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

In the matter of: STUDENT, Petitioner, v. SAN JUAN UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE NO. N 2006120636

DECISION

Ann F. MacMurray, Administrative Law Judge, (ALJ) Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter from April 30 through May 3, 2007, in Carmichael, California.

Bob N. Varma, Attorney at Law, represented Student. Student was not present during the hearing. Student's mother and father (Parents) were both present for the majority of the hearing and at least one parent was always in attendance.

Linda Simlick, Attorney at Law, represented San Juan Unified School District (District). Jim Chucas, Special Education Program Director for the District, was also present at the hearing.

Student filed her original request for due process hearing on December 19, 2006. On February 15, 2007, the parties agreed to continue the due process hearing until April 30, 2007. Oral and documentary evidence were received during the hearing. The parties stipulated that the record remain open for the submission of written closing arguments by May 31, 2007, when the record was closed and the matter was submitted for decision. The parties also waived the statutory timeline for decision and stipulated to the decision issue date of July 9, 2007.

ISSUES[1]

Did the District's June 7, 2006, and August 25, 2006 Individualized Education Program (IEP), fail to offer Student a free appropriate public education (FAPE) for the 2006-2007 school year because:

1. District's goals and objectives were deficient in the areas of pre-academics, motor development, self help, social/emotional growth, school behavior and behavior?

2. District failed to develop a behavior support plan or appropriate behavioral interventions?

3. District's offer of placement in the Special Day Class (SDC) Autism Spectrum Disorder (ASD) preschool program was not appropriate because Student was not ready for a school-based program as Student's unique needs required 40 hours per week of Applied Behavioral Analysis (ABA) with a one-to-one aide and the District's proposed autistic SDC/ASD preschool program is an eclectic program which is not supported by peer-reviewed research?

CONTENTIONS OF THE PARTIES

Student contends that the District's goals and objectives were deficient because they failed to address all areas of need and did not incorporate the goals and objectives developed by Bridges Behavioral Language System (Bridges), the nonpublic agency with which the parents sought placement. Student also contends that District failed to implement a behavior support plan despite evidence that Student had been engaging in self-injurious behavior (SIB). Further, that the District's SDC/ASD preschool program was inappropriate in that Student was not ready for a school-based program but required the intensity of an in-home, 40 hour a week program, with a one-to-one aide, as offered by Bridges, an Applied Behavioral Analysis (ABA) program.

Student also contends that the legal standard by which to gauge the offer of FAPE has changed from the ability of Student to make educational progress to the Student's potential for development. Student further contends that the District's SDC/ASD preschool program is not supported by peer-reviewed research. Student asserts that District's eclectic program's use of various models of instruction for autistic children, which includes Social Communication Emotional Regulation Through Transactional Supports (SCERTS), ABA, and Treatment and Education of Autistic and related Communication Handicapped Children (TEACCH), and Picture Exchange Communication System (PECS) as some of its components, has not been peer-reviewed and shown to be an effective method of educating

[1] The ALJ has clarified the issue statements in conjunction with the due process complaint and according to the evidence presented at the due process hearing.

preschool children with autism. Student's position is that an ABA-only program, like Bridges, is the only program which is supported by peer-reviewed research as an effective program for autistic preschoolers.

As a remedy, Student requests that the District reimburse Parents for the educational portion (37.5 percent for tutor, consult and clinic time) of Student's placement at Bridges for the 2006-2007 school year.

The District maintains that its June 6, 2006, and August 25, 2006 IEPs are reasonably calculated to provide Student with educational benefit in the least restrictive environment. The District asserts that the goals offered in the IEP provide Student with FAPE as they meet Student's unique needs and that its SDC/ASD preschool for autistic children can meet those educational needs. Further, the legal standard determining FAPE has not changed and the District retains the discretion to determine methodology. Finally, that the primary component of its program, SCERTS, was founded in response to peer-reviewed research from the National Research Council's autism study.

FACTUAL FINDINGS

Background

1. Student, born on June 7, 2003, resides in the District with her family which includes an autistic brother who is approximately two years older than she. Student is eligible to receive special education services under the category of autistic-like behaviors (autism).

2. Student was provided initial services pursuant to the California Early Start Program through Alta California Regional Center (Alta). Beginning in January 2006, after being diagnosed with autism, Student received on-site Early Intensive Behavioral Treatment from Applied Behavior Consultants, Inc. (ABC) in the form of 40 hours per week of one-to-one teaching sessions by tutors, 50 hours per month of lead tutor hours, 20 hours per month of behavior consultation, and 6 hours of senior behavior consultation. Student also attended speech and language therapy and occupational therapy two times a week. On April 4, 2006, Student's program was moved from on-site to an in-home program. In ABC's quarterly report of Student's progress, issued April 6, 2006, no SIB or aggression was noted.

3. On April 13, 2006, Alta's multi-disciplinary team held a planning team meeting to reassess Student's eligibility for on-going services. With concurrence of the family and the team, Alta's Individualized Family Service Plan (IFSP) adopted ABC's recommendation to continue in-home services in the quantities noted above with regional center funding through June 30, 2006. In Student's June 6, 2006 quarterly report, ABC reported SIB primarily in the form of head banging and aggression especially when Student was transitioning from preferred activities to activities she did not prefer. ABC developed a behavior plan to address Student's SIB. Parents terminated ABC's services as of June 6,

2006, since they wanted both of their autistic children served by one vendor, Bridges, which had not yet assessed Student.

4. Alta's multi-disciplinary team generated a referral to the District on April 17, 2006. On May 31, 2006, the District conducted its initial assessment of Student. The assessment was conducted by special education teacher Jennifer Whitmire, along with speech and language pathologist Mary Jo Hartman. The District's school psychologist, Peggy Holcomb, also assessed Student prior to the IEP meeting. It was undisputed that District timely and appropriately assessed Student.

IEP Team Meetings June 7, 2006, and August 25, 2006

5. The initial IEP team meeting convened on June 7, 2006. It was undisputed that this meeting was timely held. The parents and all other appropriate IEP team members were present.[2] The ABC consultant presented her report which included information that Student's SIB had decreased and leveled out. Because ABC was no longer providing Student with services, the parents requested that the ABC consultant leave the meeting.

6. At the conclusion of the June 7, 2006 IEP meeting, the District offered Student placement in its SDC/ASD preschool program at Citrus Heights Elementary School (Citrus Heights) for four hours a day, five days a week. Parents did not accept the District's offer because they wanted Student to continue with a 40 hour, one-on-one in-home program to be provided by Bridges.[3] Because Bridges had not yet assessed Student, the IEP meeting was adjourned until that assessment was completed. The District agreed to fund some transitional consultation hours with Bridges through October 2006.

7. On June 15, 2006, an agreed IEP addendum was signed which obligated the District to fund an increase in the number of consultation hours to be provided by Bridges, over what the District had originally agreed to provide at the June 6, 2006 IEP meeting.

8. Bridges assessed Student in July 2006 over four three-hour periods. The assessment and objectives developed centered on language, play and functional skills. On August 25, 2006, the IEP team reconvened to consider Bridges goals and recommendation for placement in its program. All attending IEP team members read and discussed the Bridges report. The District revisited the academic/functional goals proposed in the June 2006 IEP meeting and determined that they were appropriate and covered the majority of the objectives contained in the Bridges assessment. The District continued to recommend its SDC/ASD preschool placement offered in June 2006. The District made a full offer of placement.

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[2] The adaptive physical education (APE) teacher was excused by permission.

[3] Parents accepted District's speech and language services, APE and OT and, as noted, these services are not at issue.

9. Parents rejected most of the District's proposed goals and rejected the District's IEP placement offer. Parents continued to request the Student be placed with Bridges where she would receive ABA one-on-one in-home services for 40 hours per week. Parents have privately funded Student's attendance at Bridges from September 1, 2006, through the date of the due process hearing, although no evidence was presented regarding the cost to the parents.

Goals and Objectives Challenged as Deficient and Rejected by Parents

10. Student contends that she was denied FAPE in the 2006-2007 school year because the District's goals and objectives were deficient in the areas of functional skills, play and imagination skills, language skills and behavior. As discussed in Legal Conclusions 9 through 11, a school district's offer of FAPE must be set forth in an IEP, which, in addition to detailing the special education and related services that the child needs, must also contain a statement of measurable academic goals and a description of the manner in which the goals will be measured. Goals for the preschool child must reflect how the disability affects the child's participation in appropriate activities. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals.

11. As noted above, the District's initial assessment was conducted by District special education teacher Jennifer Whitmire, along with District speech and language pathologist Mary Jo Hartman, on May 31, 2006. Student did not challenge the District's present levels of performance upon which the proposed goals noted in Findings 12 through 18 were developed. Present levels of performance noted in these first seven goals were based on the May 2006 assessment by District which included conversations with the ABC consultant and the father. Additionally, after Bridges conducted its assessment in July 2006, the IEP team met to consider that report. Except for the parents, the remaining IEP team members determined that the District's proposed goals adequately addressed the Bridges objectives. Placement in the District's SDC/ASD preschool as offered at the June 2006 IEP meeting continued to be the offer.

12. The June 7, 2006 IEP noted Student's present level of performance as being able to match identical items to items and pictures to pictures. The corresponding pre-academic annual goal was that Student would receptively identify items or pictures as belonging to a category for six categories with 90 percent accuracy, 90 percent of times asked. This goal had the following benchmarks: that by November 15, 2006, Student will appropriately match non-identical items with 90 percent accuracy, 90 percent of the times asked; that by March 15, 2007, Student would sort items into appropriate categories for six categories with 90 percent accuracy, 90 percent of the times asked. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age, abilities and her unfamiliarity with the concepts of categories and non-identical items.

13. The June 7, 2006 IEP noted Student's present level of performance as enjoying scribbling. The corresponding pre-academic and motor development annual goal was that Student would imitate drawing a horizontal and vertical line, circle, cross and 90 degree angle with 90 percent accuracy, 80 percent of the time. This goal had the following benchmarks: that by November 15, 2006, Student would imitate drawing a horizontal and vertical line with 90 percent accuracy, 80 percent of the time; that by March 15, 2007, Student would imitate drawing a circle and 90 degree angle with 90 percent accuracy, 80 percent of the time. This was a measurable annual goal containing a statement of how Student's progress could be measured and met Student's educational needs in light her age and abilities.

14. The June 7, 2006 IEP noted Student's present level of performance as being able to don her shoes with 40 percent accuracy and doff them with 60 percent accuracy as well as being able to pull her pants up and down. The corresponding self-help annual goal was that Student would independently dress herself with 100 percent accuracy once daily for a period of two weeks. This goal had the following benchmarks: that by November 15, 2006, Student would don and doff her shoes and socks with 80 percent accuracy, 80 percent of the time; that by March 15, 2007, Student would put her legs through the appropriate holes and pull up her pants or skirt with 80 percent accuracy, 80 percent of the time. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age and abilities.

15. The June 7, 2006 IEP noted Student's present level of performance as sitting on the toilet for approximately 30 seconds and using the toilet a couple of times. The corresponding annual self-help goal was that Student would be toilet trained for urination with no more than one accident in a two-week period for at least two months. This goal had the following benchmarks: that by November 15, 2006, Student would urinate in the toilet once daily for a period of one month; that by March 15, 2007, Student would urinate in the toilet with no more than two accidents in a one-week period for at least one month. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age and abilities.

16. The June 7, 2006 IEP noted Student's present level of performance as enjoying many social baby-like games with her tutor in which Student awaits her tutor's action with anticipation as well as enjoying singing and doing the motions to songs with her tutor. The corresponding annual social/emotional growth goal was that Student would social play with a peer with no more than two gestural prompts per activity. This goal had the following benchmarks: that by November 15, 2006, Student would participate in three mutual participation songs or activities such as ring around the rosy or London Bridges three times per week; that by March 15, 2007, Student would participate in two turn taking games at a rate of three times per week. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age and abilities.

17. The June 7, 2006 IEP noted Student's present level of performance as being able to do the motions to several songs and sing the words as well as enjoying books. The corresponding annual school behavior goal was that Student would participate in circle time by independently raising her hand for at least two times, counting during calendar or identifying one item in story time and making the motion or singing for at least two songs per group time. This goal had the following benchmarks: that by November 15, 2006, Student would participate in circle time by independently making the motions or singing for at least two songs 80 percent of the time; that by March 15, 2007, Student would raise her hand to express a choice or identify an item at least two times per circle time for a two-week period. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age and abilities.

18. The June 7, 2006 IEP noted Student's present level of performance as being able to touch items with one-to-one correspondence as her tutor counts them as well as making the intonation of counting. The corresponding annual pre-academic goal was that Student would count five objects with one-to-one correspondence with 80 percent accuracy, 80 percent of the time. This goal had the following benchmarks: that by November 15, 2006, Student would independently count to five with 90 percent accuracy, 80 percent of the time; that by March 15, 2007, Student would independently count to ten with 90 percent accuracy, 80 percent of the time. This was a measurable annual goal containing a statement of how Student's progress would be measured and met Student's educational needs in light of her age and abilities.

19. The parents proposed the present levels of performance and the goals and objectives in Findings 19 and 20 due to their concern for Student's SIB. Student's SIB is further addressed in Findings 22 through 27. The June 7, 2006 IEP noted Student's present level of performance as having an average of 7.2 excesses of self-injurious behavior within a four-hour session. The corresponding annual school behavior goal was that Student would transition between a preferred to a non-preferred activity with a decrease in behavioral excesses by 70 percent. This goal had the following benchmarks: that by November 15, 2006, Student would transition between a preferred to a lesser preferred activity with a decrease in behavioral excesses by 25 percent; that by March 15, 2007, Student would transition between a preferred to a non-preferred activity with a decrease in behavioral excesses by 40 percent. This was a measurable annual goal containing a statement of how Student's progress would be measured and meet Student's educational needs in light of her age, abilities and evidence of some history of behavioral excesses.

20. The June 7, 2006 IEP noted Student's present level of performance as a pending baseline to be provided by parents from the NPA [Bridges]. The corresponding annual school behavior goal was that Student would decrease aggression toward peers and adults by 70 percent of baseline. This goal had the following benchmarks: that by November 15, 2006, Student would decrease aggression toward peers and adults by 25 percent of baseline; that by March 15, 2007, Student would decrease aggression toward peers and adults by 50 percent of baseline. This was a measurable annual goal containing a

statement of how Student's progress would be measured and net Student's educational needs in light of her age, abilities and evidence of some history of behavioral excesses.

21. As set forth in Findings 12 through 20, the Student's IEP contained meaningful measurable goals, which considered the most recent assessment by Bridges, and are designed to meet Student's unique needs.

Failure to Develop Behavior Support Plan or Appropriate Behavioral Interventions

22. Parents contend that the District's failure to develop a behavior plan denied FAPE. As discussed in Legal Conclusion 12, when developing an IEP for a child whose behavior impedes her learning, the IEP team shall consider, if appropriate, strategies, including positive behavioral interventions and supports to address that behavior. An IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight.

23. Beginning in January 2006, Student received on-site Early Intensive Behavioral Treatment from ABC in the form of 40 hours per week of one-to-one teaching sessions by tutors, 50 hours per month of lead tutor hours, 20 hours per month of behavior consultation, and 6 hours of senior behavior consultation. Student also attended speech and language therapy and occupational therapy two times a week. On April 4, 2006, Student's program was moved from on-site to an in-home program. In the ABC quarterly report issued April 6, 2006, no self-injurious behavior (SIB) or aggression was noted. In its June 6, 2006, quarterly report, after Student's services were moved to the home, ABC first reported Student's SIB, head banging and aggression, especially when Student was transitioning from preferred activities to activities she did not prefer. During this second quarter, ABC developed a Behavior Plan to address Student's SIB.

24. On May 31, 2006, the District's SDC teacher, Ms. Whitmire, conducted her initial assessment of Student in Student's home. ABC, the home program, reported to her that Student had a period of increase in SIB, but that the SIB had since decreased. Student did not exhibit any SIB during Ms. Whitmire's observation. Ms. Whitmire did observe one tantrum which involved Student throwing an object at her tutor.

25. Megan Haggard, Student's Program Director from Bridges assessed Student in July 2006 over four, three-hour periods. Shelly Lemus, a Bridges Consultant, conducted the functional assessment. By parent report to Ms. Haggard, Student had a history of aggression with her brother and SIB, head banging, when making transitions from one activity to another; however, neither Ms. Haggard nor Ms. Lemus observed SIB during their assessment as none was noted in the Bridges report or by other evidence. Behavioral excesses which were observed during the assessment included minor protests to demand and transitions. Because Student's behavior did not interfere with her learning, as a preventive measure, Ms. Haggard developed a differential reinforcement of other behavior (DRO) to address aggression and SIB. Since no SIB was observed during the assessment, no behavior plan was written at that time. Ms. Haggard decided that a behavior intervention plan would be

developed in the future if Student's behavior rose to the level that interfered with her learning.

26. Bridges began providing Student's services around September 1, 2006. Between September 1 and October 27, 2006, nine incidents of head banging were recorded; consequently, Bridges developed a behavior plan but there is no evidence that the SIB grew in severity. In fact, by February 2007, the SIB incidents had decreased.

27. The SIB information available to the IEP team as of August 25, 2006, was the SIB that had occurred in the spring had decreased by June 2006 pursuant to the behavior plan implemented by ABC. No SIB was observed by the District or Bridges personnel during their assessments in late May 2006 and late July 2006. The fact that Student subsequently engaged in SIB which formed the basis of the Bridges behavior plan in October 2006 is irrelevant to the inquiry regarding whether the IEP team erred in not developing a behavior plan at the August 2006 IEP meeting. While SIB was a concern of parents, the behavior goals requested by parents, as noted in Findings19 and 20, were sufficient to place SDC/ASD preschool personnel on notice of this concern and provided a basis to reduce such behavior. As of August 25, 2006, there is no indication that Student's behavior impeded her learning or that instructional/behavioral approaches had not been effective such that the IEP team should have developed behavioral strategies beyond the two proposed goals. Once in the SDC/ASD program, if Ms. Whitmire saw a return of or increase in SIB that interfered with Student's learning or the learning of others that could not be remedied by instructional/behavioral approaches, the IEP team was prepared to formulate a behavioral plan that would have addressed Student's maladaptive behaviors.

Appropriateness of District's Offer of Placement in the SDC/ASD Preschool Program for Autistic Students

28. Student contends that she requires an in-home, 40 hour per week ABA based program, with a one-to-one aide as offered by Bridges because that method is supported by peer-reviewed research and the District's SDC/ASD preschool is an eclectic program which is not supported by such research. As discussed in Legal Conclusions 2 through 8 and 15 through 19, a district must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. A district is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. A school district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student. In developing a student's educational program, the district must provide a program that is based on peer-reviewed research to the extent practicable.

Peer-Reviewed Research

29. The District's SDC/ASD preschool is a comprehensive program with an inclusionary component that, for the last two years, has primarily used the SCERTS methodology to educate autistic students. SCERTS looks at the child through the lens of social communication and emotional regulation, which are autism's two core deficits, and provides the child with transactional support to address these deficits. The comprehensive program incorporates other methodologies, such as ABA, TEACCH, and a modified form of PECS.

30. The ABA program preferred by Student's parents utilizes methodology created by Doctor Ivar Lovaas. ABA is an intensive behavioral intervention which employs behavior modification treatment. The component parts of early intervention through the use of ABA techniques include the intensity of a 40-hour week, primarily involving one-on-one repetitive drills, or discrete trial training (DTT), by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition.[4]

31. TEACCH uses different approaches and methods, including several techniques in combination.

> The premise of TEACCH is to utilize the typical strengths of children with autism, including visual learning, visual cues and visual scheduling, to develop other related skills that are generally more challenging. The program emphasizes a variety of communication skill and socialization all aimed at helping the child "generalize" skills that are fostered in her educational environment. TEACCH also employs behavioral intervention, incidental teaching through various structured activities, and the Picture Exchange Communication System.[5]

32. The Picture Exchange Communication System (PECS) is a program designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication.[6]

33. Jennifer Whitmire is a qualified special education teacher and has been teaching the District's SDC for five years. She holds a special education teaching credential and is a candidate for her Master of Education in Special Education in May 2008. She has worked with autistic children for twelve years, seven of which were in the private sector in various ABA programs.

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[4] *Deal v. Hamilton County Dept. of Educ*. (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, p. 10, fn. 2.

[5] *Pitchford v. Salem-Keizer School District* (W.D. Or. 2001) 155 F.Supp.2d. 1213, 1217.

[6] *Ptichford, supra*, 155 F.Supp.2d at p. 1217, fn. 2.

34. Michael Prentiss oversees the District's autism programs in conjunction with the Program Specialist, Dayle Cantrall. Mr. Prentiss obtained his Master of Arts in Special Education and holds a Professional Clear Severely Handicapped Credential. His first job in the autism field was as an instructional assistant for ABC and, thus, he is very familiar with ABA techniques. Mr. Prentiss has worked with the District's autism program for the last twelve years as an instructional assistant and then teacher. Currently, Mr. Prentiss consults with teachers and works on developing technological transactional supports to assist the educational process. When new autistic students arrive, he is available to consult with the teacher to design a program based on the child's needs. He also provides training sessions which are open to parents, teachers, and others involved with autistic children, including personnel from other school districts.

35. In addition to Ms. Whitmire, the District employs three paraprofessionals to assist in the SDC/ASD preschool. The ratio of teacher to student as of August 2006 was four adults to five students. With current staffing, eight students would be the maximum. The goal of the District's program is to work on the student's social communication and emotional regulation to enable their transition into the regular education classroom. The District's SDC/ASD preschool is housed next door to the Head Start preschool and the curriculum has designated time and activity permitting its students to interact with the typically developing peers from the Head Start class.

36. The strengths of the SDC/ASD preschool program are inclusion, mainstreaming; parent participation, and naturalized thematic instruction. Two to three days a week for one-half hour per day, the SDC/ASD preschool students interact with the Head Start preschoolers. The SDC students also have recess with these typical peers. Ms. Whitmire and Mr. Prentiss hold parent seminars to facilitate parent participation. Ms. Whitmire communicates with parents in a daily notebook the student carries back and forth to school. For those students who are also involved in a home program, Ms. Whitmire collaborates with the parents and the service providers to keep abreast of the child's progress. She generally attends in-home program team meetings twice a month and communicates with those providers and parents through email and telephone. Ms. Whitmire conducts parent meetings once a month along with the Citrus Heights speech and language pathologist and the inclusion specialist. After one to two years in Ms. Whitmire's SDC, the majority of her students transition to the regular education classroom. Some of those Student's are fully included in the regular classroom without additional support. Other students continue to require some support in the regular classroom.

37. Mr. Prentiss explained that the core deficits of autism are in the social realm and issues regarding a child's readiness for school constantly arise. Social skill is an integral part of the SDC/ASD preschool, and its basis in SCERTS, which looks at things through the social component. Mr. Prentiss feels that an autistic child does not need to work on readiness skills prior to exposure to an actual social situation. The program provides expert support to the child in accordance with his or her needs. In the case of Student, Mr. Prentiss's opinion is that the SDC/ASD preschool would meet Student's unique needs and provide her educational benefit.

38. While SCERTS has not been peer-reviewed because it is a new program, it was developed in response to the National Research Council's report on autism. SCERTS looked at a variety of approaches and incorporated what was most efficacious in working with autistic children. The District did not establish that two other important components of its program, TEACCH and PECS, are supported by peer-reviewed research. However, TEACCH, which employs the PECS methodology, is a widely accepted method for the treatment of autism.[7]

39. Audrey Gifford is the founder and director of Bridges which she established in 1998. Ms. Gifford holds a Master of Education in Special Education, Severely Handicapped with a Behavioral Emphasis. She also holds a Specialist Clear Credential and is a Board Certified Behavior Analyst. Ms. Gifford describes Bridges as a non-public agency recognized by the State of California to provide ABA services to preschool children with autistic spectrum disorders. Ms. Gifford has reviewed the literature regarding the efficacy of ABA programs for preschool children as contrasted with other, less intensive "eclectic" programs. Ms. Gifford is of the opinion, based on her experience and review of peer-reviewed journal articles, that an ABA program, like Bridges, is the most effective program for autistic preschool children as contrasted with eclectic autism preschool programs.[8]

40. For her opinions, Ms. Gifford referenced the seminal work of Doctor Ivar Lovaas described in *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*. According to Ms. Gifford, the Lovaas study found a direct positive correlation between learning and the level of intensity measured by increased hours. In that study nearly half of the children passed into regular education after receiving at least two years of ABA-type services. The children in the Lovaas study were later studied by John J. McEachin who published his results in *Long-Term Outcome for Children With Autism Who received Early Intensive Behavioral Treatment*. That study found that all but one of the children continued to function well in the regular education environment.[9] Ms.

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[7] See footnote 5.

[8] Both parties presented testimony regarding whether the District's SDC was an eclectic or a comprehensive program. Presumably, Student sought to define the SDC as eclectic since the peer-reviewed journal articles she offered contrast the ABA program with other "eclectic" programs. District sought to portray its program as comprehensive so as to distance its program from the eclectic model contained in Student's journal articles. Whether the District's SDC is eclectic or comprehensive is irrelevant to the salient question of whether the methodology offered was believed by the IEP team to be appropriate to meet the individual needs of the child and calculated to provide her educational benefit.

[9] Other studies mentioned by Ms. Gifford for the proposition that an ABA program is more effective than an eclectic program include: Eikeseth, Smith, Jahr, Eldevik, *Intensive Behavioral Treatment at School for 4-to-7-Year-Old Children with Autism* (January 2002) Vol. 26 Behavior Modification No. 1, pp. 49-68; Howard, Sparkman, Cohen, Green, Stanislaw, *A Comparison of Intensive Behavior Analytic and Eclectic Treatments For Young Children with Autism* (September 2004) Vol. 26 Research in Developmental Disabilities No. 26, pp.359-383; Sallows, Graupner, *Intensive Behavioral Treatment for Children With Autism: Four-Year Outcome and Predictors* (November 2005), Vol. 110 American Journal on Mental Retardation, No. 6: 417-438; Cohen, Amerine-Dickens, Smith, *Early Intensive Behavioral Treatment: Replication of the UCLA Model in a Community Setting* (April 2006), Vol. 27 Developmental and Behavioral Pediatrics No. 2, pp. 145-155; Sheinkopf, Siegel, *Home-Based Behavioral Treatment of Young children with Autism* (1998) Vol. 28 Journal of Autism and Developmental Disorders No. 1, pp.

Gifford admitted that the studies she reviewed regarding the effectiveness of preschool programs for autistic children have all involved ABA-type treatment. However, the various studies cited by Ms. Gifford, which had comparison groups, do not state that students in an eclectic preschool program did not make adequate progress in meeting their educational needs. In fact, the April 2006 study by Cohen [10] found that the comparison group made progress. The Cohen study noted other studies with similar findings.

41. The Cohen study found a smaller difference in the outcome measure of IQ between the children receiving early intensive behavioral treatment (ABA methodology) and the comparison group, as the comparison group also made gains. Similar results were found on measures of adaptive behavior. While language comprehension differences showed a trend toward significance, there was no difference between groups in expressive language and nonverbal cognitive skill.

42. Despite IQ gains in the comparison group, all but one student remained primarily in the special education classroom while most of the students in the intensive group moved into a regular education classroom at least part of the day. The authors note, however, that classroom placement is a controversial outcome measure because of concerns that it may reflect factors of parent advocacy and social policy rather than the child's functioning. Because such gain may at least in part be attributable to the intensity of training, the authors recommended further study.

43. This Cohen study also expanded the original Lovaas treatment protocol to reflect the contemporary view that the defining feature of ASD is an impairment in social reciprocity. The authors noted that while discrete trail training is a common approach (an important part of the ABA method) to teaching social skills and has some empirical support, other teaching methodologies have empirical support and may have advantages such as generalizing more quickly to settings outside of treatment. On this issue the authors also recommended further study on how best to teach such skills.

44. The Cohen study cites five other studies that partially replicated the Lovaas study. Those studies found that the gains of children receiving early intensive treatment were substantially smaller than in Lovaas's original study. In other words, the comparison group made progress in meeting their educational needs.

15-23; Green, Brennan, Fein, *Intensive Behavioral Treatment for a Toddler at High Risk for Autism* (January 2002), Vol. 26 Behavior Modification, No. 1, pp. 69-102; Eldevik, Eikeseth, Jahr, Smith, *Effects of Low-Intensity Behavioral Treatment for Children with Autism and Mental Retardation* (February 2006), Vol. 36 Journal of Autism and Developmental Disorders, No. 2, pp. 211-224; Butter, Mulick, Metz, *Eight Case Reports of Learning recovery In Children With Pervasive Developmental Disorders After Early Intervention* (2006), Vol. 21 Behavioral Interventions pp. 227-243.

[10] Cohen, Amerine-Dickens, Smith, *Early Intensive Behavioral Treatment: Replication of the UCLA Model in a Community Setting* (April 2006), Vol. 27 Developmental and Behavioral Pediatrics No.2, pp. 145-155 (Cohen).

45. Additionally, Ms. Gifford offered no opinion whether the SDC/ASD preschool would be effective in meeting the individual needs of Student because she was not familiar with the District's SDC/ASD preschool structure. The Individuals with Disabilities Education Act does not mandate a particular methodology if the educational agency can establish that its chosen methodology is based on peer-reviewed research to the extent practical and that the methodology will allow the student to make an adequate education progress. The District established, based on empirical evidence, that students who attended its SDC/ASD preschool have made adequate progress as students have transitioned to District's regular education program.

46. The Cohen study is the most objective evidence submitted by Student of the continuing controversy regarding the best treatments for young children with ASD, a controversy so noted by the Editor. The scientific research regarding the various methodologies to teach autistic children is still emerging and inconclusive at best. One component of the District's program, ABA, has been subjected to peer-reviewed research. Another component, SCERTS, was developed in response to the National Research Council's report on autism. Still other components, TEACCH and PECS, are widely accepted methods of treatment. District's program is based on peer-reviewed research to the extent practicable.

Was District's SDA/ASD Preschool Offer of Placement Proper

47. Parents further contend that the District's offer of placement in the SDC/ASD was not appropriate because Student was not ready for a school-based program as her needs required a 40 hour per week program, with one-to-one aide, based on the ABA method. The District contends that placement in its SDC for four hours a day, five days a week met Student's unique needs and was placement in the least restrictive environment.

48. As discussed in Legal Conclusions 2 through 4 and 13, a district must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. A district is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. A school district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student. The focus is on the placement offered by the school district, not the alternative preferred by the parents.

49. As of August 25, 2006, neither Mr. Prentiss nor Ms. Gifford had met or observed Student. The Bridges assessment in July 2006 was not performed by Ms. Gifford, although she reviewed and signed that report. Bridges did not begin providing services until September 2006. Mr. Prentiss had reviewed the Bridges report and the District's proposed IEP goals. The experts offered contrasting opinions regarding Student's placement.

50. Ms. Gifford opined that Student was not ready for a school setting but required one-to-one, in-home ABA services offered by Bridges. Ms. Gifford explained that Student did not yet have the ability to learn in a school setting because she needed to work on social readiness skills in a structured peer setting in order to establish a baseline of social interaction including play, imitation, ability to follow instructions and increase her language skills. Ms. Gifford testified earnestly, intelligently and passionately. However, given the fact that she is the founder and owner of Bridges, her bias is inherent. Furthermore, she is not familiar with the SDC/ASD preschool program offered by the District and admittedly knew nothing about SCERTS. Because of her unfamiliarity with the District's SDC, she could not offer an opinion regarding whether the District's program was reasonably calculated to provide Student with educational benefit. Accordingly, Ms. Gifford's expert opinion that Student's placement must be in an ABA-type program like Bridges as contrasted with an eclectic program is not persuasive and is afforded less weight.

51. Mr. Prentiss's inherent bias is with his employer, the District. He shared the same good qualities as Ms. Gifford and both share an obvious passion for work with autistic children. Despite the fact that both experts have built in-bias,[11] the evidence tips in favor of Mr. Prentiss's opinion that Student is ready for a preschool program because she does not need to work on social readiness skill prior to exposure to social situations and that the SDC/ASD preschool can meet Student's unique needs and would provide educational benefit. Mr. Prentiss is familiar with all of the District's programs as well as with the ABA methodology. Mr. Prentiss began his special education career in a private sector ABA program. Moreover, Mr. Prentiss's opinion is bolstered by the well-founded principle that, where the District's program or placement will provide an appropriate education in accordance with the Student's needs, the methodology for implementation of that program is left to the District's discretion.

52. The District established that its SDC/ASD preschool has been successful in the past in meeting the special education needs of students. While Parents may prefer the Bridges ABA-only model, Student did not establish that the District's plan would not meet Student's special educational needs nor did Student establish that she was not ready for a school-based program. The IEP offer of placement and goals contained in the June 7, 2006 and August 25, 2006 IEPs were designed to address Student's unique educational needs and were reasonably calculated to provide her some educational benefit. The District's offer was an appropriate placement for Student in the least restrictive environment with a low student-teacher ratio, a preschool setting where Student will have exposure to typically developing peers.

[11] As neither Ms. Gifford nor Mr. Prentiss is a neutral expert from the outside of the District or Bridges, they are biased in that both are seeking placement of Student.

LEGAL CONCLUSIONS

Applicable Law

Burden of Proof

1. Under *Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for a due process hearing and bears the burden of persuasion.

General Principles

2. Under the Individuals With Disabilities Improvement Act (IDEIA) and state law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).)

3. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid*.) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id*. at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id*. at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id*. at p. 201.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Id.* at p. 208.)

4. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist*. (9th Cir. 1987) 811 F.2d 1307, 1314) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if the student's parents preferred another program which would have resulted in greater educational benefit. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

Rowley Standard Prevails

5. Despite Student's contention to the contrary, the *Rowley* standard remains the standard by which to evaluate the appropriateness of an IEP, and whether it confers a student with a FAPE. Congress defined the phrase, "free appropriate education" in the IDEIA, identically as it defined that phrase in the IDEIA's predecessor, the IDEA.

6. *Rowley*, at pages 187-188, stated:

> We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":
>
> The term 'free appropriate public education' means special education and related services which:
>
> (A) have been provided at public expenses, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. (1401(18).

The Supreme Court then went on to announce the standard for evaluating the appropriateness of an IEP, as set forth in Legal Conclusion 3.

7. When Congress reenacts a statute in terms identical to the prior enactment in the face of consistent judicial and administrative construction, it is persuasive legislative recognition and approval of how the statute was thus construed by courts and administrative agencies. *Kales v. Commissioner* (1939 CA6) 101 F.2d 35, 39. The judicial interpretation given to a phrase is presumed correct, where Congress, with full knowledge of the judicial interpretation, reenacts the phrase without changing it. *Bennett v. Panama Canal Co.* (1973, App DC) 475 F.2d 1280. These principals of statutory construction establish that the IDEIA left the *Rowley* standard unchanged.

8. Student's contention that amendments to the IDEA significantly changed the educational standard for special education to one of "…higher expectations aimed at trying to have disabled children achieve self-sufficiency and independence" and superseded the *Rowley* standard, above, is rejected. Student cited *J.L. and M.L. v. Mercer Island School*

District (2006) 46 Ind. Dis. Educ. Law Rptr. (IDELR) 273 (W.D.Wash.) *citing Deal v. Hamilton County Bd. of Educ*., 392 F.3d, 840, 862, 864 (6th Cir. 2004).) If Congress had intended to overturn *Rowley*, it would have said so. The Ninth Circuit as well as the United States District Court for the Northern District of California, have recently reaffirmed that the appropriate standard for determining whether an IEP provides FAPE is still whether it is "reasonably calculated to enable the child to receive educational benefits." (*Park Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031 (citing *Amanda J v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877); and *San Rafael Elementary School District v. California Special Education Hearing Office* (9th Cir. March 28, 2007) 2007 U.S. Dist. LEXIS 27764.)

The IEP

9. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (Honig v. Doe (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot be "judged exclusively in hindsight…an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. Of Educ*. (3d Cir. 1993) 993 F.2d 1031, 1041.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist*. (9th Cir. 1987), 811 F.2d 1307, 1314.)

10. The IEP is a written document detailing, in relevant part, (1) the student's current levels of academic and functional performance (for preschool children, how the disability affects the child's participation in appropriate activities), (2) a statement of measurable academic and functional goals designed to meet the child's educational needs and enable the child to make progress, (3) a description of how the goals will be measured, (4) a statement of the special education and related services to be provided the Student based on peer-reviewed research to the extent practicable, (5) the beginning date along with the anticipated frequency, location and duration of the special education and related services, and (6) an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The statement of measurable annual goals must be designed to meet the individual's needs that result from the individual's disability to enable the preschool pupil to participate in appropriate activities. (Ed. Code, § 56345, subds. (a)(1)(B), (a)(2)(A); see also 34 C.F.R. § 300.320(a).)

11. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. 20 U.S.C. § 1414(d)(3)(A).) Nevertheless, an IEP need

not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education…designed according to the parent's desires."], citing *Rowley*, supra, 458 U.S. at p. 207.)

Behavioral Plan

12. In developing an IEP for a child whose behavior impedes his or her learning or that of others, the IEP team shall consider, if appropriate, strategies, including positive behavioral interventions and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

Least Restrictive Environment

13. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.)

14. While IDEA requires that children with disabilities be mainstreamed to the extent possible, it does not require their integration at the expense of other IDEA mandates, such as minimum educational opportunities. (*Id)* However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.)

Methodology/Peer-reviewed Program and Services

15. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist*. (D. Or. 2001) 155 F. Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.*, 361 F.3d at p. 84 (citing Roland M., 910 F.2d at pp. 992-93).) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour-per-week

ABA/DTT program modeled after the research of Dr. Lovaas, the Ninth Circuit Court of Appeal explained:

> Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children. See, e.g., E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs). IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (*Adams v. State of Oregon*, 195 F.3d at pp. 1149-1150 (citing *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, 1314).)

16. IDEIA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ*. (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57; which provides a comprehensive summary of decisions discussing the matter).)

17. In holding that the ALJ erred in assuming that there is only one appropriate methodology for educating autistic children, and further erred because the ALJ failed to consider the wealth of evidence provided at hearing that there is no one correct methodology for teaching autistic children, the *Deal* Court stated, at page 48:

> Many federal courts have struggled to address whether 'Lovass style ABA' program is a necessary component of an appropriate program for autistic children under the IDEA. Some courts have found that a school district's program was appropriate despite the parents' preference for a 'Lovass style ABA' program. Other courts have determined that the school district's proposed program was not appropriate and that the parents' proposed Lovass program was appropriate in contrast. However, this Court has not located any authority suggesting that a 'Lovass style ABA' program is the *only* appropriate program for young autistic children under the IDEA. (Original italics.)

18. Courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Deal*, at pp. 65-68.)

19. Title 34 Code of Federal Regulations part 300.320 states IEPs shall include statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable.* The language "to the extent practicable" regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program. The U.S. Department of Education's comments and discussions regarding "peer-reviewed research" are instructive in determining the intended meaning of the phrase "peer-reviewed," within the context of the IDEIA:

> Comment: A significant number of commenters recommended the regulations include a definition of "peer-reviewed research," as used in Sec. 300.320(a)(4). One commenter recommended that the definition of peer-reviewed research be consistent with the work of the National Research Council.
>
> Discussion: "Peer-reviewed research" generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, *there is no single definition of 'peer reviewed research' because the review process varies depending on the type of information to be reviewed.* We believe it is beyond the scope of these regulations to include a specific definition of "peer-reviewed research" and the various processes used for peer reviews.
>
> Changes: None.
>
> Comment: Some commenters recommended revising Sec. 300.320(a)(4) to require special education and related services, and supplementary aids and services, to be based on 'evidenced-based practices' rather than 'peer-reviewed research.' A few commenters recommended revising Sec. 300.320(a)(4) to require special education and related services, and supplementary aids and services to be based on peer-reviewed research, evidenced-based practices, and emerging best practices. Many commenters recommended clarifying the meaning and intent of the phrase "to the extent practicable." One commenter recommended requiring all IEP Team meetings to include a focused discussion on research-based methods and to provide parents with prior written notice when the IEP Team refuses to provide documentation of research-based methods.
>
> Discussion: Section 300.320(a)(4) incorporates the language in section 614(d)(1)(A)(i)(IV) of the Act, which requires that special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. The Act does not refer to 'evidenced-based practices' or 'emerging best practices' which are

generally terms of art that may or may not be based on peer-reviewed research. Therefore, we decline to change Sec. 300.320(a)(4) in the manner suggested by the commenters. *The phrase 'to the extent practicable,' as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research.* We do not believe further clarification is necessary.

We decline to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome.

Changes: None.

Comment: One commenter recommended clear guidance on the responsibilities of States, school districts, and school personnel to provide special education and related services, and supplementary aids and services that are based on peer-reviewed research. One commenter requested clarification that the requirement for special education and related services, and supplementary aids and services to be based on peer-reviewed research does not mean that the service with the greatest body of research is the service necessarily required for FAPE. Another commenter requested that the regulations clarify that the failure of a public agency to provide special education and related services, and supplementary aids and services based on peer-reviewed research, does not result in a denial of FAPE, and that the burden of proof is on the moving party when the denial of FAPE is at issue.

Discussion: Section 612(d)(1)(A)(i)(IV) of the Act requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. *States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.*

With regard to the comment regarding the burden of proof when the denial of FAPE is at issue, we have addressed this issue in the Analysis of Comments and Changes section for subpart E.

Changes: None.

Comment: Several commenters recommended including a construction clause in the regulations to clarify that no child should be denied special education and related services, or supplementary aids and services, based on a lack of available peer-reviewed research on a particular service to be provided.

Discussion: We do not believe that the recommended construction clause is necessary. *Special education and related services, and supplementary aids and services based on peer-reviewed research are only required 'to the extent practicable.' If no such research exists, the service may still be provided, if the IEP Team determines that such services are appropriate*. A child with a disability is entitled to the services that are in his or her IEP whether or not they are based on peer-reviewed research. The IEP Team, which includes the child's parent, determines the special education and related services, and supplementary aids and services that are needed by the child to receive FAPE.

Changes: None.

Comment: A few commenters recommended that the regulations clarify that the reference to 'peer-reviewed research' does not require an IEP to include instructional methodologies. However, a few commenters recommended that the regulations require all elements of a program provided to a child, including program methodology, to be specified in the child's IEP.

Discussion: *There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision.* Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

Changes: None.

Comment: A few commenters requested that the regulations require programs provided to a child with a disability to be research-based with demonstrated effectiveness in addressing the particular needs of a child.

Discussion: *While the Act clearly places an emphasis on practices that are based on scientific research, there is nothing in the Act that requires all programs provided to children with disabilities to be research-based with demonstrated effectiveness in addressing the particular needs of a child where not practicable.* We do not believe the recommended change should be made because, ultimately, it is the child's IEP Team that determines the special education and related services that are needed by the child in order for the child to receive FAPE.

Changes: None. (Italics added).

Reimbursement

20. Parents may be entitled to reimbursement for the costs of services they have procured for their child when the school district has failed to provide FAPE, and the private services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148; *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 13-14 (parents' unilateral placement not required to meet all requirements of the FAPE now codified at 20 U.S.C. § 1401(9).)

Determination of Issues

Issue 1: Did the District's June 7, 200, and August 25, 2006 IEP fail to offer Student a free appropriate public education (FAPE) for the 2006-2007 school year because District's goals were deficient in the areas of pre-academics, motor development, self help, social/emotional growth, school behavior and behavior?

21. Factual Findings 4-21, and Legal Conclusions 1-9, establish that Student failed to meet her burden of demonstrating that she was denied a FAPE for school year 2006-2007. The IEP contains sufficient goals to meet Student's needs and contained sufficient benchmarks such that Students' progress could be measured. The IEP was reasonably calculated to allow Student to make educational progress and took into account Student's most recent assessment.

Issue 2: Did the District's June 7, 2006, and August 25, 2006 IEP fail to offer Student a free appropriate public education (FAPE) for the 2006-2007 school year because District failed to develop a behavior support plan or appropriate behavioral interventions?

22. Factual Findings 19 - 27, and Legal Conclusion 12, establish that Student failed to meet her burden of demonstrating that she was denied a FAPE for school year 2006-2007, because her IEP failed to include a behavioral support plan. Parents proposed and the District was willing to include the behavioral goals noted in Findings of Fact 19 and 20. Since no behavioral excesses were observed during the District or Bridge's assessments, it is appropriate to monitor Student's behavior and if SIB returns or increases, and instructional approaches prove ineffective, the IEP team may determine that a behavior plan is appropriate.

Issue 3: Did the District's June 7, 2006 and August 25, 2006 IEP fail to offer Student a free appropriate public education (FAPE) for the 2006-2007 school year because District's offer of placement in the District's SDC/ASD preschool was not appropriate because Student was not ready for a school-based program as her needs required a 40 hour per week program based on the Applied Behavioral Analysis (ABA) method, with a one-to-one aide, and the District's proposed autistic SDC/ASD preschool program is an eclectic program which is not supported by peer-reviewed research?

23. Factual Findings 28-52, and Legal Conclusions 1-11, 13-19, establish that Student failed to meet her burden of demonstrating that she was denied a FAPE for school year 2006-2007, in that Student did not establish that the District's SDC/ASD preschool was not a proper placement offer. The District developed its program based on the available information regarding the appropriate methodology for an autism program for preschool children in accordance with peer-reviewed research to the extent practicable. The District established that its program has been successful in mainstreaming and educating students and that the District could meet the needs of Student in its program in its SDC/ASD preschool program. The legal standard for determining FAPE as announced by the United States Supreme Court in the *Rowley* case was not changed by recent amendments to the IDEA.

Remedy

24. Factual Finding 1-52, and Legal Conclusions 20, establish that Student failed to meet her burden of demonstrating that the District failed to offer FAPE thus parents are not entitled to reimbursement as requested.

ORDER

All relief sought by Student is denied

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicated the extent to which each party prevailed on each issue heard and decided. Here, the District was the prevailing party on all issues presented.

RIGHT TO APPEAL THIS DECISION

The parties to the case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 18, 2007

ANN F. MacMURRAY
Administrative Law Judge
Office of Administrative Hearings
Special Education Division