

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

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH No. N2005090882

NOTICE: This decision has been REVERSED in part by the United States District Court. Click [here](#) to view the court's decision.

DECISION

Administrative Law Judge Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on March 7, 8, 9, and 10, 2006, in Los Angeles, California.

Petitioner Student (Student), through her mother and father (Parents), filed a request for a due process hearing on September 29, 2005.

Student was represented by Bruce Bothwell, Attorney at Law. Student's mother (Parent) was present throughout the hearing.

Respondent Los Angeles Unified School District (District) was represented by attorney Donald A. Erwin of the Office of General Counsel, Los Angeles Unified School District. Present as the District's designated representative was Cynthia Shimizu, Program Specialist.

Testimony concluded on March 10, 2006, subject to a written briefing schedule. Student submitted a closing brief on March 24, 2006. District submitted a reply brief on April 7, and Student submitted a closing response on April 14, 2006, when the record was closed, and the matter was submitted.

STIPULATIONS

1. The parties stipulated that the statutory time requirements for the completion of the case continued to be waived during the above briefing period prior to issuance of this Decision.
2. At the outset of the hearing, prior to the presentation of evidence, a stipulation was entered into by the parties as follows. Without admission of liability, and without stipulating either that the services described below were or are “appropriate,” or that District’s special education and related services provided for Student pursuant to the June 2005 individualized education program (IEP) were “inappropriate,” but solely in the interests of convenience, and expediency in the conduct of the hearing, District and Petitioner agreed that the Administrative Law Judge would issue an order after the hearing as follows:
 - (a) District shall reimburse Student and her Parents for all services provided to Student by Stepping Stones Center for Autistic Spectrum Disorders, Inc., a certified nonpublic agency (NPA), from July 2005 through and including March 3, 2006,¹ upon proof of appropriate invoices and verification of payments made by Parents to Stepping Stones.
 - (b) The services to be reimbursed in Stipulation 2(a) above include all school-based services as well as services provided outside the school setting, including “behavior intervention development” (BID) and “behavior intervention implementation” (BII), and all supervision provided by that agency.
 - (c) In addition to the above reimbursement, District shall provide twelve and a half hours (12.5) of speech and language therapy, that shall be provided to Student by the Pediatric Therapy Network (PTN), a certified NPA.

ISSUES

Student’s due process complaint notice is brief, and describes her issues in a conclusory manner. The complaint lists two procedural violations and one generalized substantive issue. Student’s statement of issues for hearing (Education Code section 56505(e)(6)) clarifies her substantive problem and breaks it down into separate components. In doing so, Student has added a new issue: that District did not provide speech and language services called for in the June 2005 IEP. Because the issue of speech and language services was not listed in Student’s complaint, that issue is not decided in this case. (20 U.S.C. § 1415(f)(3)(B).) The stipulation of the parties regarding speech and language services, recited in Stipulation 2(c) above, will not be approved or ordered as part of this case, and constitutes a separate, private agreement of the parties. The issues to be decided in this case are reframed as follows:

¹ The parties agreed to use the July 2005 date because it was the start of the new school year; however, it was agreed that Stepping Stones in fact did not begin providing services until October of 2005.

1. In connection with District's June 2005 IEP, did District fail to offer or provide Student a free and appropriate public education (FAPE) for the 2005-2006 school year by:

(a) Failing to provide Student with a full time one-on-one aide, properly qualified, and properly trained to have the skills and knowledge to work with Student?

(b) Failing to include the use of scientifically based instructional practices based on peer reviewed research, specifically, Lovaas-style applied behavioral analysis (ABA)?

(c) Failing to offer Student a home based Lovaas-style ABA program in order to provide appropriate behavior support to Student?

(d) Failing, procedurally, to have a general education teacher attend the June 2005 IEP meetings?

(e) Failing, procedurally, to have an administrative designee attend the June 2005 IEP meetings who was authorized to provide or supervise home and classroom based Lovaas-style ABA therapy?

2. Since District has stipulated to reimburse Parents and provide compensatory education to Student for the period of July 2005 through March 3, 2006, is Student entitled to any further services in resolution of this case?

FACTUAL FINDINGS

1. Born in October of 1999, Student is a six and a half year-old girl residing in the District, and is currently in the first grade in a special day class (SDC) at Liberty Elementary School (Liberty). It is undisputed that, per the District's IEPs, Student is eligible for special education and related services with disabilities of autism and speech and language impairment.

2. Student was diagnosed with autism and severe language delays in 2002, and was evaluated in 2003 by Dr. B. J. Freeman, Ph.D., Licensed Clinical Psychologist (Dr. Freeman), now Professor Emerita of Medical Psychology, with the University of California Los Angeles (UCLA) School of Medicine. In the fall of 2004, Student was enrolled in kindergarten in a class for autistic children at Florence Elementary School (Florence) in the District. Student began first grade at Liberty on July 5, 2005, pursuant to her IEP of June 2005. Her school hours generally run from 8:00 am to 2:00 pm, or six hours a day.

3. The relevant aspects of the June 2005 IEP offer of the District are summarized as follows: the transfer of Student from Florence to first grade at Liberty, from a dedicated autism class to a mild/moderate specific learning disability (SLD) SDC classroom, specified goals and objectives, the provision of related services, the support of a full time aide for six

hours per day, and a behavior support plan. Central to Parent's complaint about the June 2005 IEP offer is the absence of a District-funded behavior intervention or support program for Student from a nonpublic agency (NPA), based on Lovaas-style ABA methodology. There is no dispute that the SLD classroom at Liberty is an appropriate placement.²

4 The history of the behavior support issues between the parties is relevant to evaluate both District's June 2005 IEP offer, and Student's unique needs at the time of the offer. In the fall of 2004, Parent filed a request for a due process hearing to resolve an on-going dispute with District. A settlement agreement was entered into in November 2004. Pursuant to the agreement, District agreed to provide Student with behavior support and intervention therapy to be provided by a NPA. Due to District's delay in implementing the agreement, a second settlement agreement was entered into on February 2, 2005. The behavior program was for 57 total hours of Behavior Intervention Development (BID), which included both development of a behavior support and intervention plan and on-going supervision, and 570 total hours of Behavior Intervention Implementation (BII), which involved implementation of the therapy plan by a behavior specialist in the home and school settings. The agreement contained a "use or lose" deadline of September 1, 2005, for all BII and BID hours.

5. In January 2005, Parent approved, and District retained, the Center for Autism and Related Services (CARS) as the NPA to provide the agreed-upon behavioral support services to Student. Parent understood that at least part of the CARS program would involve ABA methods, which she assumed meant Lovaas-style ABA methods. Lovaas-style ABA primarily involves intensive behavior modification therapy, one-on-one repetitive drills, or discrete trial training (DTT), by a therapist trained in the Lovaas methodology,³ and detailed daily data collection to monitor skill acquisition. An IEP meeting was held on March 4, 2005, as an Amendment to Student's annual IEP of June 22, 2004, at which the above total behavior support hours were agreed upon by the team. The March 2005 IEP initially contained five goals and objectives that were the responsibility of the behavior NPA. The goals and objectives did not address Student's maladaptive or self-stimulating behaviors previously targeted by either Dr. Freeman, in her last 2004 assessment, or in a private assessment report from another behavioral NPA dated January 6, 2005,⁴ both of which had been previously given to the District. At Parent's insistence, a behavior support plan (BSP) and a sixth behavior goal were therefore added to the March 2005 IEP. The BSP identified Student's problem behaviors as tantruming, whining, and excessive crying after school, and when working at home with the NPA behavior therapist. The BSP identified the responsible personnel as the behavior NPA.

² Student's contention at hearing that the SLD classroom teacher was not qualified to teach the class was not raised in her due process complaint, Student made no motion to amend the complaint to include the issue, and it is therefore not an issue in this proceeding. (20 U.S.C. § 1415(f)(3)(B).)

³ Dr. O. Ivar Lovaas, "Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children" (UCLA, 1987).

⁴ The Center for Autism and Related Disorders, Inc. indicated in its January 2005 report that Student's maladaptive behavior included noncompliance, excessive whining, tantrums, screaming, crying, hitting, aggression, and elopement.

6. On May 27, 2005, prior to the June 2005 IEP meetings at issue, Parent had Student evaluated again by Dr. Freeman. Dr. Freeman is a nationally known expert in autism, whose lengthy curriculum vitae shows over thirty years with UCLA, primarily in the field of autism diagnosis, evaluation and appropriate treatment, with numerous publications, honors, and professional associations, including being a member of the Advisory Board on Autism of the California Department of Developmental Services. Dr. Freeman's testimony was highly credible and is deserving of significant weight. Dr. Freeman testified that as of June 2004, the previous year, she had been alarmed at Student's lack of progress or improvement, lack of ability to attend, and increased behavior problems. In May 2005, Dr. Freeman found, for the first time, that Student's cognitive abilities indicate skills in the borderline to low average range, showing that Student is not mentally retarded, and possesses intelligence and reasoning skills that can potentially benefit her academically, if she could increase her communication skills.⁵ Student still had poor eye contact, preferred to be alone, did not initiate play, and her limited verbalizations were still difficult to understand. Dr. Freeman administered the Vineland Adaptive Behavior Scales - Second Edition (Vineland II). She testified that Student's receptive communication skills had not improved, and she was still at the level of 3.11 years old. Student's socialization skills had only increased by one month since the previous year, from 1.8 to 1.9 years old. Her expressive communication levels had not improved. In the communication and socialization domains, there was virtually no progress at all since 2004. Dr. Freeman found that Student's fine motor and language deficits continued to interfere with her ability to function in a classroom setting, and fine motor deficits interfered with her ability to learn self-help skills such as toileting. Dr. Freeman's May 2005 report recommended continued intensive intervention of unspecified methodology. At hearing, she testified that ABA, if done appropriately, would be her treatment of choice. She has long had objections to massed DTT, a central component of Lovaas-style ABA. According to Dr. Freeman, autism diagnosis and treatment research and methodologies have developed and changed in recent years, including modifications of ABA techniques away from drills and toward observational learning. Dr. Freeman cited the 2001 report by the National Academy of Sciences, *Educating Children with Autism* (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, Washington D.C; National Academy Press). She agrees with the report's findings that without early intervention, children with autism have only limited progress, whereas, regardless of differences in specific programs, children who receive appropriate intensive intervention can significantly progress.

In the May 2005 report, Dr. Freeman recommended that Student receive continued intervention for a minimum of 30 hours a week of services. She also recommended use of the Picture Exchange Communication System (PECS), because Student is a visual learner. She recommended exposure to typical peers for part of the day, a one-on-one aide trained in both autism and ABA, a strict school toileting schedule, regular clinic and supervision meetings, and a positive behavior support plan across all environments.

⁵ Student communicated using a multi-modal combination of signs, gestures, pictures, and verbalizations, including PECS, and American Sign Language (ASL).

The June 2005 IEP Offer

7. On June 10, 2005, the District held an annual IEP meeting for Student. Present at the meeting, and constituting Student's IEP team, were Student's mother (Parent); Student's special education teacher from her kindergarten class at Florence, Yoon Paik; assistant principal Edwin Marson; nonpublic agency (NPA) language and speech (LAS) therapist Carrie Dishlip; occupational therapy (OT) therapist Joy Le; LAS therapist Diana Zelinsky; physical therapist (PT) MaryAnne Marcos, Parent's attorney Cathy Jerrigan; District program specialist Vinita Bhafin; and two NPA representatives from CARS, Program Director, Susan (Sumathy) Kumar and a supervisor Judith Chavez. There was no general education teacher present. Parent did not waive her right to have a general education teacher present, as she had done on occasion in the past.

8. At the June 2005 IEP meeting, District presented Student's school based evaluations and her then-present levels of academic and functioning performance. District knew or should have known of Dr. Freeman's May 2005 report, as Parent provided the report to the District prior to or at the meeting. For the 2004-2005 school year, Student was in Ms. Paik's dedicated autism class. Ms. Paik informed the June 2005 IEP team that Student did not display excessive tantruming, whining, or crying in the classroom. Ms. Paik reported that Student's vocabulary had progressed, and that she recognized more than 40 sight words, an increase from 20 words the previous year. She was beginning to read simple sentences. Typical of many autistic children, Student had a short attention span and had difficulty focusing on a task. Student had difficulty transitioning from one thing to another, but showed improvement. Verbalizations were still unintelligible and Student still used PECS and ASL. Student spontaneously signed five expressions of her needs and wants. She had some reported progress in reading readiness, could write her first name, and met her math readiness goal. In the social-emotional domain, Student was reported by Ms. Paik as a happy girl who had "no difficulty" following the daily schedule. Ms. Paik also reported, somewhat inconsistently, to the team that Student cried when transitioning, and in particular, to express fear or dislike of being pulled out of the classroom for designated instructional services (DIS) services⁶, such as physical therapy, occupational therapy, and speech and language services.

9. For the 2004-2005 school year at Florence, when Student was in kindergarten, there were twelve children with a range of autism from mild to severe in Ms. Paik's autism class. There was very little social interaction between the children in the class because of isolating tendencies commonly associated with autism. Student imitated inappropriate behaviors of other autistic children in the class. She exhibited an interest in typically developing peers at recess during kindergarten, but had little opportunity for social interaction with typical children in her age range.

10. At the June 10, 2005 meeting, the IEP team discussed transferring Student for first grade to a school with a stable environment and mainstreaming opportunities. Everyone agreed that Student needed more peer-modeling to develop social interaction skills. The

⁶ DIS is referred to as "related services" in the IDEA.

placement possibilities were narrowed to two schools and the meeting was continued to June 24, 2005, to allow Parent time to visit both schools and make a decision. On June 24, 2005, Parent, Mr. Marson, Ms. Paik and Parent's attorney reconvened as the IEP team, and Parent chose the SLD class at Liberty Elementary School for the 2005-2006 school year. Again, no general education teacher was present, and Parent did not waive the right to have all required personnel present. The IEP called for Student's placement in special education for sixty-six percent of her time, and the remainder for mainstreaming opportunities at lunch, recess, field trips, assemblies, and other times as appropriate.⁷

11. The evidence does not support Ms. Paik's report that Student had no difficulty with following a daily schedule, and showed that Student needed regular prompting and adult support to pay attention, focus, and make transitions from one activity to another. Being able to pay attention and focus on the class lesson is essential to receive any educational benefit. At the June 2005 IEP meetings, the team discussed that Student would require an additional adult assistant (AAA) in her new classroom setting. The IEP meeting minutes state that the team recognized the importance of providing Student with an AAA: "...especially for mainstreaming time due to off task behavior and lack of socialization skills with the peers. She has a very short attention span and is easily distracted. She needs verbal and minimal physical prompts to focus and attend to the teacher. She also has difficulty completing the task independently. [Student] is not toilet trained and continues to require close supervision to assist [Student] to be fully toilet-trained. An AAA to support [Student] within the school setting for the full school day (6 hours) is being suggested once she has started school." The June 2005 IEP offered Student a full time AAA for six hours a day.

12. The June 2005 IEP for Student's 2005-2006 school year contained fourteen new annual goals and objectives for Student developed by the IEP team, including Parent.⁸ Two of the new goals were to be the responsibility of a general education teacher along with other personnel (self-help/restroom, and social communication/greeting peers and adults), and four of the goals were to include responsibility by an AAA (pre-Voc/backpack, self-help/restroom, social communication/greeting, behavioral support/attend and listen).

13. There was no DIS offer for intensive behavioral support to be provided by CARS or any other NPA for any part of the 2005-2006 school year in the June 2005 IEP. The remaining behavior support hours were noted in the minutes, but the remaining CARS hours of service to September 1, 2005, were not formally part of District's offer. Despite this, the IEP team understood that the June 2005 IEP offer did not supersede the prior agreement between Parent and District for behavior intervention. District knew that its IEP offer of a full time AAA would be supplemented by continued services from CARS through August 2005, based on the March 2005 IEP and the settlement agreement. Furthermore, as found in Factual Findings 15, 16, and 17 below, the IEP team was influenced by a report

⁷ Although never mentioned in the IEP, a general education music class had been added to Student's schedule in January 2005, as included in "other times as appropriate."

⁸ Parent requested two goals which were added by the team: a self-help goal for bathroom skills, and a social communication goal.

from CARS that Student had successfully achieved most, if not all of the March 2005 goals, including the BSP goal, and failed to consider Dr. Freeman's negative report as to Student's progress and behavior.

14. In addition to the AAA, District again offered a BSP with the June 2005 IEP at Parent's insistence. The only targeted behavior for the June 2005 BSP was "off task behavior," and the plan was to be implemented by the classroom teacher and the AAA. A related behavioral goal was added: "[Student] will attend and focus to the teacher [sic] and complete the assignments with verbal reminder 70% of the instructional time as observed by the teacher." District's new June 2005 BSP behavioral goal was not to be implemented by CARS, but by an AAA and the classroom teacher. They were assigned to be responsible for the goal, and to communicate daily reports to Parent with both communication logs and behavior logs. Ms. Paik completed a written report in support of the June 2005 BSP and the request for an AAA, that indicated the March 2005 BSP did not work. She reported that Student's needs were significant enough to necessitate an AAA on a form required by the District, and wrote the proposed BSP goal.

The misleading CARS Progress Report

15. CARS presented a Progress Report at the June 10, 2005 IEP meeting.⁹ CARS reported to the June IEP team that Student had achieved five goals designated by District and the March 2005 IEP team. The report was written with a positive "yes" in every goal area after the word "Achieved." Parent took issue with this report. In fact, many of the goals were not achieved at school, and the report qualified some of the "yes" responses with "in the home" in parentheses. The testimony of CARS supervisor Chavez that the IEP team understood the goals were not all met at school is contradicted by the IEP minutes, which reported: "According to NPA report, [Student] met all of the goals and objectives." In addition, Chavez' testimony was impeached by CARS Director Kumar, who also testified that she believed Student only needed occasional verbal prompts, and had met all her goals. The report's claim that Student could attend to a task for 45 minutes was a gross exaggeration based on an isolated incident, was not representative of Student's overall progress, and was even questioned by Ms. Paik, who knew that inattention was still a significant problem impeding Student's progress.

16. CARS personnel testified that their behavior specialist compiled data regarding Student's inappropriate behavior by selecting one random day each week when the behaviorist was present, and tallying that day's behavior in six areas: hand flapping, inattentive, whining, crying, aggressive, and fingers in mouth. Student challenges the data because her behaviors were not tracked and charted on a daily basis, and contends that daily data gathering, as is done in Lovaas-style ABA, is required in order to analyze or treat her inappropriate behaviors. District also uses data collection with its BSP's but did not clarify their policy as to frequency of collection. Regardless of whether daily or weekly tracking of

⁹ The CARS Progress Report is Exhibit J2, and labeled "Report of Student Progress by LAUSD dated 6-10-05" in the parties' index of joint evidence, because it is on an LAUSD report form.

targeted behaviors is appropriate, the CARS behavior charts are very simplistic, and do not contain any information as to what antecedents occurred prior to the behaviors in any specified settings, what the functions of the behaviors may have been when they occurred, what consequences resulted, or what replacement behaviors did or did not work.

17. CARS did not display any understanding at hearing that their overly positive, if not false, report contributed to the June 2005 IEP team's decision that Student did not need any further services from an NPA in her new IEP. District did not present any evidence of active oversight of CARS performance, and failed to note that CARS did not implement a plan for one of the goals,¹⁰ or that they provided misleading information to the June 2005 IEP team. As of June 10, 2005, CARS inexplicably told the IEP team that they had only a little over one hour of BID supervision left, at a time when they still had about half of the therapy hours left to perform.¹¹ Dr. Freeman testified that, given the hours of intervention services Student received from the NPA, she had expected to see greater improvement in Student's communication and socialization abilities. As of her May 2005 assessment, Dr. Freeman was concerned that the NPA was not doing its job because Student showed virtually no progress. Dr. Freeman reviewed the CARS June 2005 Progress Report, and noted that the focus appeared to be on reactive strategies, and not on teaching Student positive replacement behaviors.

18. Parent was dissatisfied both with CARS performance to date, and with Student's limited progress. At the June 2005 IEP meetings, Parent requested that District continue funding a behavior intervention therapist from an NPA for the next school year. District personnel disagreed and believed that the AAA offered to attend to Student's needs full time in the classroom would be sufficient. Parent consented to other aspects of the June 2005 IEP. Parent disagreed with District's denial of a behavior therapist from an NPA.

Student's transfer to the Liberty SLD classroom in July 2005 and subsequent behavioral problems

19. Pursuant to the June 2005 IEP, Student began attending Liberty in the SLD classroom on July 5, 2005. Student was transferred into a new school, and into a new classroom with more verbal students and more noise, with a new bathroom, a new teacher, a new schedule, a new classroom teacher's assistant (TA), and a new AAA. The teacher, Krista Cons, was on maternity leave, and the class was taught by substitute teacher Roberto Camberos, Jr. for three months until the class went "off track" in October. During the time in Mr. Camberos' class, Student was provided with a male AAA, Mr. Garcia. District failed to present any evidence as to why Student was not provided with a female AAA. The provision of a male aide was inappropriate, given that the June 2005 IEP assigned Student's AAA the responsibility both to assist her with her self help toileting goal, and to change her

¹⁰ In the March 2005 IEP, District's fifth goal, prior to addition of the BSP goal, was for expressive communication, responsibility for which was assigned both to the LAS and the behavioral NPAs. CARS never developed a plan for this goal.

¹¹ District's summary of CARS invoices showed that CARS had about 4.5 hours of BID left in July, but the summary also appears to be incomplete.

diapers. It is reasonably inferred that when Student soiled, she would need assistance cleaning her body as well as changing a diaper. It is evident that District thought it would be inappropriate for AAA Garcia to attend to Student's restroom needs, at the age of five or six, because District did not have Garcia do so. Student's toileting needs were sporadically met by a female TA or the female CARS behaviorist when present, not by Garcia. Because Garcia, her full time AAA, did not attend to her restroom goal or toileting needs, Student's lack of a regular restroom schedule further impacted her transition. Neither party presented evidence as to the qualifications of AAA Garcia as a classroom assistant in special education in general, or with autistic children in particular.

20. While Garcia was Student's AAA and she was transitioning into her new program, Student's behavior regressed. When CARS supervisor Chavez visited Student at Liberty for the last time, on July 7, 2005, Student cried numerous times. Beginning in the latter half of August 2005, Student turned from crying to aggression, and began having episodes of aggressive behavior in the classroom and at recess. Much of the aggressive behavior was directed at AAA Garcia, although some of it was also directed at the behavior specialist and other children in the class. The behavior included attempting to hit, or hitting Garcia and the specialist, trying to hit other children, and attempting to bite. The CARS therapist or the AAA responded by "benching" Student at recess or making her take "time out" in the classroom. There was no evidence of any effort at redirection toward positive replacement behavior. There was no evidence that the teacher, the AAA, or CARS compiled any behavior logs.

21. Chavez reported some behavioral issues to CARS Director Kumar, but assured Kumar she was handling it. Chavez did not communicate with the District about Student's unusual behavioral problems. CARS failed to intervene regarding the behavioral problems or to meet with Parent or District. CARS ended their provision of services by September 1, 2005.

22. Credible evidence was presented that Student had significant transition difficulties, both with moving from one task or activity to another, and with changes in the adults interacting with her. At hearing, it was speculated that the possible reasons for Student's aggressive behavior included her being tired from long, schedule-filled days with various therapies; that Student was imitating other pupils in her new class, who often hit each other; or that Student did not like Garcia. District's lack of insight into Student's behavior highlights their inattention to her needs. Regardless of the reasons, Student's behavior significantly regressed after transfer to Liberty. The behavior incidents occurred at school but District did not take action.

23. Less than a month after CARS services terminated, on September 21, 2005, Parent gave District written notice of her intent to retain an after school ABA behavior support plan for Student. On the same date, at Parent's request, the Center for Autistic Spectrum Disorders, Inc., otherwise known as Stepping Stones (Stepping Stones) began a behavioral assessment of Student for the purpose of developing a new behavior intervention program. On September 29, 2005, the instant due process request was filed.

The October 2005 IEP Amendment Meeting

24. After the due process request was filed, another IEP meeting convened on October 27, 2005. The meeting's purpose was to amend the June 2005 IEP. Present at the meeting as District's administrator was Vice Principal April Diedrich, special education teacher Cynthia Tarver, general education teacher Veronica Delgado, and Parent. The IEP minutes state that Student was "currently" receiving the support of an AAA. That statement was false, as the AAA, Garcia, left the classroom prior to the end of September.

25. Student did not amend the due process complaint request following the October 27, 2005 IEP meeting to include any problems about the October 2005 IEP. Therefore, the October 2005 IEP is not an issue in this case. Nevertheless, the October 2005 meeting has some relevance to the issues in the present case, as to District's efforts to implement aspects of the June 2005 IEP that are at issue, and as to the continued impact of District's failure to implement aspects of the June 2005 IEP on Student.

26. At the October 2005 IEP meeting, Parent expressed her concern about Student's continued aggressive behavior in the classroom. Special education teacher Tarver reported at the October 2005 IEP meeting that "over all [Student's] behavior is satisfactory, however on several occasions she has attempted to hit her AAA [unidentified in the record], baseline TA as well as her peers and her NPA in the classroom and on the playground. She has also attempted to grab items such as books from other students in the classroom." The teacher reported that Student had shown "improvement" in most academic areas, but that Student "refuses to complete her work about 50% of the day." The October 2005 IEP minutes do not reflect how Student's "improvement" was measured, and the description of her then-present levels of performance simply referred to the June 2005 IEP.

27. District agreed to provide professional development training for Student's AAA, an obligation it was already legally required to meet. It also granted Stepping Stones personnel permission to access Student's classroom to provide services then being paid for by Parent, but did not offer to pay for the services, or agree that they were necessary or appropriate.

District provided an Additional Adult Assistant in late January 2006

28. No AAA was provided for Student when her class began again in November 2005. From Garcia's departure in late September 2005 until late January 2006, District failed to provide any full time aide, male or female, as a dedicated AAA to support Student in the classroom. On January 23, 2006, District finally provided Student with a female AAA, Amparo Gonzales.

29. Student did not amend her due process complaint to include additional complaints against District for violations occurring after she requested a hearing. However, a generous reading of Student's due process complaint is that it generally alleges that District failed to implement the June 2005 IEP for the 2005-2006 school year, by failing to provide

professional development training for personnel working with Student, and that the skills and knowledge possessed by personnel should be based on scientifically based instructional practices if practicable. In addition to the ABA issue, District understood the complaint to address the training and qualifications of AAA Garcia, and the absence of any AAA as of the latter part of September 2005 when Garcia left. District understood that Student's complaint, as clarified by her statement of issues filed in February 2006, included the continued absence of any AAA until late January 2006. At hearing, Student continued the theory of lack of a qualified or trained AAA by including Ms. Gonzales, the AAA assigned to Student in late January 2006, within the ambit of her complaint. District did not object at hearing to the inclusion of AAA Gonzales as an additional AAA within the scope of the same issue. District provided training to Ms. Gonzales shortly before hearing, and was prepared to, and did present evidence at hearing as to the qualifications and training of Ms. Gonzales for the position of Student's AAA.¹² District was therefore not prejudiced. It is found that District impliedly waived the right to object to including Ms. Gonzales within the scope of the AAA problem. (3 Witkin & Epstein, California Evidence (4th ed. 2005) Presentation, § 371; 9 Witkin, California Procedure, (9th ed. 2005) Appeal, § 390.)

30. The evidence showed that no classroom AAA assigned to Student ever received professional development training regarding behavior support plans, Student's BSP in particular, how to conduct data collection, or communication training for Student or Parent, until shortly before hearing. Ms. Gonzales had been a substitute AAA for the District off and on for about five years with little formal special education training until 2005. She was supervised by the school's vice principal, and classroom teachers. In 2005, she had six hours of training on extreme behavior problems, and had six hours of PECS training last fall. In mid-February 2006, after she began to work with Student, she had about three hours of introductory behavior support training. A week before the hearing, she had about three hours of autism-specific behavior training. Ms. Gonzales did not keep any notes or take data about Student. It was her understanding that the classroom teacher was responsible for collecting such data. Although the BSP in the June 2005 IEP calls for daily reports and behavior logs from both the AAA and the teacher to be provided to Student's Parent, the AAA had no understanding at hearing that she had any responsibility to log or report Student's behavior, except verbally to Ms. Cons.

Stepping Stones ABA-based Intensive Intervention Program for Student

31. The initial Stepping Stones evaluation report of Student was done by supervisor Sharon Venezia, who has a Master of Science degree in psychology and a Master of Arts degree in English. The "Behavioral Assessment/Intervention Program," dated September 28, 2005, reported that Student's observed behavior deficits included severely limited language skills, severely limited and primarily solitary play skills, difficulty transitioning from one activity to another, often evidenced by crying, limited expressive

¹² In contrast, Student's complaint and statement of issues at no time mentioned any problem about the training or qualifications of the special education classroom teacher (Camberos or Cons), or about deficiencies in speech and language services, and those issues are not within the scope of the present case.

comprehension, significantly delayed self help skills, and delayed gross motor skills. Her behavior excesses were listed as self-stimulatory and perseverative behavior (shaking her arms and body, hand flapping, and stiffening her muscles), escaping behavior (avoiding eye contact, ignoring others, walking away, or crying/screaming), and disruptive behavior (crying or screaming). Ms. Venezia testified that Student's behavioral goals, previously reported as accomplished in the CARS June 2005 progress report, were not accomplished by Student as of their baseline performance observations. Student's baseline behavior for "requesting" in October 2005 was using one or two words, crying or screaming. They confirmed Student's continued behavioral problems in a December 2005 progress report, indicating that Student exhibited tantrum behaviors (crying, whining) when transitioning away from her mother, and throughout a classroom session if she did not like the activity. Stepping Stones' observations in the classroom support Parent's contention that District's claim, in connection with the June 2005 IEP, that Student no longer needed positive behavior support services was incorrect.

32. Stepping Stones recommended that Student receive Lovaas-style ABA behavioral intervention methodology, at the rate of 12.5 hours per week at home, and 31.25 hours per week at school, for a total of 43.75 hours per week, with an additional .75 per week per therapist for bi-weekly clinic meetings, and 4.5 hours of supervision. The methodology described included daily one-on-one teaching sessions with someone trained in ABA techniques at home and at school, compilation of daily data on the targeted behaviors, modified DTT, social skills training, incidental teaching, and a differential reinforcement of alternative behavior (DRA) schedule of reinforcement for alternate replacement behaviors. These are the services that District has agreed to reimburse to March 3, 2006, pursuant to the stipulation at hearing.

33. To implement the new behavior intervention plan, Stepping Stones created eleven annual goals to be achieved by September 2006. Stepping Stones personnel did not use District's goals and objectives established by the IEP team to create their goals for Student. They were not under contract to the District and viewed the IEP as irrelevant to their role. The Stepping Stones goals addressed receptive and expressive communication to follow instructions and express Student's needs, increase her vocabulary, answering questions, visual performance, reading skills, math skills, play activities, reduction of self stimulatory behavior, and self help skills for washing her hands and requesting to use the toilet to reduce or eliminate the diapers.

34. Stepping Stones behavior therapists did not view their work with Student to be "teaching" but behavior therapy. For example, if the teacher in the classroom worked on a new math problem, Student's learning delays would often impede her ability to grasp the lesson. The therapist would then go over the same material at home, and increase Student's rate of learning by repeating the exercise. Janette Alison, who has worked with Student three days a week, has a Bachelor of Arts in psychology, and is a Master's candidate in psychopathology and behavior disorders (although her resume in evidence stated she already has the Master degree). Stepping Stones personnel believe Student needs a one-on-one aide in school, as well as at home, because her short attention span prevents her from accessing

the educational program without assistance and direction that the teacher cannot provide. When they began working with Student, her attention span was approximately ten minutes maximum (contrary to a claimed 45 minutes previously reported by CARS). Ms. Venezio credibly testified that Student's tantruming behavior has nearly been eliminated.

35. District's classroom teacher, Ms. Cons, agrees that Student still needs someone in class with her, although she also thinks Student should have some times when she can participate independently. Dr. Freeman observed Student at school for over an hour a few weeks before the hearing. She also thinks Student still needs a full-time aide with training in autism, ABA, Student's behavior issues, her school goals and objectives, and ongoing supervision by an autism specialist. She normally would not recommend continued home intervention services for a six-year old, but credibly testified that Student is an exception. Because Student has missed the benefit of intensive intervention for so long, Dr. Freeman concludes that she still needs at least 15 hours per week of home based therapy as well.

36. Beginning in late January 2006, after District provided AAA Gonzales for Student in the classroom, difficulties arose between the District personnel and the Stepping Stones behavior therapists, and between Ms. Gonzales and Ms. Alison in particular. While Stepping Stones gave lip service to the obligation of the classroom teacher, Ms. Cons, to be in charge of the educational content of the class, Stepping Stones personnel viewed themselves to be in charge of Student. Stepping Stones disagreed with the length of some of Ms. Cons' activities, and pulled Student from them after ten minutes or so. Their desire to redirect Student from inappropriate behavior, such as whining, clashed with the teacher's or the AAA's goals. Stepping Stones disagreed with the teacher's token system, believed she was implementing it wrong, and preferred their own token system to reward task completion. District staff believed Student did not like to be prompted too much and were working toward self-management, and viewed Stepping Stones as overly dominating Student's access to the class or other students. Ms. Alison disapproved of District's placement of Student in a mainstreamed music class, where her autistic behaviors and limited motor skills rendered her disability more visible, and disagreed with Ms. Gonzales' approach to Student's self stimulatory behavior, such as handflapping.

37. As a result of the clash between the District personnel and Stepping Stones, Ms. Venezio requested a meeting in about late February 2006, which was attended by her, Vice Principal Diedrich, Ms. Cons, and Parent. District agreed they wanted to work with Stepping Stones and discussed techniques all could use in common. However, nothing was agreed upon at that meeting and another meeting was suggested. As of the time of the hearing herein, the issues remained. Although District has a staff of autism specialists, no evidence was presented as to why an experienced autism specialist was not at least assigned to consult with the classroom staff, separately or with Stepping Stones.

38. At hearing, Parent credibly testified that she has now seen a dramatic difference in her daughter's academic, behavioral, and functioning skills since Stepping Stones has been providing services, compared to the prior services of CARS. She described

Student as “a different child,” who expresses her needs more, rather than engaging in inappropriate behavior. Socially, Student has a peer friend at school for the first time. Student was able before to read some sight words but was not able to retain them, and now she can. Parent has seen improvement in writing skills as well. In addition, Parent has been able to fully participate, attend meetings, and receive training, instead of being virtually excluded as before.

39. The preponderance of the evidence supports a finding that Student’s recent improvement is attributed, in significant part, to the intensive home and classroom intervention services she has received from the NPA, Stepping Stones. Aspects of the classroom lessons that may be appropriate for other SLD pupils were not modified or adapted by Ms. Cons to meet Student’s unique needs. Rather, the behavior specialist would take the generalized classroom lesson, pull Student out when she was reaching a frustration point, or take the lesson home for repetition and review. Stepping Stones testified that persistent prompting from a therapist is still necessary to ensure that Student receives and is able to process instruction in order to benefit from it, but that their goal is to fade the prompting. However, the evidence does not support Student’s claim that only ABA methodology can provide such benefit to her. Rather, the evidence shows that a professional and competent company, which delivers consistent, intensive, and responsible services, makes a difference and provides Student with some educational benefit.

District’s Staff Training and Methodologies

40. District has special education training programs for their personnel. Because the District now has about six thousand autistic or autistic spectrum disorder (ASD) children in the school system, District has hired additional staff trained in a broad range of autism methodologies to train and work with the schools. The District has four local regions, or districts, and there is now an autism specialist for each one, who works with District’s main Autism Center. There is a vice or assistant principal at every school who is responsible to oversee special educational services at that school. Nancy Franklin, District’s Coordinator of Special Education - LRE and Behavior Support since 2003, has over 14 years of special education leadership with the District, including specializations in LRE, behavior, and inclusion services. She helped design the positive behavior support plan training that is part of a district-wide training program in special education and disabilities for “paraeducators” (classroom aides and AAAs) and others.¹³ Tier I of the full program is mandatory for all paraprofessionals, and is about 12 hours long over several days. The autism portion includes awareness of autism, behavior, methodologies including PECS, TEACCH,¹⁴ ABA, and DTT, communication, sensory issues (noise, lack of response), roles and responsibilities. The initial part of the training is a three hour basic introduction. Tier II is voluntary, also about 12 hours, and divides the training into three areas: behavior, autism, and inclusion. In part, it

¹³ The training is also being provided to principals, assistant or vice principals who supervise paraeducators, and to district school sites on request.

¹⁴ “TEACCH” stands for Treatment and Education of Autistic and Related Communication Handicapped Children.

covers behavior support plans, functions of behavior, the “ABC’s” of data collection,¹⁵ scenario work, and resource information. On February 17, 2006, Ms. Franklin conducted a modified three-hour version of the Tier I introductory behavior support training at Liberty, attended by Ms. Gonzales. Ms. Franklin understood she was to conduct the training at Liberty because of an unspecified due process matter. No evidence was presented as to why Ms. Gonzales has not received the entire 12 hours of mandatory Tier I training for paraprofessionals.

41. Sharon Asarch, the District’s lead Program Specialist in Special Education-LRE and Autism since 2002, holds California certificates for Severely Handicapped and Learning Handicapped Life Specialist, and Administrative Services, and a Master of Arts in Educational Leadership, with an emphasis in autism and behavior analysis. She has a background in different methodologies for autism, taught autistic children for over 20 years, and now does district training in “best practices” methodologies, along with two autism specialists. Her professional training includes ABA, DTT, PECS, TEACCH, Hughes Bill, techniques for social skills development, and many other areas. In 2000, she was selected to receive both Program and Professional of the Year awards from the Autism Society of America. Ms. Asarch conducted a three-hour training at Liberty on March 2, 2006, attended by Ms. Gonzales, involving an overview of autism behavior deficits and strategies, modifications, and accommodations. This training involved parts of the autism sections of Tier I and Tier II, and Ms. Asarch was only assigned three hours within which to do it.

42. District utilizes “best practices” approaches that are research based methodologies that have proven effective with autistic children. The umbrella methodology of ABA, or general applied behavioral analysis, includes the principles of ABC, and underlies the District’s approach to their obligation to develop positive behavior support for pupils. District staff training includes understanding that behavior has a function, and that staff must search to find that function when behavior that impedes education occurs, to identify the antecedents that precedes the occurrence of the behavior, and to be aware of the consequences of the behavior. District also uses and teaches a modified discrete trial teaching for severely impaired autistic children usually aged three to five years old with little or no ability to attend or learn, but does not identify Student in that category. District also uses TEACCH and PECS. Ms. Cons did not use DTT or modified DTT in her class. Although she did not believe she used “ABA” methods, as defined by Student to include Lovaas-style ABA or DTT, she did use behavioral analysis methods such as redirecting, routines, prompting, token economy, and schedules.

¹⁵ ABC is an acronym for identifying the antecedents to the behavior at issue, the function of the behavior, and the consequences of the behavior.

LEGAL CONCLUSIONS

Applicable Law

1. Petitioner, the Student and her Parent, have the burden of proof as to the issues in this proceeding. (*Schaffer v. Weast* (2005) ___ U.S. ___ [163 L. Ed. 2d 387].)

2. The reauthorized Individuals with Disabilities Education Improvement Act at 20 U.S.C. §1400 et seq. (IDEA 2004) became effective July 1, 2005. Prior to that, at the time the June 2005 IEP was conducted, the prior version of the IDEA was in effect (IDEA). The law requires that a “free appropriate public education” (FAPE) is made available to children with disabilities and other exceptional needs. FAPE is defined as special education, and related services, that are available to the student at no cost to the Parent, that meet the State educational standards, and that conform to the student’s “individualized education programs” (IEP). (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5 § 3001, subd. (o).) The term “related services” (DIS in California) has been redefined in IDEA 2004, but still 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).) School districts are charged to develop, and propose school placements for children with disabilities in educational programs based on their unique assessed needs. (*Benjamin G. v. California Special Education Hearing Office* (2005) 131 Cal. App. 4th 875 at 878.)

3. Until July 1, 2005, school districts receiving federal funds under IDEA were required under 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that contained: (1) a statement regarding the child’s then-present levels of academic achievement and functional performance; (2) measurable annual goals, including benchmarks or short-term objectives; (3) a statement of the special education and related or supplementary aids and services to be provided to the child; (4) a statement of the program modifications or supports for school personnel that will be provided; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular; and (6) other required information, including the anticipated frequency, location, and duration of the services. Effective July 1, 2005, the law now requires that the special education and related services and supplementary aids and services must be “based on peer-reviewed research to the extent practicable.”

4. 20 U.S.C. § 1400(c)(5)(E), cited by Student, does not contain a mandate that the District could “violate,” but instead contains Congressional findings for IDEA and IDEA 2004. The version in effect as of June 2005 states: “Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by ...supporting high-quality, intensive professional development for all personnel who work with children in order to ensure that such personnel have the skills and knowledge to enable” the children to meet their goals and be prepared in life. A Congressional finding to include “preservice preparation” was added in IDEA 2004, along with a finding that the skills and knowledge should include “scientifically based instructional practices” was also added, and was not in effect when the June 2005 IEP was formulated.

The relevant requirement is found at 20 U.S.C. § 1412(a)(14)(B), which addresses personnel standards, and mandates that the State educational agency shall establish standards¹⁶ to ensure adequate preparation and training for related services and paraprofessionals. It provides that qualified paraprofessionals, who are trained and supervised, may be used to assist in the provision of special education to children with disabilities. Education Code section 56205(a)(14) permits each SELPA to establish personnel standards in conformance with the IDEA, and Education Code section 56241 requires staff development programs to be provided for school staff and administrators, including paraprofessionals.

5. According to the United States Supreme Court, a FAPE must meet 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 Education. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, at 178-89.) The *Rowley* court rejected the argument that school districts are required to provide services “sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” (*Ibid*, at 198.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

6. The *Rowley* opinion established that as long as a school district provides an appropriate education, the methodology employed in so doing is left up to the district’s discretion. (*Rowley*, 458 U.S. at 208.) A hearing officer must give “appropriate deference to the decisions of professional educators.” (*MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 533.) 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 School Comm.* (1st Cir. 2004) 361 F.3d at 84 (citing *Roland M.*, 910 F.2d at 992-93).) In *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, at 1149-1150, , 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. (citing *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, 1314.)

¹⁶ IDEA 2004 changed the word “standards” to “qualifications” and added new language.

7. The public educational benefit must be more than *de minimis* or trivial. (*Doe ex rel. Doe v. Smith* (6th Cir. 1989) 879 F.2d 1340.) Just how much more than a de minimis educational benefit is required is unclear. The Third Circuit has held that an IEP should confer “a meaningful educational benefit.” (*T.R. ex rel. N.R. v. Kingwood Township Bd. of Education* (3rd Cir. 2000) 205 F.3d 572, 577 (citing *Polk v. Cent. Susquehanna Intermediate Unit 16* (3rd Cir. 1988) 853 F.2d 171, 182.)

8. If Parent disagree with the IEP and proposed placement, they may file a request or notice for a due process hearing. (20 U.S.C. § 1415(b)(7)(A).) In this case, procedurally, the IDEA 2004 applies because the due process complaint was filed in September 2005, after it went into effect. Under IDEA 2004, the party requesting the due process hearing may not raise issues at hearing that were not raised in the complaint, unless the other party agrees. (20 U.S.C. § 1415(f)(3)(B).) In addition, a procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child’s right to a free appropriate public education; (b) significantly impeded the Parent’s opportunity to participate in the decision making process regarding the provision of [FAPE]; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) and (ii).) (See also Education Code section 56505, subdivision (j); and *W.G. v. Bd. of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 1483-1484 (9th Cir. 1992).)

9. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Keizer School Dist. No. 24J* (D.Or. 2001) 155 F. Supp.2d 1213, 1236.) The focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the Parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307 at 1314.)

10. On the issue of behavioral supports or interventions, 20 U.S.C. § 1414 (d)(3)(B)(i) provides that the IEP team shall: “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (See also 34 Code of Federal Regulations (CFR) § 300.346(a)(2).) 34 CFR § 300.346(c) requires that if the IEP team considers behavioral factors, and if the team determines that a child needs a particular service, “including an intervention, accommodation, or other program modification in order for the child to receive FAPE,” the team must include a statement to that effect in the IEP.

11. Education Code section 56341, subdivision (b)(2) provides that the IEP team shall include not less than one regular education teacher of the pupil, “if the pupil is, or may be, participating in the regular education environment.” The regular education teacher shall, “to the extent appropriate,” participate in the development, review, and revision of the pupil’s IEP, “including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program

modifications or supports” pursuant to 20 U.S.C. § 1414(d). In *M.L. v. Federal Way School District* (9th Cir. 2004) 387 F.3d 1101, the U.S. Court of Appeals concluded that as long as a general education placement was a possibility, the participation of a general education teacher in the creation of the IEP was required, and the absence constituted a denial of FAPE. In addition, the IEP team must include a representative of the local educational agency who is qualified to supervise the provision of (or provide) special education to meet the unique needs of the student, and is knowledgeable about the general curriculum and the availability of resources. (20 U.S.C. 1414(d)(1)(B)(iv).)

12. Court decisions have extended equitable relief in the form of compensatory education to students who have been denied a FAPE. (See, e.g. *Lester H. v. K. Gilhool and the Chester Upland School district* (3rd. Cir. 1990) 916 F. 2d 865; *Miener v. State of Missouri* (8th Cir. 1986) 800 F. 2d 749.) Compensatory education is an equitable remedy. Education Code section 56505, subdivision (f) requires the written decision after hearing to state the reasons for the provision of nonpublic agency services, or for the reimbursement for such services. There is no obligation to provide day-for-day or hour-for-hour compensation. “Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA.” (*Student v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1497.)

Determination of Issues:

In connection with District’s June 2005 IEP, did District fail to offer or provide Student a free and appropriate public education (FAPE) due to the following:

Issue 1(a): Failing to provide Student with a full time one-on-one aide, properly qualified, and properly trained to have the skills and knowledge to work with Student?

13. Pursuant to Factual Findings 5, 11, 13, and 18, the June 2005 IEP offered Student a full-time AAA, and declined Parent’s request to fund a behavior therapist from an NPA for the 2005-2006 school year. District declined the NPA service, in part at least, because CARS was still implementing the BII/BID services until the end of August 2005. Although the IEP did not specify that the AAA had to be qualified or trained for the position, the law requires District to ensure that its paraprofessionals working with Student must be trained, qualified, and supervised. District therefore committed to provide Student with a full time trained, qualified AAA for six hours a day in the new SLD classroom. District failed to provide Student with a properly trained, or properly qualified full-time one-on-one aide in the following respects:

(A) As found in Factual Findings 5, 7, 13, 14, 15, 16, 17, 18, 20, 21, and 22, the CARS behavior therapists, who attended Student from the June 2005 IEP through August, 2005, do not count to fulfill District’s obligation to provide a full time aide because they were not offered to Student as such in the IEP, they were not full time, and no evidence was produced to show the qualifications of the three CARS behavior specialists who actually provided behavior therapy services to Student from June 24, 2005 to September 1, 2005.

Even if the behavior specialists were “properly trained,” they did not implement that training in attending to Student. There is no evidence that the CARS behavior specialists taught Student positive replacement behaviors at any time, or compiled behavioral data after the June 2005 IEP. If they had been properly trained, they would have intervened when Student’s behavior began to regress beginning in July 2005, and they failed to properly attend to Student’s needs.

(B) As found in Factual Findings 19, 20, 21, and 22, no evidence was produced by either party to show the qualifications or training of the AAA the District provided to Student from July to October 2005, Mr. Garcia. The burden of proof in this proceeding is on Student. Student failed to present evidence to establish that AAA Garcia was not generally qualified or trained to be Student’s aide. No evidence was produced as to whether Garcia did or did not keep behavioral logs to support Student’s BSP. The circumstantial evidence gleaned from Student’s behavioral difficulties is insufficient to support a determination whether Garcia was or was not qualified or trained, except as determined in Paragraph 13(C) below.

(C) Pursuant to Factual Findings 11, 12, 19, and 20, Mr. Garcia, the AAA provided by the District from July to October 2005, was not qualified for the position because he was a male aide. It was inappropriate for District to assign Student a male AAA, given the age and needs of the child. The June 2005 IEP assigned the AAA to be a responsible person to attend to Student’s toileting needs and self help skills, which included changing her diaper and cleaning her body when she soiled. Student should have been assigned a female aide.

(D) As found in Factual Findings 24 and 28, from October 2005 to January 23, 2006, District failed to provide any full time AAA to assist Student with anything whatsoever. Student had no AAA to assist with attending to lessons, focusing, and accessing the educational curriculum, or with supporting and intervening to assist Student to attain District’s goals and objectives, including the self help toileting goal, or to implement or monitor District’s BSP and behavioral goal for Student.

(E) As found in Factual Findings 28, 29, 30, 36, 37, 40, 41, and 42, from January 23, 2006, until about one week prior to the hearing, District failed to provide a properly trained, full time aide for Student, in that AAA Ms. Gonzales did not receive any training in behavior support plan methodology, including behavior support plans, functions of behavior, the ABC’s of data collection, or communication training. Since the June 2005 IEP required the AAA to be a responsible person to implement the BSP, District’s failure to train Ms. Gonzales in BSP components and practices resulted in the provision of an aide untrained to support Student’s BSP. Ms. Gonzales had no idea at hearing that she had any role regarding Student’s BSP. In addition, Ms. Gonzales had no training in autism until shortly before the hearing. District has a mandatory Tier I training program, including an autism component, that Ms. Gonzales had not completed, and her lack of awareness of needs and behaviors unique to autism was inappropriate.

(F) Student's contention that Ms. Gonzales was otherwise not qualified to be Student's aide because of her lack of focused training in Lovaas-style ABA methods for autism is rejected. As found in Factual Findings 28, 29, 30, 36, 40, 41, and 42, Ms. Gonzales had several years of experience as an AAA with the District, including limited formal training and hands on training in special education, and prior supervision by the assistant principal and classroom teachers. She was not required to be a specialist in any particular methodology, let alone Lovaas-style ABA. (See Issue 1(b) below.)

Issue 1(b): Failing to include the use of scientifically based instructional practices based on peer reviewed research, specifically, Lovaas-style applied behavioral analysis (ABA)?

14. Student's contention that the District's "school based services" are not supported by "scientifically based" or "peer reviewed" research is rejected. As found in Factual Findings 10 and 18, District's June 2005 IEP was effective on June 24, 2005, and IDEA 2004 was not effective until July 1, 2005. IDEA 2004 added as new requirements that educational methodology should be scientifically based or based on peer reviewed research "to the extent practicable." Both case law and the rules of statutory construction indicate that the applicable law for evaluating the IEP is the statute in place at the time the IEP was developed. (See *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 n. 1 (citing *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1148 n. 2).) Therefore, the new requirements are not applicable to this case.

15. Even if the "scientifically based" components of IDEA 2004 were applicable in this case, the law requires such programs "to the extent practicable." Autism research and methodologies are changing on an on-going basis. (Factual Finding 18.) Both California and the federal government are funding massive research in the field of autism, and it would not be desirable or practicable to limit District to one narrow methodology for Student. In addition, as found in Factual Findings 40, 41, and 42, District's methodologies are scientifically based on "best practices" in the autism field. District's instructional program for Student includes broad application of general applied behavior analysis principles in the development of their behavior support services. District utilizes methods and practices that are supported by scientific and peer reviewed research, including TEACCH, PECS, and ABA. Student contends that Lovaas-style ABA is the only "peer reviewed" methodology that should be used for Student because the original 1987 Lovaas study (Young Autism Project, UCLA) has finally been replicated and reported. The fact that the Lovaas behavior modification methodology was not replicated for almost twenty years has long been one of its critical deficiencies. Other criticism of Lovaas-style ABA includes that the focus on DTT, repetitive discrete skill drills, is overly restrictive, and that the intensive one-on-one teaches over-dependence on an adult, on verbal prompts, and on token or food reinforcers. (*County School Board of Henrico county v. Z.P.* (2005) 285 F. Supp.2d 701.) There is nothing in the legislative history of IDEA 2004 to indicate that the new provision's requirement to use scientifically based programs "to the extent practicable" was intended to overturn the longstanding rule in *Rowley, supra*, that choosing among appropriate methodologies should be left up to the school district. Even if the Lovaas-style ABA

program were the best program to provide Student with optimal progress, District is not required to provide optimal services, but to provide a basic foundation of educational benefit.

Issue1(c): Failing to offer Student a home based Lovaas-style ABA program in its offer in order to provide appropriate behavior support to Student?

16. Pursuant to Factual Findings 6, 18, 20, 21, 22, 26, 28, 30, 31, 34, 35, 38, 39, 40, 41, and 42, District was required to offer Student a home based program of intensive intervention in order to receive continued intensive intervention and behavior support, and to allow her to have consistency across her home and school learning environments. The evidence established that Student still needs adult supervision to attend to the teacher, focus, and be redirected due to her short attention span. In addition, she needs repetition and generalization between home and school. However, District's obligation did not extend to providing a restrictive program based solely on ABA methods. (See Determination of Issues 15 above.) Student, Dr. Freeman, and District all cited the 2001 report by the National Academy of Sciences, *Educating Children with Autism* (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, Washington D.C; National Academy Press). Both TEACCH and the Lovaas Young Autism Project were among the ten models of early autism intervention researched and reported by the Committee, at the request of the U. S. Department of Education. The Committee found that early intensive educational intervention made a significant difference in the educational progress of autistic children. No direct relationship was found between any of the intervention programs and progress made. Regardless of the program, the consensus was that the intervention program, to be effective, needs to have intensive instructional programming in a variety of settings. Even though the Lovaas-style methodology is what Student refers to as "ABA," the National Academy of Sciences Committee stated: "Rather than being tied to specific procedures, applied behavior analysis includes any method that changes behavior in systematic and measurable ways." (*Ibid*, at pg. 148.)¹⁷

17. As found in Factual Findings 4, 5, 6, 13, 15, 16, 17, 18, and 31, Student was denied significant benefit from District's prior award of intensive intervention as compensatory education in the amount of 570 hours of BII and 57 hours of BID, because the manner in which CARS designed and implemented their behavior support intervention program with Student did not result in measurable benefit to Student, and Student significantly regressed beginning in the last two months of their program. District offered CARS as one of a limited number of agencies for Parents to select, but the service contract was entered into between CARS and District. CARS services to Student resulted in only limited, short term classroom benefit from March through June of 2005. During that time, CARS manipulated simplistic random data about Student's behavior and reported to the IEP

¹⁷ Student cites *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, as authority that only Lovaas-style ABA methodology provides FAPE for young autistic students. However, *Deal* is not from the Ninth Circuit; and the school district in that case had a predetermined policy to reject any ABA techniques in its program, unlike the District in the present case.

team on June 10, 2005, that Student had achieved all five goals and objectives that were their responsibility (omitting a sixth goal). Their report was factually inaccurate and CARS misled District into assuming that, when CARS hours would be completed at the end of August, no further home based NPA services would be required to support Student, and that providing an aide at school would be sufficient.

18. As found in Factual Findings 6, 15, 16, 17, 18, and 31, in fact, Student had not achieved most of her goals and objectives by June 2005, and displayed none of them by October 2005. In addition, Dr. Freeman conducted a thorough psychological assessment of Student in May 2005, and found virtually no improvement in Student's core communication and social skills since 2004. District's reported progress for Student consisted of an increase of 20 to 25 words in her vocabulary, some limited progress in articulation and reading readiness, and meeting her math goal. However, Student's limited academic progress is regarded as virtually de minimis when compared to the lack of progress in those significant areas.

19. Pursuant to Factual Findings 19, 20, 21, 22, and 26, Student experienced massive change when she transferred to Liberty, and, given Student's limited verbal expressive communication skills, she acted out first with crying, then with aggression against both adults and students. As of District's IEP meeting of October 2005, a teacher reported continued aggressive behavior, and District's effort to minimize the behavior problem is rejected. As found in Factual Findings 6, 18, and 35, Dr. Freeman's assessment of Student on May 27, 2005, is determined to be credible, as is her testimony and professional opinion that Student requires continued educational and behavioral intervention in the home at this time to ensure the continuity of skills and lessons in both the home and school environments. The combination of the mishandling by District and CARS of Student's behavior support services, and District's failure to timely provide a qualified, trained AAA for Student for many months compel the conclusion that Student was denied a FAPE, and is entitled to compensatory education until her next annual 2006 IEP. The mistakes and unprofessional conduct of CARS must be imputed to the District for purposes of finding that the June 2005 IEP did not offer Student a FAPE because of its omission of any offer of appropriate, and continued home and school based behavior support and intervention services. Because the home component to the support services is still necessary, a classroom AAA is insufficient, and the same NPA should provide both the home and the school components.

20. Pursuant to the legal authorities cited above, District remains entitled to exercise their discretion in the choice of intervention methodologies and service providers. Pursuant to Factual Findings 34, 38, and 39, Student's core communication and socialization skills are finally beginning to progress through the Stepping Stones services. Given the short time remaining before Student's next annual June 2006 IEP, it is recommended that District consider retaining the services of Stepping Stones to provide continued and consistent behavior support services to Student in the home and at school. Stepping Stones would then be able to work cooperatively under contract with the District, be obligated to use District's goals and objectives, and the classroom strains between various adults and Student's program would be reduced. In the event that District chooses to retain another NPA to

provide the behavior support services to Student, that NPA shall not be CARS. If District chooses to retain another NPA, instead of Stepping Stones, it is determined that to avoid a denial of FAPE, Student's significant difficulties with transition must be addressed with a transition plan to fade Stepping Stones over a period of not less than thirty days. It is critical that District's continued services include adequate supervision, and parental training and involvement. FAPE requires the continuation of the services of an NPA to provide continuity and intensity of autistic behavior support and intervention services both at home and at school.

Issue 1(d): Failing to have a general education teacher attend the June 2005 IEP meetings?

21. As found in Factual Findings 7 and 10, District did not have a general education teacher at either the June 10, 2005, or the June 24, 2005, IEP meetings. Parent did not waive her right to have a general education teacher present at either meeting, as she had done on occasion in the past. Pursuant to Factual Findings 9, 10, 11, 12, 19, and 20, there was more than a mere possibility that Student would be participating in the regular education environment, as District allocated a significant percentage of Student's daily time to general education. The absence of a general education teacher at the June 2005 IEP meetings must be considered a denial of FAPE, even though Student was not placed in a general education classroom full time, for several reasons. As indicated, the IEP team was required to include a general education teacher because Student was transferring to a different school in order to have mainstreaming opportunities. Secondly, District and the IEP team designed new goals and objectives, the responsibility for two of which was to include a general education teacher. Finally, because Student was transferring in order to have mainstreaming opportunities, and peer modeling opportunities, the insights of a general education teacher during the IEP process could have promoted specific discussions about transition, and the development of a transition plan. The absence of a general education teacher impeded Student's right to a FAPE, and Parent's right to meaningfully participate in the decision making process.

Issue 1(e): Failing to have an administrative designee attend the June 2005 IEP meetings who was authorized to provide or supervise home and classroom based Lovaas-style ABA therapy?

22. Pursuant to Determinations of Issues 1(b) and 1(c) above, District was not obligated to provide Student with Lovaas-style ABA behavior support therapy at school or at home. Therefore no administrative staff personnel at the June 2005 IEP meetings needed to be specifically authorized to provide or supervise such therapy. As found in Factual Findings 7 and 10, CARS representatives, who were then providing behavior support services in the home and school for the District, were present. Vice Principal Marson was present representing the District. As found in Factual Findings 40, Mr. Marson was designated by District as the supervisor of special education services at Student's school, Liberty. Mr. Marson's presence complied with the IDEA's requirements. Student bears the burden of proof and did not offer any evidence that Mr. Marson was not qualified in his position to supervise that which he was appointed to supervise.

23. Student contends that District also committed a procedural violation by failing to have such an administrative designee at the October 2005 IEP Amendment meeting. At that time, Liberty's vice principal and special education supervisor was April Diedrich. The above reasoning would apply. However, Student's complaint was filed on September 29, 2005, prior to the October 27, 2005 IEP meeting. This case does not involve any violations of law or due process related to the October 2005 IEP.

Issue 2: Since District has stipulated to reimburse Parents and provide compensatory education to Student as set forth in Stipulations 2(a) and 2(b), for the period from July 2005 through March 3, 2006, is Student entitled to any further services as a resolution of this case?

24. Pursuant to the stipulation for compensatory education by the parties, District has agreed to reimburse Parents for the prior Stepping Stones services from October of 2005 to March 3, 2006, a period of about five months. Because of the substantive and procedural violations of the IDEA and California special education law, as found in Determination of Issues 1(a)(13)(A), 1(a)(13)(C), 1(a)(13)(D), 1(a)(13)(E), 1(d), and 2, above, Student is entitled to additional compensatory education until her next annual IEP meeting, as requested by Student and Parent, and contained in the Order below. Pursuant to Factual Findings 6, 18, and 35, Dr. Freeman's observations of Student shortly before the hearing, and her evaluation of Student's progress to date, lead to the conclusion that Student is still entitled to DIS services that support her communication, self help, and socialization skills that are a significant component of her education, and her ability to access functional and academic education. Although no hour for hour measure is required to determine compensatory education, it is determined that Student still needs remedial intensive behavior services to make up for District's earlier violations.

ORDER

1. Pursuant to the stipulation of the parties, District shall reimburse Student and her Parents for all services provided to Student by Stepping Stones Center for Autistic Spectrum Disorders, Inc. (Stepping Stones), a certified Nonpublic Agency (NPA), from July 2005 through and including March 3, 2006, upon appropriate invoice and verification of payment made by Parents to Stepping Stones.

2. Pursuant to the stipulation of the parties, the services to be reimbursed in Order 1 above include all school-based services as well as services provided outside the school setting, including behavior intervention development and implementation, and all supervision provided by that agency.

3. District shall reimburse Student and her Parents for all services provided to Student by Stepping Stones, as defined by the parties in Order 2 above from March 4, 2006, through and including the effective date of this Decision, upon appropriate invoice and verification of payment made by Parents to Stepping Stones.

4. District shall provide combined home and school based autistic behavior support and intervention therapy services for Student from a reputable NPA, excluding CARS, from the effective date of this Decision until Student's next 2006 annual IEP, including but not limited to the following:

- (a) 30 hours per week of school based one-on-one services;
- (b) 15 hours per week of home based one-on-one services;
- (c) 4.5 hours per week of supervision;
- (d) 9 hours per month of clinic meeting time; and
- (e) If the NPA is not Stepping Stones, a transition plan to fade Stepping Stones within not less than 30 days from the date the new NPA begins services.

PREVAILING PARTY

Student prevailed on Issues 1(a)(13)(A), 1(a)(13)(C), 1(a)(13)(D), 1(a)(13)(E), 1(d), and 2, for hearing in this case. District was the prevailing party on Issues 1(a)(13)(B), 1(a)(13)(F), 1(b), 1(c), and 1(e). (Ed. Code § 56507, subd. (d).)

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. Or, a party may bring a civil action in United States District Court. (Ed. Code § 56505, subd. (k).)

DATED: June 2, 2006

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings