

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

MANTECA UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009060164

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on August 31, and September 1 through 3, and 10, 2009, in Manteca, California.

Will Schell, Attorney at Law, Disability Rights California (DRC), represented Student. In addition, DRC senior staff attorney Barbara Ransom was present during some of the hearing. Student's mother and father (Parents) were present during the entire hearing. Student was not present.

Daniel A. Osher and Patricia G. Andreen, Attorneys at Law, Lozano Smith, represented the Manteca Unified School District (District). Senior Director of Student Services and Special Education Roger Goatcher was present on behalf of the District throughout the hearing. Program specialist Paul Ouellette was present during most of the hearing.

On June 4, 2009, Student filed a request for a due process hearing (complaint). On July 13, 2009, OAH granted a continuance of the hearing. At hearing, oral and documentary evidence were received. At the request of the parties, a continuance was granted and the record remained open until September 25, 2009, for the submission of

written closing arguments. Closing briefs were timely filed and the record was closed on that date.

On September 29, 2009, OAH granted Student's motion to reopen the record for the submission of surrebuttal evidence regarding one issue, and the matter was continued to October 12, 2009. On October 5, 2009, Student moved to admit the following documents into evidence as Student's Exhibits: (a) Exhibit S-72- an undated chemistry test; (b) Exhibit S-73- Student's attendance history (printed September 14, 2009); (c) Exhibit S-74- Lathrop High checkout sheet for August 17, 2009; (d) Exhibit S-75- Student's profile showing his class schedule; (e) Exhibit S-76- Lathrop High bell schedule; and (f) S-77-the Declaration of Mother. On October 8, 2009, District moved to admit into evidence, as District's Exhibit D-101, the Declaration of Rita Youanis, and five attached documents, as follows: (a) Exhibit D-101(A)- Student's attendance record as of October 6, 2009; (b) Exhibit D-101(B)- Email messages dated August 26, 2009; (c) Exhibit D-101(C)- Teacher's gradebook for Student as of October 6, 2009; (d) Exhibit D-101(D)- Chemistry tests; and (e) Exhibit D-101(E)- District's Science Department Grading Rubric. The motions of both parties are granted. All documents are marked for identification accordingly, and all documents are admitted into evidence.¹ On October 12, 2009, the record was closed, and the matter was submitted for decision.

¹ Objections to the documents are overruled and are considered in evaluating the weight, if any, to be accorded the documents in connection with the issues.

ISSUES²

Did the District deny Student a free appropriate public education (FAPE) for the 2007-2008 and 2008-2009 school years, and the 2009-2010 school year to the present, by failing to find Student eligible for special education under the category of autistic-like behaviors?

REQUESTED REMEDIES

Student requests that OAH issue an order directing the District to find Student eligible for special education and related services under the eligibility category of autistic-like behaviors and to hold an individualized education program (IEP) meeting to develop specialized academic instruction, annual goals, and an award of compensatory education. In addition, Student seeks an order directing the District to change its eligibility "policy" to conform to state and federal law.

CONTENTIONS OF THE PARTIES

Student contends that he meets the eligibility criteria for special education under the category of autism set forth in the federal reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004) and the category of autistic-like behaviors under California law. Student contends that because he has been medically diagnosed with high functioning autism, his disorder meets the requirements for special education eligibility. He argues that he has met most of these criteria from the beginning of the 2007-2008 school year through the present. Student asserts that he needs special education and related

² The parties stipulated at the outset of the hearing that the only eligibility category at issue in this case is autistic-like behaviors, and that the issue encompasses present eligibility. The ALJ has reframed the issue for purposes of clarity.

services in order to benefit from his education, particularly in the areas of organization and social skills. Student contends that he has not received meaningful educational benefit under his Section 504 plan from the District, because he only does about 50 percent of the school work required of general education pupils, and that the District should provide him with an IEP to meet his unique needs.³

District contends that Student does not meet any of the criteria required to find him eligible for special education under the category of autistic-like behaviors, and that, even if he does meet the criteria, Student does not require a special education placement or related services because he is doing well in the general curriculum with accommodations provided pursuant to a Section 504 plan.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is 14 years old and lives with Parents within the geographical boundaries of the District. Mother testified that Student has been diagnosed with high-functioning autism, an anxiety disorder, phobias regarding germs, a depressive disorder, and scoliosis of the spinal column.

2. Student began receiving special education and related services in Germany when he was about four years old, where Father was stationed with the United States Army. The Department of Defense Dependents Schools (DODDS) records indicated that

³ A "Section 504 plan," pursuant to the federal anti-discrimination law, Section 504 of the Rehabilitation Act of 1973, requires school districts to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning. (29 U.S.C. § 794; 34 C.F.R. § 104.1 et seq.)

Student received special education speech and language services due to language articulation and phonological delays. In 2003, the DODDS found Student eligible for special education with an emotional impairment due to an anxiety disorder.

3. Parents moved within the boundaries of the District in 2004. For the 2004-2005 school year in fourth grade at Stella Brockman Elementary School, Student initially received interim special education services under the category of speech and language impairment. After 30 days, the IEP team in October 2004 found Student no longer needed speech and language services. The IEP team instead found Student eligible for services under the category of specific learning disability, based on a discrepancy between his ability and achievement in the area of written expression, due to a deficit in the area of visual motor integration skills. Student was provided resource specialist services and testing and classroom accommodations.

4. At the beginning of the 2005-2006 school year in fifth grade, at an IEP meeting in October 2005, the District found that Student no longer needed special education and related services to benefit from his education and exited him from the program with the consent of Parents. Student thereafter performed at least in the average range and was accepted into the gifted and talented education (GATE) program, in which he has continued to participate.

5. In July 2007, the District agreed to assess Student at Parents' request, and Parents signed an assessment plan for a special education eligibility assessment. Parents were concerned that, despite Student's academic success, he had problems including an obsession with perfection and deficient social skills that interfered with his ability to be successful in school and in the community. Parents informed the District that they suspected that Student had Asperger's Syndrome (Asperger's). Asperger's is a medical diagnosis of a condition on the autism spectrum.

SPECIAL EDUCATION ELIGIBILITY AND CHARACTERISTICS OF AUTISTIC-LIKE BEHAVIORS

6. The determination of eligibility for special education is not made by a school administrator, medical doctor, or psychologist. In order for a pupil to be eligible for special education, the pupil must be assessed by the school district, and the IEP team, including the parents, must review the assessment and, first, determine that the pupil has a qualifying educational disability. Secondly, the IEP team must determine that the degree of the pupil's impairment is such that he requires instruction or services which cannot be provided with modification of the regular school program so as to enable the child to benefit fully from instruction.

7. The actions of the IEP team are to be evaluated in light of the information available at the time the IEP was developed, and are not to be evaluated in hindsight. Thus, in determining the issues, the ALJ is required to consider the District's actions in light of the information available to the District as of the October 2007 and September 2008 IEP meetings, and is not to judge those actions in hindsight.

8. California law provides that, 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, including but not limited to:

- (a) An inability to use oral language for appropriate communication;
- (b) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy to early childhood;
- (c) An obsession to maintain sameness;
- (d) An extreme preoccupation with objects and/or inappropriate use of objects;
- (e) Extreme resistance to controls;
- (f) A display of peculiar motoric mannerisms and motility patterns; and
- (g) Self-stimulating, ritualistic behaviors.

District's October 2007 Denial of Eligibility

9. In August 2007, while Student's special education assessment was pending, Student transferred to Veritas Elementary School (Veritas) in the District for seventh grade. In light of Parents' information about Student's needs, the District convened a Section 504 meeting that month. District agreed that Student was eligible for a Section 504 plan based on a disability in visual motor integration which substantially limited a major life activity of learning, in that Student had difficulty with tasks that had a high writing demand.⁴

10. Student's August 2007 Section 504 plan provided a list of numerous accommodations for Student in his general education classrooms, and for test taking and other matters. The accommodations included preferential seating in the front rows of the classrooms, use of organizational notebooks, allowance of typewritten or computer presentations instead of handwriting, use of visual aids, a reduced number of problems and tasks, frequent feedback, reduced homework, more time for test completion "if needed," and a reduced number of test items.

11. Between July and September 2007, the District assessed Student for special education eligibility. On October 1, 2007, the District convened an IEP meeting to review the assessments. The IEP team reviewed Student's historical records, his then-present levels of academic and functional performance, and the District's 2007 psychoeducational assessment by Dr. Jody Browning, the District's school psychologist, and a 2007 speech and language assessment by Kilian Graciano, the District's speech and language therapist.⁵

⁴ The evidence established that a visual motor integration deficit is an impairment of the ability to integrate visual input with motor output and hand-eye coordination.

⁵ In addition, there was an adaptive physical education assessment that is not at issue here.

Based on their assessments, both assessors recommended that Student did not qualify for special education.

12. The District members of the October 2007 IEP team determined that Student was academically successful in all of his classes at Veritas, his speech and language skills were within the average range for his chronological age and development, and he did not demonstrate autistic-like behaviors in two or more areas as required by law. They recognized that Student had an anxiety disorder and recommended that his Section 504 plan be reviewed.⁶ In addition, they recognized that Student related to his peers at Veritas inappropriately, and recommended that he participate in a peer group or club to assist his social skills development. The District members of the IEP team concluded that Student did not meet the eligibility criteria for special education under the category of autistic-like behaviors, and that he did not need special education services in order to benefit from his education. The District therefore found Student ineligible for special education.⁷

DISTRICT'S SEPTEMBER 2008 DENIAL OF ELIGIBILITY

13. On May 23, 2008, Mother wrote a letter to the District's Director of Special Education indicating that, based on an assessment, the Valley Mountain Regional Center (VMRC) had found Student eligible for their services due to autism.⁸ Mother asked the

⁶ Dr. Browning's assessment determined from the assessments that Student no longer displayed a visual-motor integration deficit, and recommended that his Section 504 plan be changed to support his anxiety disorder.

⁷ The District also found that Student did not qualify under two other categories considered, other health impairment, and emotional disturbance.

⁸ The Lanterman Act in the California Welfare and Institutions Code provides that the regional centers of the state may provide specified services to children and adults

Director to review the VMRC diagnoses and recommendations, and asked for an IEP meeting, not a Section 504 meeting.

14. Thus, the District was on notice of new information regarding Student, including a medical diagnosis of autism. On June 5, 2008, the District agreed to reassess Student in light of the new information, and prepared an assessment plan of that date which proposed to assess Student in the areas of social, emotional, and behavior. Mother signed the assessment plan and returned it to the District on June 18, 2008, but noted her concern that “too much testing can become stressful for our son.”

15. Thereafter, in August and September 2008, the District reassessed Student, who was then 13 and a half years old and in the eighth grade. For eighth grade, Student and his entire class at Veritas had transferred to Mossdale Elementary School (Mossdale). On September 9, 2008, the District convened an IEP meeting to review the assessments. The September 2008 IEP team reviewed Student’s historical records, his then-present levels of academic and functional performance, the District’s 2007 psychoeducational and speech and language assessments, the 2008 VMRC assessment, the District’s September 2008 psychoeducational assessment by District’s school psychologist Paul Ouellette, and the District’s 2008 speech and language assessment by Ms. Graciano.

16. The District members of the September 2008 IEP team determined that Student still did not meet the eligibility criteria for special education based on autistic-like behaviors, and that he did not need special education services in order to obtain educational benefit. Parents disagreed and wanted Student’s Section 504 plan converted to an IEP.

with “developmental disabilities” as defined, including autism. (Welf. & Inst. Code § 4512, subd. (a).)

DR. MCCRAY'S EVALUATION

17. In January 2008, Dr. James McCray, Psy.D., of McCray Psychological Services, Inc., assessed Student for VMRC and issued a written report. Dr. McCray did not testify at the hearing and his qualifications are unknown. Mother established that the VMRC made Student eligible for developmental services based on Dr. McCray's assessment and medical diagnosis of autistic disorder (high functioning). In addition, Dr. McCray's report contained medical diagnoses of anxiety disorder and depressive-disorder-not otherwise specified, both secondary to autism.

18. Official notice is taken of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR, American Psychiatric Association), sections 299.00- 299.80. The DSM-IV-TR provides medical definitions and criteria for the class of pervasive developmental disorders which includes autism disorder and Asperger's. The medical definition of autism disorder includes a formula involving finding a "severe and pervasive impairment" in several areas of development including reciprocal social interaction skills and communication skills, and the presence of stereotyped behaviors, interests, and activities.

19. Dr. McCray's report indicated that he reviewed unspecified records, conducted an observation and interview with Student and an interview with Mother, administered the Adaptive Behavior Assessment System II (ABAS-II), and the Autism Diagnostic Observation Schedule (ADOS), and reviewed the DSM-IV-TR criteria for both autism and Asperger's. Dr. McCray's January 2008 report does not indicate that he reviewed the District's 2007 assessments. However, it records that he reviewed assessment results reported by Dr. Nancy Brison-Moll in a December 2007 "psycho-diagnostic" evaluation, and by Donna Herrick in a November 2007 speech and language assessment of Student. Dr. McCray did not contact the District or interview any of Student's teachers or District assessors.

20. While the evidence supports a finding that the VMRC made Student eligible for regional center services under the Lanterman Act based on a medical diagnosis of autism, Dr. McCray's assessment results and diagnoses are hearsay which cannot, in and of themselves, form the basis of a factual finding that Student had autism disorder as of January 2008.⁹ Nor is such a finding necessary to determine the issues in this case regarding eligibility under different criteria for special education under the IDEA.

STUDENT'S EXPERT, DR. ULREY

21. Student does not contend that District's 2007 and 2008 assessments violated the law, but disagrees with the results of the assessments and/or conclusions reached by the District members of the IEP teams that reviewed the assessments.

22. To establish his eligibility for special education, Student relies primarily on the testimony of Dr. Gordon L. Ulrey, Ph.D., a licensed clinical psychologist with the Department of Psychiatry, University of California at Davis, School of Medicine (U.C. Davis). Dr. Ulrey obtained a Master of Science in Educational Psychology (1971), and a Doctorate in Clinical/Developmental Psychology (1974). He has been with U.C. Davis in various capacities since 1982, including as Director of Child Clinical Neuropsychology Training, and retired from teaching two years ago. As an Associate Clinical Professor of Psychiatry and Psychology, Dr. Ulrey has also maintained a private practice from 1989 to the present. He has many publications and presented many papers regarding child and adolescent psychology, and has performed assessments on many children with neurodevelopmental disabilities. From 1982 to the present, he has supervised and trained graduate students and interns regarding psychological and neuropsychological assessments, including assessment of children with autism. Dr. Ulrey's curriculum vitae does not mention autism in

⁹ See Cal. Code Regs., tit. 5, § 3082, subd. (b).

any context, and he is not associated with the U.C. Davis, M.I.N.D. Institute (Medical Investigation of Neurodevelopmental Disorders).

23. Dr. Ulrey established that the most widely accepted medical standard used by clinical mental health professionals to diagnose autism is the DSM-IV-TR. The medical definition of autism in the DSM-IV-TR contains a formula that requires finding at least six criteria of qualitatively significant impairments in three areas: impaired social interaction, impaired communication, and restricted repetitive or stereotyped behaviors. Although Dr. Ulrey is primarily familiar with the DSM-IV criteria for autism, he is also somewhat familiar with the special education disability criteria for autistic-like behaviors described above.

24. Dr. Ulrey was retained by Student in order to conduct a review of Student's records and provide an expert opinion regarding Student's condition and the actions taken by the District in 2007 and 2008, not to conduct a comprehensive assessment. Dr. Ulrey reviewed Student's historical records and prior assessments provided by Parents, including the District's 2007 and 2008 assessments and Dr. McCray's January 2008 assessment (including Dr. McCray's summary of a December 2007 assessment by Dr. Brison-Moll). Dr. Ulrey decided that, in order to provide his opinion, he also wanted to meet Student and conduct some assessments that focused on areas of concern he noted in the records. Dr. Ulrey selected certain assessment tools and interviewed and assessed Student three times in January and March 2009, for a total of about five hours.

25. Dr. Ulrey prepared a brief opinion letter summarizing his assessment conclusions dated July 6, 2009. Dr. Ulrey concluded that, as of 2009, Student meets the special education eligibility category of "autism" because Student exhibited a combination of autistic-like behaviors. Specifically, Dr. Ulrey wrote in the letter, and testified that Student meets five out of the seven special education eligibility criteria for autistic-like behaviors as set forth in subsections (a) through (d), and (g) of Factual Finding 8 above. Aside from this conclusion, Dr. Ulrey's letter does not provide any further detail or

explanation.

26. On cross-examination, Dr. Ulrey retracted his conclusion regarding subsection (a), that Student has an inability to use oral language for appropriate communication. Dr. Ulrey conceded that the word “inability” was too strong, and that Student is able to use oral language for appropriate communication. Dr. Ulrey testified that, based on his review and assessment, Student met the remaining criteria in subsections (b), (c), (d), and (g), for special education eligibility. In addition, Dr. Ulrey agreed with Dr. McCray’s January 2008 report that Student met the medical diagnostic criteria of the DSM-IV-TR for high functioning autism.

27. Dr. Ulrey did not administer any assessments to directly measure autism because he relied on Dr. McCray’s January 2008 assessment, which reported the results of the ADOS. Dr. Ulrey accepted Dr. McCray’s ADOS assessment results as the test tool that documented Student’s medical diagnosis of autism. Dr. Ulrey’s opinions and assessments are evaluated more specifically with respect to the criteria for autistic-like behaviors.

DISTRICT’S EXPERT, DR. PATTERSON

28. The District primarily relies on its psychoeducational assessments conducted by the District’s school psychologists, Dr. Browning in 2007, and Mr. Ouellette in 2008, and the speech assessments for both years conducted by Ms. Graciano, as well as their testimony, Student’s school records, and the testimony and observations of his teachers. In addition, the District retained Dr. Robert Goode Patterson to review Student’s records in this case and provide an expert evaluation for purposes of the hearing.

29. Dr. Patterson is a licensed psychologist, educational psychologist, and marriage, family and child counselor. He holds multiple degrees, including a Master of Arts in Education and Psychology (1962), a Master of Arts in Developmental Psychology (1983), and a Doctor of Psychology degree in Psychology and Family Therapy (1988). Dr. Patterson holds several Diplomate Certificates including Fellow-Forensic Sciences of the International

College of Prescribing Psychology, and Fellow-Serious Mental Disorders (1997), as well as a recent Diplomate Certificate from the Board of the American School of Neuropsychology. Dr. Patterson holds numerous California educational credentials including General Elementary, General Secondary, Pupil Personnel Services, and School Psychology credentials. He has extensive experience working in the education field as a special education teacher, school administrator, and Director of Special Education. In addition, he has published numerous articles, and has taught numerous courses, workshops, and lectures. As a psychologist in private practice for over 23 years, Dr. Patterson has conducted assessments for the California regional centers, the California Superior and Juvenile courts, school districts, and families, and has testified on behalf of both families and school districts. Dr. Patterson has conducted many assessments in which the autism spectrum or autism was at issue.

30. Dr. Patterson did not meet, interview, diagnose, or assess Student or issue a written report of his opinions. Dr. Patterson reviewed Student's historical school records from the DODDS and the District, and Student's prior assessments, including the District's 2007 and 2008 assessments, and Dr. McCray's 2008 assessment. In addition, Dr. Patterson reviewed Dr. Ulrey's opinion letter, and assessment test protocols produced by Dr. Ulrey for the hearing.

31. Dr. Patterson's review led him to conclude that because Student had extensive records and a long history of assessments, he did not need to conduct a further assessment of Student in order to render an opinion. However, Dr. Patterson did want updated information from the District, and therefore interviewed two of Student's eighth grade teachers at Mossdale. In addition, Dr. Patterson reviewed a video that Student had made in connection with the graduation of his class from Mossdale, in which Student had

narrated various school scenes and skits involving his classmates.¹⁰

32. Dr. Patterson concluded from his review of Student's records, assessments, and other data that Student did not meet any of the criteria for eligibility for special education under autistic-like behaviors. Dr. Patterson emphasized that autistic-like behaviors must be pervasive across settings, including the school, and not just appear in the home setting. Dr. Patterson's opinions and assessments are also evaluated more specifically with respect to the criteria for autistic-like behaviors.

AUTISTIC-LIKE BEHAVIORS: INABILITY TO USE ORAL LANGUAGE

33. The first criterion of autistic-like behaviors that may qualify a pupil as eligible special education involves an inability to use oral language for appropriate communication. As found above, Dr. Ulrey withdrew his opinion that Student met this criterion, and agreed that Student did not display an "inability" to use oral language appropriately. Dr. Browning and Dr. Patterson were persuasive in testifying that Student's records are devoid of evidence to support this criterion. There is ample evidence that Student has had the ability to use oral communication appropriately from 2007 to the present.

34. Therefore, there is no evidence that Student was unable to use oral language for appropriate communication in the school environment from 2007 to the present.

AUTISTIC-LIKE BEHAVIORS: EXTREME HISTORY OF WITHDRAWAL OR RELATING INAPPROPRIATELY

35. The second characteristic of autistic-like behaviors that may qualify a pupil as eligible for special education is a history of extreme withdrawal or relating to people inappropriately, and continued impairment in social interaction from infancy to early

¹⁰ Dr. Ulrey also viewed Student's video for the hearing.

childhood. Student contends that he met these criteria beginning in the fall of 2007 and continues to do so. As found below, the weight of the evidence does not support Student's contention.

Historical Records

36. Dr. Browning and Dr. Patterson both established that, for the most part, Student's historical records, up to the time Student transferred into the District in 2004, did not contain references to extreme withdrawal or extreme problems with Student relating to people inappropriately from infancy to early childhood, although they did reflect his early language delays.

37. For example, Dr. Browning reviewed a social/family/medical history completed by Mother when Student was seven years old that stated Student related well to adults and children.¹¹ During Student's primary grades, teachers reported that Student related well to other children and was "sensitive to others' feelings." A 2002 psycho-educational assessment reported that Student's adaptive behaviors were consistent with his level of intellectual functioning. An assessment from DODDS in 2003 included a teacher report that Student "sometimes" refused to talk, played alone, had trouble making friends, avoided competing and refused to join group activities.

38. Based on the foregoing, Student's records did not contain the requisite early history of extreme behaviors to qualify for this criterion. The lack of evidence for the

¹¹ In 2007, Mother filled out an early history survey for Dr. Browning as part of the GARS-2 assessment. Although Mother reported early social delay behaviors such as not reaching out to be picked up, she also reported that Student had interactive behaviors. Dr. Browning was persuasive that Mother's responses did not meet the criteria for an early history of extreme withdrawal or inappropriate interaction.

historical component of this criteria results in Student's inability to meet the criteria at any relevant point in time. However, the criteria of Section 3030, subdivision (g) are expressly not exclusive because of the phrase "including but not limited to ..." which precedes the listed criteria in the regulation. Therefore, evidence regarding other elements that may relate to these criteria are considered. Accordingly, since Student did have an early history of language delay, evidence regarding Student's deficits involving withdrawal or inappropriately relating to people is considered. However, the quality of extreme or significant impairment that is central to these criteria in the regulation should be met.

39. It is noted that the District's records since 2004 contain some references to Student's problems with inappropriate or infrequent eye contact and relating inappropriately to other pupils in the school environment. For example, for Student's 2004 psycho-educational assessment, a teacher reported that he was "very shy with peers and adults, does not do well working in groups, takes an extreme amount of time to complete class work, does not ask for help when he has difficulty with a concept," and was observed to "rarely make eye contact."

District's 2007 Assessments

40. As found above, the District's school psychologist, Dr. Browning, and the speech and language therapist, Ms. Graciano, assessed Student for eligibility in the fall of 2007. During seven sessions between August 15, and September 15, 2007, Ms. Graciano assessed Student and issued a written report. Ms. Graciano obtained a Master's degree in Communicative Disorders in 1998, is a licensed speech and language pathologist, and has been with the District since 2004. She has training and experience in assessing and providing therapy for communication deficits, and completed the U.C. Davis M.I.N.D. Institute course on autism spectrum disorders in 2007. In addition to obtaining a speech sample, and observing Student interact with pupils and adults in a classroom, at lunch, and in one-to-one sessions with her, Ms. Graciano also administered standardized assessment

tests to evaluate Student's expressive and receptive language and his thinking skills. Ms. Graciano established that Student's articulation, fluency, voice, and receptive and expressive language skills all appeared to be within the normal range for a child of 12 and a half years old.

41. During nine sessions between July 20, and September 27, 2007, Dr. Browning conducted a psychoeducational assessment of Student, administered a battery of standardized assessment tests, and issued a written report. Dr. Browning obtained a Master's degree in Educational and Counseling Psychology in 1999, and an Educational Doctorate in School Psychology in 2003. Dr. Browning has training and experience in conducting special education eligibility assessments and in assessing and treating autism, including completion of a course on autism spectrum disorders conducted by the U.C. Davis M.I.N.D. Institute in 2007.

42. Dr. Browning and Ms. Graciano separately observed Student engage in reciprocal oral communication during school and during their 2007 assessments. Ms. Graciano observed that Student was able to maintain a topic in conversation, have reciprocal conversation on preferred and non-preferred topics, understood nonverbal communication, and demonstrated the ability to take another's perspective. Ms. Graciano was persuasive that Student used greeting, commenting, requesting, labeling, and closing of conversation appropriately. During Ms. Graciano's observations, Student was approached several times and greeted by peers who slapped Student on the shoulder in a friendly fashion, and engaged in reciprocal verbal exchanges with Student.

43. Dr. Browning observed Student once on the playground during lunchtime at Veritas, in late September 2007, as he approached some pupils playing basketball. Student appeared unsure of himself, but after a few minutes, he approached a pupil standing

nearby, initiated a conversation, and engaged in reciprocal conversation that included laughter.

44. Ms. Graciano established that in 2007, Student rarely made eye contact with her during the first four sessions of her assessment. She found that his eye contact became more frequent in later sessions during some spontaneous conversations with her. Student informed Ms. Graciano that he was not interested in social relationships with his peers at school. She observed Student make appropriate eye contact with peers.

2007 BEHAVIORAL RATING SCALES

45. During Dr. Browning's 2007 psychoeducational assessment, she administered a thorough battery of standardized assessment tests, including behavioral rating surveys. Dr. Browning interviewed and administered the rating scales to three of Student's seventh grade general education teachers at Veritas. She was persuasive in concluding that Student displayed a "recent history of withdrawal or relating to people inappropriately" since moving into the District. However, as found below, Student's behaviors did not meet the criteria because they were recent and not extreme.

46. Student contends that all of the behavior scale ratings by his 2007 Veritas teachers resulted in suspect scores because the teachers had known Student for only about a month. He argues that their ratings were invalid and should not have been considered by the District to decide his eligibility, or considered here. Student's argument is not persuasive. First, the appropriateness of the District's assessments is not at issue in this proceeding. In addition, Dr. Browning established that Parents did not want her to contact Student's teachers at his prior fifth and sixth grade schools in the District because Parents thought those teachers had not treated Student fairly and would have been biased.

47. To the extent the teacher ratings are relevant to the question of Student's eligibility for the 2007-2008 school year, the evidence did not establish that the knowledge

of a teacher who observed Student daily in a class period for a month was insufficient for purposes of the behavior rating surveys. With the exception of the Behavior Assessment System for Children (BASC), the various assessment protocols for the behavior scales called for the knowledge of the teacher at the time of the rating and did not require the teacher to have known the Student for any specific length of time. On the ABAS-II, the protocol expressly permitted guessing. The standard testing protocols for the BASC required that a teacher must know the pupil for at least six months in order to qualify for the assessment. Dr. Browning therefore did not give Student's teachers the BASC rating scales. On the remainder of the rating scales, the Asperger Syndrome Diagnostic Scale (ASDS), Gilliam Asperger's Disorder Scale (GADS), Gilliam Autism Rating Scale-Second Edition (GARS-2), and ABAS-II, there was fairly consistent uniformity in the scores of Student's teachers, and widely disparate scores from Mother.

48. For example, on the ASDS, a behavior rating scale for the assessment of Asperger's Syndrome, and the GARS-2, a rating scale used to screen for autism, the teachers all reported that they had observed Student use few gestures and avoid or limit eye contact. Two teachers reported that Student had few or no friends in spite of a desire to have them. Nevertheless, their resulting scores on these assessments were low, showing his probability of Asperger's or autism as "very unlikely." In contrast, Mother's scores resulted in ratings that his probability of Asperger's was "likely," and his probability of autism was "very likely." On both surveys, the teachers reported that they did not observe Student at school to frequently engage in the behaviors reported by Mother.

49. On the ABAS-II, used to rate Student's adaptive skills, the teachers rated Student's general composite of adaptive skills in the average range. In contrast, Mother rated Student's general adaptive skills in the extremely low range, at the first percentile, comparable to the mentally retarded range, a rating that was not supported by the evidence. However, in the area of social skills, all three adults reported "below average" or

"extremely low" scores that reflected significant concerns for Student's social skills.

50. On the BASC, which evaluated Student's emotions, behavior, and self-perceptions, Mother rated Student's behaviors as "clinically significant" in the areas of anxiety, depression, atypicality, and withdrawal. Mother's BASC scores were so low that they resulted in an "F Index" rating of "extreme caution," warning that Mother had a "tendency to be excessively negative in describing the child's behaviors."

51. Based on the foregoing, the District members of the 2007 IEP team determined that Student did not meet the criteria of a history of extreme withdrawal or relating to people inappropriately for autistic-like-behaviors for the 2007-2008 school year. The evidence supports the District's determinations. Although Student exhibited some problems with eye contact and relating to his peers that indicated social skills deficits, he did not demonstrate extreme or significant behavior that is the hallmark of the criteria, whether historically based or not.

District's 2008 Assessments

52. District's 2008 psychoeducational and speech assessments continued to show that Student had social skills and peer relationship issues, which were not extreme and did not meet the educational criteria for autistic-like behaviors. For four sessions from June 20 to September 8, 2008, Ms. Graciano again assessed Student's speech and language skills, including oral communication. She conducted two pragmatic social observations of Student and was persuasive that Student was doing well. Student communicated with his peers in class and helped a classmate with a math problem. In another class, Student participated equally, smiled, laughed, and gave input on a project.

53. In August and September 2008, the District's school psychologist, Mr. Ouellette, conducted another psychoeducational assessment. Mr. Ouellette obtained a Master's degree in school counseling in 1994, and an Education Specialist degree in school psychology in 2000. He has been a school psychologist for about nine years and has

training and experience in conducting assessments, including assessments for autism. He also completed a course in autism at the U.C. Davis M.I.N.D. Institute. Mr. Ouellette reviewed Student's records, including his academic records for the 2007-2008 school year. Mr. Ouellette conducted observations and interviews with Student, Mother, and Student's teachers at Veritas, and administered the BASC-2, the Conners' Teacher Rating Scale (Conners'), the ASDS, the GARS-2, the ABAS-2 and the GADS to obtain updated information.

54. Mr. Ouellette administered the BASC-2 to four of Student's seventh grade teachers to evaluate Student's behaviors and perceptions. After a school year of teaching Student, two teachers reported that Student was "at risk" in the area of withdrawal, indicating that Student avoided interacting with his peers. A third teacher reported Student had "clinically significant" behaviors, the highest rating, for withdrawal, and "at risk" behaviors in the areas of anxiety and somatization.

55. On the Conners', used to rate Attention Deficit Hyperactivity Disorder (ADHD), three teachers participated and reported "markedly atypical behavior" or a "significant problem," the highest rating. Two of the teachers' scores indicated Student had a significant problem of perfectionism, and all three teachers indicated a significant problem in the area of social problems.

56. Mr. Ouellette observed Student on two occasions in late August 2008, in a classroom and during the lunch hour. During a language arts class, Student did not make eye contact during his interactions with peers. However, during Ms. Graciano's assessment of Student's communication skills during this same time period, she found Student actively involved with his peers in classes, where he participated equally, smiled, laughed, and gave input on a project. Ms. Graciano testified persuasively that as of September 2008, and to the present, Student's eye contact has improved remarkably. Student has also demonstrated the ability to take another's perspective and respond to nonverbal

pragmatic communication.

57. Mr. Ouellette reported to the September 2008 IEP team that his results were similar to those of Dr. Browning in her 2007 assessment and that Student did not meet the criteria for autistic-like behaviors. The evidence supports Mr. Ouellette's findings. Mr. Ouellette and Ms. Graciano testified persuasively that Student is able to maintain friendships, but that he does exhibit some impaired social interaction skills due to the reduced numbers of peers that he interacts with when compared to the junior high population in general.

58. Based on the foregoing, the District determined that Student did not establish that he met the criteria for a history of extreme withdrawal or extreme inappropriate relating to people for the 2008-2009 school year.

Dr. Ulrey's 2009 Assessment

59. Dr. Ulrey testified unpersuasively that Student meets the criteria for a history of extreme withdrawal or relating to people inappropriately. He did not establish where he found a history of extreme problems since infancy or early childhood. Dr. Ulrey determined that his observations of Student in early 2009 were consistent with behavioral observations reported by Dr. McCray in January 2008; specifically, that Student presented to Dr. Ulrey with a flat affect in speech and facial expressions, limited eye contact, a lack of engaging the examiner in social interaction, and passive compliance. However, Dr. Ulrey's 2009 assessment was Student's third assessment in a short time, as Student had just been assessed by the District in the fall of 2008, and again privately at the end of the 2008 year. Dr. Ulrey did not address the ramifications of so many assessments in such a short time.

60. In addition, Dr. Ulrey gave Mother the ABAS to rate Student's adaptive behaviors and accepted Mother's ratings without question. Dr. McCray had also given Mother the ABAS on January 30, 2008, as had the District's school psychologist, Dr. Browning, in September 2007. Dr. Ulrey found that the results reported by Dr. McCray

regarding Mother's "very low" scores for Student in the areas of adaptive communication and social skills were consistent with Mother's results in 2009. However, Dr. Patterson and Dr. Browning established that Mother's scores on the ABAS were consistently lower than those of the District's teachers, and that Mother's scores reflected both excessive negativism regarding Student's abilities, and behaviors of Student that she observed in the home setting that were not observed with similar frequency in the school setting.

61. Dr. Ulrey also did not interview any of the District's teachers or assessors or administer any behavioral scale surveys to any District personnel in order to compare Mother's reports with reports of Student's behaviors in the school environment. In addition, Dr. Ulrey did not observe Student in the school setting. Therefore, Dr. Ulrey's opinion that Student meets the criteria of extreme withdrawal or extreme inability to relate appropriately is not persuasive.

STUDENT'S PEER RELATIONSHIPS AT PRESENT

62. At present, Student has begun the ninth grade at Lathrop High School with his classmates from Mossdale. During the 2008-2009 school year at Mossdale, following Mr. Ouellette's assessment, Student had a successful year, academically and socially. Although Parents testified that Student only has one close friend that he associates with outside of school, the evidence established that Student was well liked in his classes at Mossdale and often assumed a leadership role. Student ran for the office of president of the student body and actively campaigned on campus. In addition, with Mother's editing help and direction, Student made a video to celebrate his class graduation in June 2009. Numerous pupils and teachers participated in short skits during the project, which Student recorded during the school day. Mother also assisted by recording Student's verbal narration when pupils were not at school because he was not comfortable being recorded narrating with other pupils watching.

63. The evidence established that Student's relevant teachers viewed Student's

social skills deficits in the fall of 2008 to be a significant problem after working with him for a year. Student does not have very many friends but he has a few friends, is not interested in having a lot of friends, and is very focused on school work.

64. Based on the foregoing, the evidence demonstrates that Student has some social skills problems in relating to his peers, including eye contact, that are of concern to his family and his teachers. However, the evidence does not substantiate Student's claim that his social skills and eye contact deficits have met the criteria for extreme withdrawal or relating to people inappropriately necessary to be eligible for special education, with or without regard for the early childhood history element. Therefore, the weight of the evidence does not support Student's claim that he has met this criteria at any time from 2007 to the present.

AUTISTIC-LIKE BEHAVIORS: OBSESSION WITH SAMENESS

65. The third criterion that could make a child eligible for special education due to autistic-like behaviors is an obsession to maintain sameness. Mother reported that Student had repeated, ritualistic behaviors in the home setting which were not established in the record.

66. Dr. Browning found no evidence of any behaviors in this category in the school setting but, as found below, her interpretation of the criterion was not persuasive. In addition, Dr. Patterson credibly testified that evaluation of this criteria as to Student is "tricky." On balance, and as found below, the weight of the evidence supports a finding that Student meets this criterion for autistic-like behaviors.

67. Student's records document that for many years he has been obsessed with completing his school work perfectly. Teachers throughout Student's education have reported that Student tended to obsess about completing school work and took extra time to do things perfectly. Student has long been diagnosed with an anxiety disorder, one manifestation of which is his perfectionism. For example, in 2002, it was reported that

Student was such a perfectionist that he would not write, and that he became emotionally upset when taking written tests. Student's teachers at Veritas in 2007 and 2008 consistently reported that he focused on his assignments to such a degree that he could not complete all assignments in the time allotted. Student's Section 504 plan contains numerous accommodations intended to help Student complete his assignments on time compared to his typical peers.

68. Dr. Ulrey and Dr. Patterson are both well qualified professionals with many years of experience and education. Dr. Ulrey credibly established that autism is commonly accompanied by an anxiety disorder, a factor Dr. Patterson did not discuss. In addition, Dr. Ulrey established that it has been well documented in the medical research that people with autism generally have deficits in either cognitive processing, academic fluency, or both, which slow down their output. Academic fluency and cognitive processing, as well as motor speed, relate to how fast or slowly someone reads a book, does homework or completes a test. As a result, their behaviors become over-focused on one or few items, and they are not able to plan and adapt, tend to overdo the few items they focus on, and their overall output is compromised. Dr. Ulrey testified persuasively that those behaviors and effects were well-documented in Student's school records and were reflected in his Section 504 plans, which provided accommodations including reduced homework, reduced assignments, and more time allowed to take tests. The testimony of District staff that Student's perfectionism was unrelated to any disability was unpersuasive. Student's eighth grade general education teachers at Mossdale, Maria Cordero and Sarah Hilson, had no specialized training in educational disabilities or autism to support such an opinion.

69. The evidence was equivocal whether Student has a slow cognitive processing speed. Dr. Patterson was persuasive that the data did not show whether Student has impaired cognitive processing because the data was variable. For example, Dr. Ulrey administered portions of the Wechsler Intelligence Scale for Children-Fourth Edition

(WISC-IV) to evaluate Student's cognitive ability, and found that Student had a neurocognitive deficit because his cognitive processing speed was more than three standard deviations (15 percent) below his verbal intelligence, which was greater than the 90th percentile. However, Dr. Patterson testified persuasively that Dr. Ulrey's administration of the WISC-IV was flawed because he violated the test's protocols by estimating Student's vocabulary score. However, it is clear that Student has a good vocabulary, and Dr. Ulrey's finding of a slow coding speed did not appear to be flawed.

70. Dr. Patterson credibly testified that Dr. Ulrey's data underlying his findings of impaired academic fluency and executive functioning were flawed. Dr. Ulrey administered selected portions of the Woodcock Johnson III Tests of Achievement (WJ-III), and found that Student's academic fluency was slow. He gave Student several executive functioning measures from the Delis Kaplan Executive Function System, with mixed results. However, Dr. Patterson was persuasive that Dr. Ulrey's WJ-III results were defective and unreliable because Dr. Ulrey scored them wrong and based Student's scores on the age of a 23 year-old adult. While Dr. Ulrey readily admitted the mistake as to the scoring of the WJ-III, his interpretation of the results remained suspect. In addition, Dr. Ulrey's executive functioning assessment using the Delis-Kaplan tests were flawed because he only scored two out of the five components and did not fill out the protocols to document what he did.

71. Moreover, Dr. Browning's 2007 assessment determined that Student did not have any weakness in either executive functioning or academic fluency. Dr. Browning administered a battery of assessments that persuasively determined that Student's cognitive functioning was well within the average range or higher. Student scored in the average range in the areas of planning and attention, in the high average range in successive processing, and in the superior range on the simultaneous processing scale, and did not display any executive functioning weaknesses. There was clear evidence that Student is generally very organized and prepared for each of his classes.

72. Dr. Patterson established that Student has had difficulty regulating his motor speed and that, as a consequence, it takes Student a long time to complete things, and Student perseverates on wanting his answers to be correct. However, Dr. Patterson's testimony that the kind of obsession usually associated with autism is more "extreme" compared to Student's "perfectionism" was not persuasive because he conceded that Student has an obsession, and the regulation does not require an "extreme" obsession. In addition, Dr. Patterson made no distinction regarding degrees of obsession between children with severe and high functioning autism.

73. Overall, Student's teachers have observed that Student's perseveration or obsession with doing an assignment or answering a question perfectly is to a significant degree in every class, every day; his need for perfection in his school work is long standing; and Student's obsession controls how he performs in every class, on every assignment, and every test. Therefore, the evidence supports a finding that Student's behavior meets this criteria of an obsession "for sameness" in perfect academic performance.

AUTISTIC-LIKE BEHAVIORS: OTHER CRITERIA

74. In general, Mother reported that Student frequently displayed behaviors in the home setting that met other criteria for autistic-like behaviors, such as an extreme preoccupation with subjects or objects, like video games; an extreme resistance to controls, and/or peculiar motoric mannerisms and mobility patterns. However, Mother's testimony did not establish that Student's interest in video games involved an extreme preoccupation, and his behaviors were not observed in the school environment. In addition, Dr. Ulrey testified that Student met the criteria for an extreme preoccupation with subjects or objects, and ritualistic behaviors. However, Dr. Ulrey's testimony was unpersuasive because he did not observe Student in the school setting and relied on Mother's descriptions of behaviors in the home environment. In addition, Dr. Browning and Dr. Patterson were persuasive that there is no evidence of any behaviors in these

categories in the school setting. Since behaviors involving the autistic-like criteria must be observed pervasively across settings, and particularly in the school environment, the evidence does not substantiate Student's claim that his behaviors in the school setting involve any of the remaining criteria for autistic-like characteristics.

COMBINATION OF TWO OR MORE AUTISTIC-LIKE BEHAVIORS

75. Based on the foregoing, as of the October 2007 and September 2008 IEP meetings, and to the present, Student's behaviors have met only one out of the above criteria for autistic-like behaviors, due to his obsession with perfection in his school work. Although Student has social problems involving inappropriate eye contact and inappropriate peer relations, those problems do not involve a history of extreme withdrawal or relating inappropriately from early childhood. Even absent such a history, the behaviors are not extreme or pervasive. Moreover, Student's relations with only a few peers did not result in his complete isolation in the school setting, as the evidence demonstrated that he has friends, speaks to peers socially in reciprocal conversations, is able to make appropriate eye contact, although not consistently, actively participates in his classes, and is well liked.

76. Since eligibility due to autistic-like behaviors requires a combination of autistic-like factors, the evidence established that Student's behaviors did not, and do not meet at least two of the criteria for autistic-like behaviors from the fall of 2007 to the present. Accordingly, Student does not meet the criteria of an educational disability based on autistic-like behaviors. Therefore Student is not eligible for special education.

ADVERSE IMPACT ON EDUCATION

77. As set forth in Factual Finding 6, in addition to meeting the eligibility criteria for autistic-like behaviors, in order for a pupil to be eligible for special education the IEP team must determine that the degree of impairment 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.

78. Since Student does not meet the eligibility criteria, this issue need not be reached. In any event, the evidence establishes that, even if Student met the criteria for a combination of autistic-like behaviors, he has not shown that he needs instruction or services that cannot be provided to him in the general education curriculum.

79. Dr. Browning and Mr. Ouellette analyzed Student's academic performance from kindergarten to the present. Student's elementary school records showed that he achieved at least in the average range in all academic areas. For sixth grade, Student performed "at or above standard" in reading, writing, and mathematics; and on the California Standardized Testing and Reporting (STAR) test, he had scored in the "advanced" range in both English language arts and math. In seventh grade at Veritas, Student received As in his classes. Dr. Browning established that, during the District's 2007 assessments, Student scored in the average to superior range on the Wechsler Individual Achievement Test – Second Edition. (WIAT-2), a standardized test of academic achievement, with an average score in reading, high average scores in written and oral language, and a superior score in math.

80. Dr. Browning and Mr. Ouellette established that Student performed very well academically during the 2007-2008 school year without special education services, recognizing that he had a Section 504 plan that provided accommodations. Student received an A+ (plus) in all subjects during his third trimester except physical education, where he received an A. Student did not receive a grade of less than an A in any subject during the entire seventh grade year.

81. For the 2008-2009 school year, Student continued to do well academically. He received grades of an A or A+ in all subjects, and continued to participate in the GATE program. At the end of the year, Student scored in the "advanced" range in all areas of the

STAR test.

82. The evidence established that the accommodations and modifications to Student's educational program pursuant to his Section 504 plan did not artificially increase his grades or test scores. The evidence established that Student was assigned about 50 percent less homework than the rest of the pupils in most classes pursuant to his Section 504 plan. Nevertheless, Student demonstrated mastery of the subject matter by the test scores and grades he received. Teachers found that because Student was so thorough, the Section 504 accommodation for him to answer fewer questions worked well. Student's Section 504 plan has accommodated his obsession for perfection and need for extra time by reducing his workload but not by reducing the quality of the curriculum. The evidence established that the content of the curriculum was not modified for Student during the school years. Student has kept pace with the general education class curriculum in every class, accommodated by reduced homework, assignments, and test questions, in order to give him the amount of time he needed to complete things as perfectly as he could.¹² Thus, Student's contention that his grades and test scores have not accurately reflected his academic achievement because of his Section 504 accommodations was not supported by the evidence.

83. Moreover, despite Student's deficits, he is able to relate kindly and politely to his peers, is looked to for leadership and help with class assignments, and is able to communicate appropriately in reciprocity with his peers. In the 2008-2009 year, Student participated in a conflict resolution class in the general education curriculum which

¹² Moreover, Student's contention that he cannot receive an appropriate education without special education services because he is having a difficult time in his ninth grade chemistry class is also not supported by the evidence, which established that Student is performing well in that class despite disputed events on one day.

provided support for his developing social skills. As found above, he campaigned for school office, and is respected by his classmates.

84. Dr. Patterson testified credibly that, even if Student has some behaviors that are characteristic of autism, Student has accessed the educational curriculum with at least average, if not above average results, has been benefiting from being in the general education curriculum, and does not show any need for a special education placement or services.

85. Based on all of the foregoing, Student is not eligible for special education on the basis of an educational disability because the evidence did not establish either that he meets two or more of the applicable criteria for autistic-like behaviors, or that he needs instruction, services, or both, which cannot be provided with modification of the regular school program so as to enable him to benefit from instruction. Accordingly, the District did not deny Student a FAPE by failing to make him eligible for special education.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party petitioning for relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

FAPE

2. A child with a disability has the right to a FAPE under the IDEA 2004. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (p).) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from

education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. In order to provide a pupil a FAPE, a school district must provide a threshold “basic floor of opportunity” in public education that “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” (Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690], cited as Rowley.) The Rowley court determined that the IEP must be reasonably calculated to provide the pupil with some educational benefit.

4. The IDEA does not require school districts to provide special education pupils the best education available, or to provide instruction or services that maximize a pupil’s abilities. The Rowley court rejected the argument that school districts are required to provide services “sufficient to maximize each pupil’s potential commensurate with the opportunity provided other children.” (Rowley, *supra*, at 198-200; J.L. v. Mercer Island School Dist. (9th Cir. 2009) 575 F.2d 1025, 1035-1038.) The Ninth Circuit refers to the “some educational benefit” standard of Rowley simply as “educational benefit.” (See, e.g., M.L. v. Fed. Way School Dist. (9th Cir. 2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or “de minimus” benefit, or at least “meaningful” benefit. (See, e.g., Houston Indep. Sch. Dist. v. Bobby R. (5th Cir. 2000) 200 F.3d 341; L.E. v. Ramsey Bd. of Educ. (3d Cir. 2006) 435 F.3d 384.) As set forth in Legal Conclusion 13, this standard has also been used by the Ninth Circuit federal court to evaluate whether a pupil is able to receive educational benefit in the general education or regular instructional program without special education services.

5. IEP team decisions are to be evaluated in light of information available to the team at the time the IEP offer was developed, and are not to be evaluated in hindsight. (Adams etc. v. State of Oregon (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.”

The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (Id. at 1149). (See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D. Ore. 2001) 155 F.Supp.2d 1213, 1236.) Here, the “snapshot” rule requires evaluations of Student’s eligibility in light of what was known to the District during the 2007-2008 and 2008-2009 school years. On the other hand, the rule does not apply to evaluate Student’s present eligibility.

ELIGIBILITY FOR SPECIAL EDUCATION

Autism or Autistic-like behaviors

6. Student contends that because he has been medically diagnosed with autism, his disorder meets the requirements for special education eligibility under the federal category of autism, because federal law uses the word “autism.” He also contends that he meets the criteria in the California regulation for the category of “autistic-like behaviors.” Student contends, correctly, that California’s criteria for autistic-like behaviors must be construed to be equal to or broader than the federal requirements, and not more restrictive than those requirements.¹³

7. Only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code, § 56026, subd. (a).) For purposes of special education eligibility under the IDEA, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic

¹³ Student also argues, unpersuasively and without legal authority, that California’s eligibility category of autistic-like behaviors only applies if a pupil does not have autism.

impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a) (2006).)

8. A federal regulation defines the special education category of autism as follows:

(c)(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

[¶]

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied. (34 C.F.R. § 300.8(c)(1)(i) & (iii) (2006).)

9. Similarly, California law defines an "individual with exceptional needs" as a pupil who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code, § 56026, subd. (a), (b).)

10. Pursuant to California Code of Regulations, title 5, section 3030, subdivision (g), the eligibility category is not labeled "autism" but "autistic-like behaviors." A pupil meets the eligibility criteria for autistic-like behaviors if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to:

- (1) Inability to use oral language for appropriate communication,
- (2) History of extreme withdrawal or relating to people inappropriately and

continued impairment in social interaction from infancy through early childhood,

- (3) Obsession to maintain sameness,
- (4) Extreme preoccupation with objects or inappropriate use of objects or both,
- (5) Extreme resistance to controls,
- (6) Displays peculiar motoric mannerisms and motility patterns, and
- (7) Self-stimulating, ritualistic behavior.

11. Student's argument that the use of the word "autism" in federal law means that a pupil with a medical diagnosis of autism is always eligible for special education is not supported by any legal authority. Neither the federal statute nor the regulation refer to a medical diagnosis or to the DSM-IV-TR or other clinical standards. Indeed, the school professionals who are charged by law with the duty, as members of an IEP team, to determine a pupil's educational eligibility are not medical or clinical professionals. Special education law provides that each state determines the meaning of the language in a federal regulation. (R.B. v. Napa Valley Unified School District (9th Cir. 2007) 496 F.3d 932 at p. 944.) Moreover, California's regulation, Section 3030, subdivision (g), is consistent with the federal law, and merely uses additional descriptions of autistic behaviors or characteristics.

Adverse Impact on Educational Performance

12. A child is eligible for special education services if an IEP team determines that the child meets one of the educational eligibility categories, and if the IEP team determines that the adverse effects of the disability cannot be corrected without special education and related services; that is, that the degree of impairment "requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, §§ 56026, subd. (b); 56333, 56337; Cal. Code Regs., tit. 5, § 3030.) Thus, if Student exhibited any combination of the above autistic-like behaviors during the

relevant time frames and the disorder adversely affects his educational performance to the extent that special education is required, Student would meet the eligibility criteria. (Cal. Code Regs., tit. 5 § 3030, subd. (g).)

13. In evaluating eligibility, the courts have applied the Rowley standard to consider whether the pupil is receiving some educational benefit from the general education classroom. (*Hood v. Encinitas Union Sch. Dist.* (9th Cir.) 486 F.3d 1099, 1107, (cited as *Hood*).) Where a pupil fails to establish that a claimed disability could not be corrected through services offered within the regular instructional program, courts have held that the question whether the pupil meets the disability criteria need not be reached. In *Hood*, the federal Ninth Circuit Court of Appeal held that the question whether the pupil qualified for special education under the category of a specific learning disability under California law did not need to be reached, because the pupil did not establish that her discrepancy could “not be corrected through other regular or categorical services offered within the regular instructional program.” (*Ibid*, at 1107-1108, 1110 [citing Ed. Code, § 56337.]) In *Hood*, the due process hearing officer and the reviewing court looked to the pupil’s above-average success in the classroom as shown by her grades and the testimony of teachers as evidence that her needs could be met in a general education classroom without specialized education and related services. (*Ibid*.) The fact that the pupil was receiving accommodations in the general education classroom under a Section 504 plan did not alter the outcome. The court held that “[t]he hearing officer had sufficient reason to conclude that the accommodations that the school district offered [the pupil] via her Section 504 plan, particularly the provisions for daily teacher checks for homework assignments, one-step directions, and use of a graphic organizer, would assist with [the pupil’s] difficulties and allow her to excel in the regular classroom.” (*Id.* at 1108-1109.)

Did the District deny Student a FAPE for the 2007-2008 and 2008-2009 school years, and the 2009-2010 school year to the present, by failing to

find him eligible for special education under the category of autistic-like-behaviors?

14. As set forth in Factual Findings 1 through 85, and Legal Conclusions 1 through 14, the weight of the evidence established that Student was, and is, not eligible for special education and related services under the category of autistic-like behaviors because he only met one of the seven criteria in that category, that of an obsession for perfection in his school work. Student's obsession for perfection is longstanding and involves a motor speed deficit and possible cognitive processing speed deficit often associated with autism. Student's perseverative need to perform perfectly has resulted in his inability to complete assignments and tests in a timely fashion. There was no evidence of an executive functioning deficit, however, and, aside from the obsession to do tasks perfectly, Student was generally well organized and prepared for his classes.

15. Student did not, and does not meet the criteria of having a history from infancy through early childhood of extreme withdrawal or relating to people inappropriately from 2007 to the present. The criteria in Section 3030, subdivision (g) are not exclusive, as is evident by the language in the regulation of "including but not limited to..." which precedes the list of autistic-like behaviors. Nevertheless, the evidence of Student's problems with inappropriate eye contact and social skills, including peer relationships, does not establish a pervasive, extreme or significant impairment, even in the absence of an early history of such deficits. The evidence established that Student has a small number of friends, participates actively in his classes, and is respected by his peers.

16. Even if Student has met two or more criteria for autistic-like behaviors, Student has not established that he needs instruction and services that cannot be provided in the general education curriculum. Similar to the factual scenario found in Hood, supra, there is ample evidence that Student's Section 504 plan accommodations have provided Student the structure to perform well academically even though he needs to take extra time to complete tests, and requires less homework and reduced assignments in order to

complete his school work. In addition, the District has accommodated Student's social deficits by providing the conflict resolution course and other opportunities for social development. Accordingly, Student has not been, and is not, eligible for special education from 2007 to the present. The District's IEP offers in 2007 and 2008 did not deny Student a FAPE, as of the hearing, Student is not eligible for special education.

REMEDIES

17. When a school district or local educational agency fails to provide FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996]; 20 U.S.C. § 1415(i)(2)(C)(3).)

18. As set forth in Legal Conclusions 14 through 16, the District did not deny Student a FAPE and he is therefore not entitled to relief.

ORDER

Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues decided in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: November 9, 2009

_____/s/_____

DEIDRE L. JOHNSON

Administrative Law Judge

Office of Administrative Hearings