measures the likeliness of a child having

Asperger's Syndrome. Parent and teacher fill out a rating scale. Mother scored Student at a standard score of 101 while Jaramillo scored him at 105. Both scores place Student within the "likely" range that he has Asperger's Syndrome. Rasmussen noted that Jaramillo's responses on the rating scale did not coincide with what Jaramillo said during the interview as well as Rasmussen's and Nasman-Moore's observations of Student.

29. In their Addendum report, Rasmussen and Gonsalves reviewed the factors for the category of autistic-like behaviors and found that Student failed to qualify. Their findings are as follows:

- (1) **An inability to use oral language for appropriate communication-** The SLP report dated January 30, 2008 found that Student did not demonstrate any speech and language deficits and his skills were in the normal range of his age. In the April 30, 2008 report, Nasman-Moore, based upon observations, concluded that Student's pragmatic skills appeared close to age level.
- (2) **An obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects or both-** Although parents reported that Student sometimes lined up objects in an orderly fashion, this behavior was not reported by his teacher or seen during the observations.
- (3) **Extreme resistance to controls-** During observations, Student followed the teacher's directions. Teacher also reported during an interview that Student adapted to change.
- (4) **Displays peculiar motoric mannerism and motility patterns-** This type of behaviors was not reported on the GARS-2 nor observed.

- (5) **Self-stimulating, ritualistic behavior-** Although Mother reported that Student has to do activities at a certain time; this was not reported or observed in the classroom, on the playground or during test sessions.
- (6) **A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood-** Although Parents report difficulties for Student joining in group activities and interacting with children outside of school, examiners' observations were that he made several attempts to engage peers.

30. In the Addendum report signed by Rasmussen and Gonsalves dated April 30, 2008, Rasmussen corrected her earlier report by stating that the results of the GARS-2 that "the probability that [Student] is displaying behaviors related to Autism is possibly." The report summarized the results of the evaluations thusly:

Results from the teacher and parent on the Gilliam Autism Rating Scale were consistent in identifying the probability that [Student] is displaying behaviors related to Autism is possible. Direct observations from the ADOS indicate [Student] displays few Autistic-like behaviors but he does not meet the ADOS classification criteria of Autism or Autism spectrum. According to parent and teacher ratings on the Asperger Syndrome Diagnostic Scale (ASDS), the probability of Asperger Syndrome is likely. However, when the teacher was questioned on items she indicated she observed from the ASDS, her examples of his behavior were not consistent with the rating scales results. Observations during testing and at [Student's] school are inconsistent to the Autism and

Asperger Syndrome rating scales completed by teacher and parent. Furthermore, observations of [Student] at Balboa City School revealed that [Student] attempted to interact with peers at school, but the older students rejected him. While reviewing all the information from this evaluation through testing, observations, interviews, and rating scales results indicate that [Student] does not meet the eligibility criteria for Autism.

APRIL 30, 2008 IEP MEETING

31. The IEP team reconvened on April 30, 2008, with Parents and Higgins in attendance along with Heather DiFede, District's special education coordinator; Rita Schwartz, a general education kindergarten teacher at Loma; Nasman-Moore; Gonsalves; Beason; and Rasmussen. Nasman-Moore presented the test results and her findings contained in her Addendum to her initial report. Rasmussen also presented her Addendum report and reviewed the test results and the amended results from the GARS-2 and ADOS. The team found that Student did not qualify for special education. The team discussed the supports available at Loma in a general education class. Parents were invited to observe a Loma class, but they declined. District team members stated that an independent diagnosis of autism may alter the decision of non-eligibility. Parents disagreed with the IEP team's determination and requested that the District fund an Independent Education Evaluation (IEE). The District said that they would consider the request.

THE IEE

32. On May 5, 2008, Mother forwarded a letter to Ms. Gonsalves reiterating Parents' request for an IEE at District expense because "[w]e do not agree with the

psycho-education evaluation that was done by the district.” On May 6, 2008, DiFede responded and agreed to fund an IEE even though the “District maintains that its assessments of [Student] were appropriate.” The District provided a list of four names and requested that Parents decide on an evaluator. Parents selected Jill Weckerly, Ph.D., a clinical psychologist. Weckerly submitted a written report to Parents and the District on or about August 25, 2008.¹⁴

33. Weckerly has a B.A. and M.A. in linguistics, a Ph.D. in cognitive science and linguistics and a second Ph.D. in clinical psychology. She has been a licensed psychologist since 2001. She has maintained a private clinical psychology practice since 2001, has been an assistant adjunct professor at the University of California, San Diego School of Medicine since 2002, and a clinical psychologist at the Mental Health Resource Center of the San Diego City Schools since 2002. Weckerly conducted Student’s evaluation over four days in her office beginning June 26, 2008 and ending on July 28, 2008. She interviewed Mother and Arielle Lugn, Student’s counselor at BCS. Weckerly administered the following tests: Wechsler Intelligence Scale for Children-Fourth Edition (WISC-4); Spelling subtest of the Wechsler Individual Achievement Tests-2 (WIAT-2); Gray-Oral Reading Test-4th Edition (GORT-4); Test of Word Reading Efficiency (TOWRE); Comprehension of Instructions, Affect Recognition and Visuomotor precision subtests from the Developmental Neuropsychological Assessment Battery, 2nd Edition (NEPSY-2); Test of Everyday Attention for Children (TeaCH); Level 1 of the Test of Language Competence-Expanded Edition (TLC-E); Wide Range Assessment of Memory and Learning, 2nd Edition (WRAML-2); Test of Problem Solving, 3rd Edition (TOPS-3); parent and teacher checklists from the Child Symptom Inventory (CSI); Roberts

¹⁴ Weckerly did not testify. The foregoing factual findings are from her written report which was admitted into evidence.

Apperception Test for Children-2nd Edition (RATC-2); Behavior Rating Inventory of Executive Function (BRIEF); Social Responsiveness Scale (SRS); Asperger Syndrome Diagnostic Scale (ASDS); Social Communication Questionnaire (SCQ-Lifetime); and San Diego ADHD Project Identification Packet (SANDAP). Weckerly's observation of Student was only during testing sessions.

Clinical interviews and observation

34. Mother informed Weckerly that Student is often irritable and in a foul mood. Student throws tantrums three to four times per week. Student's mood change can be triggered by a change of plans. He also gets overwhelmed in crowds and with noises. She also described Student as eccentric and rigid. Mother stated that Student is oblivious to listener's interest during conversations and tends to tell elaborate and unrealistic stories. She described Student as often making attempts to socialize with peers which are rebuffed. Mother stated that Student's teachers find him "artistic and focused" but exhibiting significant behavioral problems including emotional reactivity and difficulty following directions. Arielle Lugn, Student's counselor at BCS, noted that Student has significant struggles with off-task behavior and is easily distracted. He is noted to have poor eye contact, rude, and seems not to know how to join with peers. She described Student as perfectionistic and inflexible. He requires a lot of predictability, structure, and prompting.

35. Weckerly only observed Student during periods of testing. Student failed to greet her and had poor eye contact with her. He was easily distracted and often played with his watch and pencils. He was constantly squirming, restless, and in motion. He often chewed or mouthed his shirt. He required frequent re-direction and prompting to stay on task. He often made noises while completing the tests. Weckerly observed that he showed instances of inflexibility in his interactions and that he often made inappropriate comments during the testing.

Testing results

36. In general cognitive functioning, Student scored a full scale IQ of 120 on the WISC-4 which suggests that his "overall current intellectual functioning falls within the high average range and at the 91st percentile." He was also in the average to very superior range in the composite indexes. In the achievement tests, Student scored between the average range and superior. In Language, Student was in the high average for expressive and receptive language; but he was in the mildly to moderately impaired range in understanding multiple meanings of utterances and the mildly impaired in a test of understanding figurative and nonliteral uses of language. He was in the low average range in complex test of listening comprehension. In visual processing, Student scores ranged from average to very superior.

37. In executive functioning, Student demonstrated superior to very superior in concept formation and abstract reasoning and very superior in flexibility of thinking although his efficiency was moderately impaired. In problem solving, Student was in the average range for social knowledge but was unable to respond to a series of pictures of real-life situations. The BRIEF, which is a questionnaire to measure executive functioning, was given to Jaramillo and Lugn. Both noted areas of concern in initiating problem solving and activity; sustaining working memory; and planning and organizing problem solving approaches. Lugn also noted concern in Student's ability to adjust to changes in routine or task demands, which Jaramillo listed as an area that was not problematic. Both described as not problematic areas in inhibiting impulsive responses; modulating emotion; organizing his environment and materials; and monitoring his own behavior. Student was in the low average range on the NEPSY-2 Affect Recognition Age-scaled test scoring in the 16th percentile, which measured Student's skill in identifying facial expressions and moods.

38. Student's emotional functioning was assessed by the CSI; RATC-2; SCQ-Lifetime; ASDS; and SRS. The CSI is a rating scale which was given to Father, Jaramillo and Lugn. All three scored Student clinically significant in the areas of inattention; hyperactivity/impulsivity; oppositional and defiant behavior; anxiety; depression; autistic features; and poor social functioning. Father and Lugn also scored Student in the clinically significant range in rule-breaking and aggressive behavior; while Jaramillo and Lugn found chronic sadness as in the clinically significant range. The RATC-2 is a projective test where a child is presented with pictures and asked to relate a story. Student was unable or unwilling to do the majority of the test. Weckerly assumed that this meant that Student had considerable difficulty understanding social situations and the perspective of others.¹⁵ The SCQ is a parent completed questionnaire which screens for autistic spectrum disorders. The result was that there was a high likelihood Student has an autistic spectrum disorder. Mother completed the ASDS standardized rating scale which showed a probability of the presence of Asperger's Syndrome. The SRS is a rating scale which measures the severity of autism spectrum symptoms. Scores are based on percentiles with the higher a percentile indicating the more likely the child is on the autism spectrum. The SRS total percentile scores were 99 for Parents, 94 for the teacher, and 98 for the counselor.

Weckerly's conclusion and recommendations

39. Based upon the test results, information gathered in clinical interviews, and observations made during testing, Weckerly diagnosed Student with Asperger's Disorder with significant attention issues co-existing with Bipolar Mood Disorder Not Otherwise Specified. Weckerly recommended that (1) Student's learning environment be

¹⁵ Rasmussen disagreed with Weckerly's assumption. Rasmussen testified that the test should have been invalidated and no assumptions made.

constructed to circumvent his distractibility and inability to process multiple modes of information simultaneously (i.e., separating his desk from others; limiting each task to 15 minutes); (2) increase his time to process and complete work, visually and verbally present instructions; (3) employ self-managing strategies; (4) provide on-going counseling services with the goals of increasing social skills and self-awareness; (5) focus services on developing social skills and developing emotional expressions and self-awareness of emotional states; (6) consult with a child psychiatrist to consider pharmacological intervention; and (7) consider an evaluation by a pediatric neurologist to rule out neurological facts that may impact his behavior and ability to attend.

SEPTEMBER OBSERVATIONS BY DISTRICT STAFF

40. DiFede herself briefly observed Student at BCS on June 9, 2008, when she was present during recess observing another child. She noted that Student appeared to be the youngest child present and without any age appropriate peers. Student also was much smaller physically. Student was seen attempting to engage other children socially but was rebuffed as they did not seem to want to play with him.

41. DiFede received Weckerly's written report on or about August 25, 2008. She telephoned Weckerly to discuss the report because Weckerly's observations so markedly differed from those made by District personnel. DiFede then requested that Rhonda Manion, an experienced special educator and Program Specialist with the District, conduct further observations.

42. DiFede observed Student at BCS from 8:43 to 10:15 on the morning of September 5, 2008, which was the third day of school. Although Student was only six years old, he was in the second grade. During art, the class was noisy but Student was not distracted and remained on-task throughout and followed directions. He then had no problems transitioning to his math class. He worked independently and followed instructions. When he completed his assignment, he raised his hand to notify the

teacher he was done. He was allowed to read a book which he did without incident. He then transitioned to reading class which was in a different room. He was instructed to get his reading book which he did. He participated in the class and did not seem distracted.

43. Manion has been in education for over 35 years. She has a B.A. and M.Ed. in special education. She has California teaching credentials for elementary education and special education-severely handicapped. From 1972 through 1986, she was a guest teacher for the District. From 1986 through 1995, she was a special education teacher with the District. For the past nine years, Manion has been a program specialist for the District where she oversees special education programs through the third grade. Manion was contacted by DiFede and asked to observe Student at BCS as a "fresh set of eyes." To prepare, Manion reviewed some documents including the April 30, 2008 IEP document; but she did not review the assessment reports. Manion observed Student at BCS on September 8, 2008 from 10:10 to 11:30 a.m. which included reading and language classes plus a brief portion of lunch. During reading, the class of three was given a packet of worksheets. Student began working on these almost immediately. He worked diligently and only stopped to ask questions by raising his hand. He worked independently for 35 minutes and remained on task throughout. He followed instructions. Student was not distracted by constant plane noise or a disruptive peer. During language class, Student needed verbal redirection to remain on task and he was seen playing with an eraser. Manion said that neither was unusual for a six year old. He completed his work and then went to lunch. At lunch, Student sat alone but he had arrived late in order to complete his class work. Manion's observations were not consistent with those made by Weckerly during the testing sessions. She saw no signs of perseveration, he made constant eye contact with the teacher, and he was not distracted

by the constant jet noise or unruly peer. Based on her experience, Manion did not believe that Student required special education to access his education.

SEPTEMBER 10, 2008 IEP MEETING

44. The IEP team reconvened on September 10, 2008. In attendance were Weckerly; Parents; Higgins; DiFede; Nasman-Moore; Denise Sullivan, a general education teacher at Loma; Gonsalves; Beason; Rasmussen; and Manion. After introductions, Weckerly reviewed her report and recommendations, and the District members asked numerous questions. District team members pointed that Weckerly's observations were inconsistent with those made by them at BCS. Mother reported that Student's behaviors had improved over the last year. When it was pointed out that Mother's rating scale responses showed significant decline, Mother responded that she thought she was being asked about his behavior at home and school was not included. DiFede and Manion presented their observations of Student. Manion pointed out that the IEE report states that Student has extreme sensitivity to noise based on parental report, but that Manion observed that Student was not bothered or distracted by the constant jet noise during her observation. Rasmussen explained that the criterion for special education eligibility is different than a diagnosis of being on the autism spectrum. The team reviewed the five criteria for eligibility under autistic-like behaviors and again found that Student did not meet these factors. Weckerly indicated that she thought that Student may have problems in a general education class. The District team members disagreed as they cited that Student's disability did not seem to have a significant impact on Student academically or socially. In fact, District members felt that Student's social development may well be aided by being in class with same aged peers. The team also considered whether Student could be eligible under Other Health Impaired (OHI)¹⁶ due

¹⁶ ADHD is under the OHI eligibility category.

to his attention problems. The team decided that he was not eligible under OHI because there was no adverse effect on his educational performance. District team members felt that Student did not require special instruction as demonstrated by his high grades and academic levels, and that Weckerly's recommendations could be implemented within general education. Mother refused to consent to the IEP's team determination.

STUDENT'S ACADEMIC PERFORMANCE AT BCS

45. During the fall of school year 2007-2008, Student was in the first grade class of Kim Worobey. Worobey commented that Student "[i]s a pleasure to have in class." She cited that he "[s]hows improved pro-social behavior" and "[c]ontributes to class discussions and activities." Student's grades were 94 in handwriting, 96 in math, 100 in reading, 98 in language, 89 in social studies, 92 in motor fitness lab and 93 in science. In the spring of that year, Student was in Jaramillo's class. She notes that he does "quality work" and "[c]ontributes to class discussions and activities." Student's grades were 88 in handwriting, 91 in math, 92 in reading, 94 in language, 90 in motor fitness lab, 90 in social studies, and 93 in science. Student also received an Outstanding Academic Achievement Award.

REIMBURSEMENT CLAIM

46. Student claims that the District should be responsible for costs incurred in attending BCS from October 1, 2007 through April 2009 when Student was found eligible for special education at his new district of residence. Student contends that had he been found eligible by District, then he would have had special education services at the time of his transfer to the new district.

47. Student has submitted evidence that he has paid a total of \$22,534 to attend BCS. The monthly tuition during school year 2007-2008 was \$1,240 and \$1,364 for school year 2008-2009.

48. Student has submitted evidence that the distance between his home and BCS was 9.35 miles. The District reimbursed transportation costs at a rate of 55 cents per mile in school year 2008-2009. Student attended BCS for 177 days during school year 2007-2008 and 137 days in 2008-2009. Thus, Student claims that he is entitled to be reimbursed a total of \$8,492.70 for the cost of transportation to BCS.

LEGAL CONCLUSIONS

1. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S. Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof as to all issues.

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)

3. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and

other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, "related services" are referred to as DIS services. (Ed. Code, § 56363, subd. (a).)

ISSUE I: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE ASSESSMENT IN THAT THE ASSESSOR WAS UNQUALIFIED TO ADMINISTER THE AUTISM DIAGNOSTIC OBSERVATION SYSTEM TEST?

4. Student contends that the psycho-educational assessment was not appropriate because (a) the ADOS was administered by Rasmussen, who did not undergo special training provided by the test publisher; (b) the GARS was improperly scored; and (c) Rasmussen improperly negated the teacher's ratings in the ASDS.

5. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), 56322; see also 20 U.S.C. § 1414 (b)(3).) Any psychological assessment, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320 subd. (b)(3) & (g), 56324.)

6. Rasmussen was a credentialed school psychologist who possesses a B.A. in psychology and a M.A. in education-school psychology. She had been trained and supervised by an experienced school psychologist in administering the ADOS and had in fact administered the test on at least two prior occasions. (Factual Findings 13, 20-22.) Although inexperienced, Rasmussen demonstrated more than adequate knowledge of her subject area during cross-examination. As concluded in Factual Finding 22, Rasmussen was qualified to administer the ADOS.

7. Student has failed to meet his burden that he was denied FAPE because of Rasmussen's misreporting of the GARS-2 results. Although Rasmussen accurately

reported the scores of both the parental and teacher ratings in the GARS-2, she misstated the results by stating that there is a "below average" possibility of Student being autistic. She did correct this error in her Addendum report. Nevertheless, Rasmussen clearly pointed those behaviors reported by the raters that were symptoms of autism. Rasmussen, who had informed Parents at the IEP meeting of January 10, 2008, IEP meeting that she was not qualified to render a diagnosis, recommended that parents consult with Student's pediatrician because of Student's "possible difficulties with attention or Autism like behaviors." Rasmussen's recommendation and the IEP team's determination that Student was not eligible for special education was because Student "is able to complete the curriculum at the first grade level despite being of Kindergarten age." And he was in the high average to superior range in the academic testing. When Parents expressed concerns over the rating scales and the IEP team determination, the District agreed to further evaluate Student and to revisit the IEP team's decision. (Factual Findings 10-19, 22, 23, and 30.)

8. Student has failed to meet his burden that he was denied FAPE when Rasmussen "negated" the results of the ASDS teacher ratings. Rasmussen interviewed Jaramillo after reviewing her ratings and failing to note the behaviors reported during District observations. Jaramillo, in her interview, failed to report behaviors that she listed on the rating scales. As a credentialed school psychologist, Rasmussen made a determination that the teacher ratings were inconsistent with the Rasmussen and Nasman-Moore observations and, thus, unreliable. Student offered no evidence to the contrary. (Factual Findings 24-30.)

ISSUE II: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO FIND HIM ELIGIBLE FOR SPECIAL EDUCATION AND SERVICES UNDER THE ELIGIBILITY CATEGORY OF AUTISTIC-LIKE BEHAVIORS AT THE JANUARY 10, 2008 AND APRIL 30, 2008 IEP MEETINGS?

9. A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not “be determined to be an individual with exceptional needs” if they do not meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability “requires instruction and services which cannot be provided with modification of the regular school program” in order to ensure that the individual is provided a [FAPE]. (Ed. Code, § 56026, subd. (b).) Thus, “a child is not considered a ‘child with a disability’ if it is determined that a child only needs a ‘related service’ and not special education.” (*W.H. v. Clovis Unified School District* (E.D. Cal. 2009) 2009 WL 1605356, *21 (*Clovis*), citing 34 C.F.R. § 300.8(a)(2)(i) (2006).)

10. In *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 1107-1108, 1110, the Ninth Circuit found that a child may have a qualifying disability, yet not be found eligible for special education, because the child’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.*) “By definition, the IDEA only applies to children with disabilities *who require special education and related services*. 20 U.S.C. § 1401(3)(B) (emphasis added).” (*Clovis*, at *7.)

11. California Code of Regulations, title 5, section 3030, subdivision (g), describes the criteria for determining whether a child qualifies for special education under the category of autistic-like behaviors:

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

12. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district is not held to a standard based on "hindsight." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

January 30, 2008 IEP Meeting

13. Based on the information in possession of the IEP team at the January 30, 2008 IEP meeting, Student has failed to meet his burden that the District was not objectively reasonable in concluding that Student was not eligible for special education and related services under the eligibility category of autistic-like behaviors based on Student's above-average success in the classroom and the results of the evaluations. It was reasonable for the IEP team to conclude that Student did not require instruction and services outside of the general education program in order to make educational progress. The IEP team did take into considerations the concerns of Parents that the

testing data from the rating scales may not have been accurate and agreed to conduct further evaluation. (Factual Findings 7, 10-23.)

April 30, 2008 IEP Meeting

14. Based on the information possessed by the IEP team at the April 30, 2008 IEP meeting, Student has failed to meet his burden that the District denied Student a FAPE by finding him not eligible for special education. The District took into consideration the first and second evaluations, including teacher interviews and observations in the school environment. Although testing indicated that Student is possibly on the autistic spectrum and with Asperger's Syndrome, the information reviewed did not demonstrate that Student met the six criteria for autistic-like behaviors nor required special instruction or services to be given a FAPE. (Factual Findings 7, 10-31.)

ISSUE III: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO FIND HIM ELIGIBLE FOR SPECIAL EDUCATION SERVICES UNDER THE ELIGIBILITY CATEGORY OF AUTISTIC-LIKE BEHAVIORS AT THE SEPTEMBER 10, 2008 IEP TEAM MEETING?

15. Based on the information possessed by the IEP team at the September 10, 2008 IEP meeting, Student has failed to meet his burden that the District denied him a FAPE by finding Student not eligible for special education. The evidence did not demonstrate that Student requires specialized instruction and services which can only be provided by modifying the regular school program. Student, who was of kindergarten age, received excellent grades and was able to excel in the first grade. Even though Student was demonstrating autistic-like behavior at home (i.e., tantrums and noise sensitivity), there was no evidence presented that these behaviors interfered with his education. The numerous District observations amply show that Student was able to function appropriately at school. He stayed on task, even working 35 minutes

independently; followed directions; maintained appropriate eye contact with teacher and peers; was not distracted by the frequent loud jet noise or by an unruly classmate; and attempted social interactions with other children, who were older than he was. Additionally, the recommendations made by Weckerly could be implemented within the general education program.¹⁷ (Factual Findings 2, 7, 10-19, and 23-44.)

ISSUE IV: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO HAVE A GENERAL EDUCATION TEACHER IN ATTENDANCE AT THE APRIL 30, 2008 AND SEPTEMBER 10, 2008 IEP MEETINGS?

16. Student contends that the District committed a procedural violation of the IDEA by failing to have a general education present at the IEP meetings of April 30, 2008 and September 10, 2008. The District contends that it did have a general education teacher present at both meetings.

17. A properly constituted IEP team is in the best position to develop an IEP that suits the peculiar needs of the student. (*R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 946 (*Napa Valley*).) Education Code section 56341, subdivision (b)(2), provides that an IEP team shall include “[n]ot less than one regular education teacher of the pupil, if the pupil is, or may be participating in the regular education environment.” The regular education teacher shall, “to the extent appropriate,” participate in the development, review, and revision of the pupil’s IEP. (See also, 20 U.S.C. § 1414(d)(B)(iii).) The regular education teacher should be a teacher who is, or may be, responsible for implementing a portion of the IEP. (*Napa Valley, supra*, 496 F.3d at 939.) This statutory requirement is a mandatory, and not merely technical, as a regular teacher, who is, or may be the pupil’s teacher, may have insights or perspectives that aid in the formation of an IEP, including “the extent to which a disabled student

¹⁷ Student offered no rebuttal evidence on this point.

may be integrated into a regular education classroom." (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 860-861 (*Deal*).)

18. The evidence clearly establishes that a general or regular education teacher was present at both IEP meetings. At the April 30, 2008 IEP meeting, Rita Schwartz, a general education kindergarten teacher, was a member of the IEP team. (Factual Finding 31.) Denise Sullivan, a general education teacher at Loma, was present at the September 10, 2008 IEP meeting. (Factual Finding 44.) Moreover, this issue is moot as Student was not eligible for special education and there was no substantive denial of FAPE.

ORDER

Student's claims for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: August 20, 2009

 /s/

ROBERT F. HELFAND

Administrative Law Judge

Office of Administrative Hearings