

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

STUDENT,

Petitioner,

v.

POMONA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2006010049

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

DECISION

Martha J. Rosett, Administrative Law Judge of the Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on March 27, 28 and 29, 2006, at the offices of the Pomona Unified School District in Pomona, California.

Bruce Bothwell, Attorney at Law, represented Petitioner (Student) and his parents. Advocate Robert Roice represented Respondent Pomona Unified School District (District). District Director of Special Education, Trena Spurlock, and District Program Administrator for Special Education, Dr. Patti Adams, Jr., were present throughout the proceedings.

Oral evidence and documentary evidence was received. Presentation of evidence was completed on March 29, 2006. The record was held open for written closing arguments. Student's closing brief was received on April 18, 2006, District's closing brief was received on April 26, 2006 and Student's Reply was received on May 12, 2006. The record was closed and the matter was submitted for decision on May 12, 2006.

ISSUES

The issues to be determined are as follows:

1. For the period from Student's initial Individual Educational Program (IEP) meeting on November 18, 2004, to the end of the 2005 extended school year, did the District offer him a free appropriate public education (FAPE) in the least restrictive environment

2. For the period from the beginning of the 2005-2006 school year, to his next anticipated annual IEP meeting, did the District offer Student a FAPE in the least restrictive environment?

3. Should the District be ordered to reimburse Student's parents for the independent educational evaluation obtained from Dr. Robin Morris?

Contentions of the Parties

1. Petitioner contends that the District failed to provide Student with a FAPE for the 2004-2005 school year and for the 2005-2006 school year. As to the 2004-2005 school year, Petitioner contends that by failing to invite Student's preschool teacher to the November 2004 IEP meeting, the District committed a procedural violation of state and federal special education law which, by itself, constituted a denial of Student's right to a FAPE. In addition, Petitioner contends that the District did not offer Student an educational program designed to meet his individual needs, and reasonably calculated to provide Student with some benefit in the areas of behavior and communication, by offering an inadequate amount of language and speech services and by not providing occupational therapy and a behavioral intervention plan until Spring of 2005. As to the 2005-2006 school year, Petitioner contends that the District failed to offer a program which included the use of scientifically based instructional practices as required by 20 U.S.C. Section 1400(c)(5)(E). Petitioner argues that to make meaningful educational process, Student needs to continue in his privately provided, Discrete Trial Training (DTT), intensive behavior therapy program on a year round basis. Finally, Petitioner contends that the District failed to assess Student in all areas of suspected disability, and that Petitioner is therefore entitled to reimbursement for the cost of the Independent Educational Evaluation performed by Dr. Robin Morris.

2. The District contends that it provided Student with a FAPE for the 2004-2005 school year in the preschool special day class taught by Ms. Alexander. The District points to numerous modifications which were made during the seven months that Student was in this class, including assessments, behavioral interventions, and occupational therapy to adjust to Student's changing needs. Petitioner demonstrated growth with these accommodations. The District further contends that it offered Student a FAPE for the 2005-2006 school year through a special day class which uses several scientifically based instructional practices, including Applied Behavioral Analysis techniques. In addition, in its modified offer of FAPE, the District has offered 20 hours per week of one-on-one Discrete Trial Training outside the classroom and the assignment of a full-time aide with the student when he was participating in classroom activities. The District contends that the offer made at the November 2005 IEP meeting was designed to meet Student's unique needs, was reasonably calculated to provide for Student's needs in the least restrictive environment. The District argues that since parent has not accepted placement at Kingsley for a full day, it has not been able to demonstrate that the offered program would provide Student with a FAPE. Finally, the District contends that it has appropriately assessed Student in all areas of suspected disability and that it is not required to pay for the independent evaluation by Dr. Morris.

FACTUAL FINDINGS

Procedural Background

1. On January 3, 2006, Petitioner filed a Due Process Complaint with OAH in Sacramento. Hearing was originally set for February 28, 2006. On February 14, 2006, pursuant to the parties' mutual request, the matter was continued and reset to commence on March 27, 2006 for four days.

2. Hearing was held on March 27, 28 and 29, 2006. Presentation of evidence was completed on March 29, 2006. Following submission of written closing arguments and replies, the record was closed and the matter was submitted for decision on May 12, 2006.

Facts

3. Student is a five and one half year-old child, born September 17, 2000. He resides with his parents and grandmother within the District, and is the parents' only child. Student attends Kingsley Elementary School (Kingsley). He is eligible for special education services under the classification "language and speech disorder with autistic like behaviors," and was originally placed in Kingsley as a pre-kindergartner in the fall of 2004.

4. In September of 2004, at the age of four, Student was first diagnosed with "mild autism" by his private physician. At the time, Student was attending a private pre-school. Shortly after his diagnosis, Student's parents went to the District to have Student's educational needs assessed.

Initial Assessment and 2004 IEP

5. On October 28, 2004, the District performed a Transdisciplinary Preschool Team Assessment. The District's assessment team included three District psychologists from the Early Development Search and Serve section of the Special Education Department, a special day class teacher and a nurse. The team assessed Student in all areas of suspected disability, including health, physical and social development, behavior and autism. In addition to a thorough health assessment, the team administered several developmental tests, observed Student in his preschool setting, and spoke with his pre-school teacher about her observations of Student.

A. The standardized tests administered by the District relied on data provided by Student's parents and pre-school teacher in response to questionnaires. The results indicated Student's overall developmental levels to be in the 24 month age range. In addition, based on a review of all the assessments and observations, Student demonstrated significant delays in receptive and expressive language development.

B. The assessment found that Student met the criteria for eligibility for special education and related services in the areas of language/speech disorder and autistic like behaviors, leaving the final determination for eligibility and placement to the Individual Education Plan (IEP) team.

C. Based on the evaluation, the assessment team found that Student would benefit from inclusion in a developmentally based early childhood classroom program to address his special education needs; monitoring by the District preschool team to assist with transition to an appropriate preschool program; and opportunities for interaction with non-disabled peers to enhance social, behavioral, pre-academic, self-help, fine motor, gross motor, receptive language, and expressive language skills. In addition, it was recommended that the parents participate in a parent support/education group to enhance skills in working with their child on issues of concern.

6. On November 18, 2004, the District convened an initial IEP team meeting to discuss their assessment of Student's needs, determine Student's eligibility for special education and develop an appropriate educational plan for him. Both of Student's parents attended the IEP team meeting. A District administrator, a language and speech specialist, a special education teacher, a school psychologist and a nurse also attended (the special education teacher and school psychologist had been part of the assessment team). Student's private preschool teacher was not present at the meeting, and no evidence was presented indicating that she was invited by either the District or Student's parents. Parents did not object to her absence. However, Student's assessment included input from the preschool teacher in the form of responses to standardized questionnaires, interviews and observations of Student in the classroom setting.

A. At this meeting, the IEP team determined that Student was in fact eligible for special education and related services under the classifications of language/speech disorder and autistic-like behaviors.

B. Student's then-present levels of performance were addressed. In the area of fine motor skills, Student had difficulties coordinating the use of scissors and coordinating complex drawing and writing strokes. Student also experienced significant delays in receptive and expressive language. Lack of ability to participate independently and respond to people he does not know impacted his ability to participate in group activities, such as circle time, and impeded his social-emotional development. In addition, Student was having difficulties with such pre-academic skills as matching colors and shapes and identifying body parts. These areas of performance impacted Student's ability to participate in classroom educational activities.

C. The IEP team developed annual goals and short-term benchmarks designed to address each of Student's needs set forth above.

D. The District offered Student the following educational program: placement in a Special Day Class (SDC) four days per week, for three and one-half hours per day; speech

and language services twice per week for thirty minutes each session, either in a group or individually; physical education as specially designed within the SDC; and an extended school year.

E. Parents signed the IEP on November 18, 2004, indicating their consent to implement the program as offered by the District. No objection to the assessment, placement, or offer for services was expressed.

F. As of November 18, 2004, Student's IEP did not include a plan for behavioral support or occupational therapy.

7. Shortly after the IEP team meeting, Student began attending the SDC at Kingsley Elementary School for three and one-half hours per day, Monday through Thursday. The class was taught by Sonia Alexander, who obtained her Master's Degree in Education in December of 2003 and has taught special education in the District since September of 2001. There were fourteen pupils in Student's SDC. In addition to Ms. Alexander, the class had a co-teacher and three instructional aides.

8. Within the first few days of attendance in class, Student displayed difficulty in completing transitions and activities independently. He tried to run out of the classroom if staff was not in close proximity. An instructional aide began assisting Student throughout the day. Student needed hand-over-hand assistance by an adult to complete fine motor activities such as puzzles, play dough, towering blocks, and coloring. When he first joined the class, Student was very avoidant, and resisted completing any task by pushing away the materials or yelling "no, no". Circle time was also very difficult for Student, as he was unable to sit in a chair on his own, attend to a task, or sign himself in. Student often occupied his time in self-stimulatory behaviors and took other students' drinks and snacks, which negatively impacted his ability to socialize with his peers.

9. In December 2004, Ms. Alexander recognized that Student would require additional attention and teaching approaches, as his skills and behavior seemed to be less developed than the assessments had indicated. Ms. Alexander contacted Dr. Patricia Adams,¹ program administrator for special education for the District. They obtained a special cube chair for Student to sit on during circle time and ordered an occupational therapy assessment.² Dr. Adams also referred Ms. Alexander to Tracy Meury,³ an inclusion

¹ Dr. Adams has a doctoral degree in special education, and teaching credentials in special education, administration and multiple subject teaching (K-8). She has worked in the field of special education, in various capacities, for 24 years.

² Although an occupational therapy assessment was ordered in December of 2004, the provider with whom the District contracted for occupational therapy assessments at that time was not able to accommodate all the requests they were receiving, and had not assessed Student by the time the IEP team reconvened in March of 2005. Dr. Adams contacted Gallagher Pediatric Therapy and an OT assessment was performed on March 28, 2005, as set forth below in Factual Finding 17.

teacher and mentor-support provider for the District. Ms. Meury observed Student in Ms. Alexander's classroom and worked with Ms. Alexander and the instructional aides in implementing several strategies to increase Student's compliance and academic learning. During part of the day, Student worked on specific goals and skills one-on-one with the teacher. Ms. Alexander implemented visual schedules to assist Student in developing communication skills and remaining on task, which Student responded to well. Ms. Alexander also implemented sensory integration tools such as tasks with balls and trampolines, to help reduce Student's self-stimulatory behavior.

10. On January 5, 2005, Student was evaluated by a licensed psychologist at the request of the San Gabriel Pomona Regional Center. The psychologist, Dr. Lisa Doi, confirmed the diagnosis of autism and recommended continued enrollment in a language-based classroom with a small student-teacher ratio, focusing on promoting communication and vocabulary skills, social skills, appropriate behavior, and pre-academics. She recommended continued speech and language therapy and intensive intervention. Dr. Doi also recommended that Student's parents consider participating in a support group for parents of children with Autism and provided referral numbers to them.

11. In February of 2005, Student's mother discussed with Dr. Adams the possibility of implementing discrete trial training methodologies and requested that an educational program assessment be undertaken.

12. Within the field of autism, and specifically the education of young children with autism, there are distinct camps regarding what methodology is best for teaching children with autism. Discrete Trial Training (DTT) is one of the instructional methodologies frequently used in Applied Behavioral Analysis (ABA) based programs. ABA is a process of systematically applying learning and behavior interventions to improve socially significant behaviors, and to demonstrate that the interventions employed are responsible for the improvement in behavior. "Socially significant behaviors" include reading, academics, social skills, communication, and adaptive living skills. ABA focuses on the reliable measurement and objective evaluation of observable behavior. Two of the instructional methodologies utilized in ABA programs, DTT and "Lovaas Therapy," represent two of dozens of teaching strategies within the field of ABA. Methods of teaching within the field of ABA also include Picture Exchange Communication System (PECS), photo activity schedules, chaining, shaping, graduated guidance, and functional communication training. (See Exhibit P37: *Report of the Maine Administrators of Services for Children with Disabilities (MADSEC) Autism Task Force, February 2000*, pp. 23-24.) There is a wealth of peer-reviewed studies supporting the efficacy of ABA methods to

³ Ms. Meury has several teaching credentials, including one in teaching the severely handicapped and one in teaching the learning handicapped. She consults and collaborates with teachers in the District to develop and coordinate services for students with disabilities and behavioral needs. Ms. Meury has an extensive background in education and special education, and has worked for the District in various capacities since 1979. She has completed training in Discrete Trial Intervention through the District's Center for Autism and Related Disorders and the SEEK program.

improve and sustain socially significant behaviors in every domain, in individuals with autism. (Ex. P37, p. 29.)

13. "Discrete trial" intervention, in a general sense, is a teaching methodology in which students work one-on-one with a teacher to develop specific skills in a stimulus-response-consequence format. In a more intensive form, DTT is a method of providing instructional and behavior intervention, through focused implementation of a teacher's presentation (stimulus), a child's response, a consequence, and a short pause between the consequence and the next instruction (between interval trials). Correct responses receive a reward, which may be an edible treat, a toy, hugs or praise. Incorrect responses are ignored and/or corrected. Learning occurs in small steps, in which the child builds upon the mastered skill towards a more complex one. (Ex. P37, p.25). "Lovaas Therapy," derives its name from O. Ivar Lovaas, PhD, a psychologist who has researched methods of applied behavior analysis for over 30 years. Lovaas Therapy approaches tend to utilize an intensive ABA approach, up to 40 hours per week, at home and/or in school. (Ex. P37, p.27.)

14. TEACCH (Treatment and Education of Autistic and Communication Handicapped Children) is a program developed in North Carolina. It is an eclectic program, that looks at the unique needs of an individual with autism and utilizes the best available approaches and methods, including several techniques in combination. TEACCH emphasizes structured teaching, organizing the physical environment, developing schedules and work systems, making expectations clear and explicit, and utilizing visual materials to develop skills. Visual cues and concepts of sensory integration therapy are emphasized to assist students in gaining independence and managing aberrant behaviors. (Ex. P37, pp. 54-56). TEACCH was developed based on research studies performed between 1964 and 1990 through the University of North Carolina School of Medicine at Chapel Hill. Follow-up studies have documented gains in students who received TEACCH services. (*Ibid.*)

15. On March 22, 2005, an IEP team meeting was held with Student's parents, Dr. Adams, Ms. Alexander and two representatives from the Regional Center to further discuss Student's educational program. An addendum to the November 2004 IEP was developed which added a Behavior Teaching/Intervention Plan (BTIP) designed to address Student's needs for support in following the classroom routine and in transitioning. The BTIP essentially set forth the modifications Ms. Alexander had already begun to develop and implement in consultation with Ms. Meury and Dr. Adams. A new goal was established for Student to make smooth transitions to teacher-selected-tasks, utilizing visual supports such as a picture schedule. Primary and secondary reinforcers, such as positive social recognition and a reward system would be utilized (ABA approaches). The District offered a behavioral assessment and discrete trial assessment by a District behaviorist and an occupational therapy (OT) assessment by a private non-public service provider, Gallagher Pediatric Therapy (Gallagher).⁴

⁴ The Regional Center offered a behavioral assessment for family support and additional services not related to IEP issues.

Modifications of Educational Program

16. At the March 22, 2005 IEP meeting, the parents agreed to the implementation of the Addendum IEP and BTIP and to the OT assessment by Gallagher. Initially, they did not agree to have the District perform its own Behavior and Discrete Trial assessment. However, on March 24, 2005, parents gave their verbal consent, and on April 5, 2005, they signed their consent to the District's new assessment plan.

17. On March 28, 2005, Gallagher conducted its OT assessment. Results of the evaluation indicated that Student was demonstrating difficulties "processing proprioceptive and vestibular [sensory] information". The evaluator recommended that Student receive OT once per week for 50-minutes, until his next annual IEP review. The evaluation recommended four goals, with two benchmarks each, for Student's OT, designed to provide him access to his educational program.

Functional Behavior/Discrete Trial Assessment

18. On April 19, 20, 21, 24 and May 5, 2005, the District performed a "Functional Behavior/Discrete Trial Assessment." On May 31, 2005, the report of the assessment was completed. The assessment was performed by school psychologist Katie Goodwin and behavior specialist teacher Tracey Lynch, each of whom testified at hearing as to their qualifications. Ms. Goodwin is a District psychologist for the Pomona Unified School District, and is a SELPA⁵ Program Specialist, providing program support at SELPA Autistic Spectrum and Related Disorders programs in Claremont, Walnut Valley and Pomona, California. She has worked in the field of Special Education since 1972, when she began as an elementary level special education teacher. Ms. Goodwin established that she is qualified to assess students in all areas of suspected disability and to develop educational programs designed to meet their unique needs. Ms. Lynch has been teaching special education for 15 years. She has experience working with autistic preschoolers and as a behavior management teacher, and is also qualified to assess students in areas of suspected disability. Both Ms. Lynch and Ms. Goodwin have training in DTT and numerous other accepted teaching/training interventions for children on the autism spectrum.

A. The purpose of the assessment was to determine Student's need for behavioral intervention, and to determine the appropriateness of discrete trial intervention for Student. The assessors reviewed Student's records, observed Student in the special education setting on several different days, and obtained information from his parents and classroom teacher which was used to complete standardized rating scales and tests.

B. The Functional Behavior Assessment recommended as instructional strategies the use of visual schedules to facilitate transition and following routine; visual supports to promote language comprehension and language expression; visual cues and aides to assist in

⁵ A "SELPA" is a Special Education Local Plan Area. Special education is administered regionally throughout California. A SELPA typically includes several school districts within a particular geographic region.

task participation and completion; shortened verbal directions paired with visual cues; and use of a stimulus-response-consequence system for introducing skills. As behavioral strategies, the results of the Functional Behavior Assessment led to a recommendation of a highly structured, predictable routine and social skills training to promote interaction with peers.

C. With regards to discrete trial drills, the assessors found that Student did not display a strong interest in drills. He responded inconsistently between teachers or therapists. They thought that Student's inconsistent response to reinforcers would make a discrete trial program difficult to implement and that he might require a more highly structured setting for implementing drills. Ms. Goodwin clarified at hearing that this meant that they determined Student might require a program that contains more than just a stimulus-response-consequence system for introducing skills.

May 31, 2005 IEP

19. On May 31, 2005, the District convened another IEP meeting to review the OT and behavior assessments. Student's parents were present at the meeting, as well as school psychologist Katie Goodwin, special education teacher Tracey Lynch, special education teacher Sonia Alexander, occupational therapist Wendi Lee, and special education program administrator Dr. Adams.

A. Parents agreed that the Functional Behavior Assessment report described Student as they saw him at home.

B. Ms. Alexander discussed Student's progress towards the previous IEP goals. Although Student had not completed these goals, Student made good progress in the areas of social-emotional and pre-academic goals. He was able to participate in circle time for a longer period of time, and was able to identify body parts when asked to. He also made some progress in the areas of fine motor goals (scissor skills, strokes/pre-handwriting skills), receptive language, expressive language and in his behavior plan. While he still required prompting and, at times, hand-over-hand assistance, Student was able to respond to these cues to perform requested tasks. He was also responding to visual cues, looking to adults for direction and approval, and was more easily redirected towards desired behaviors.

20. The District made the following offer in the May 31, 2005 IEP:

A. Placement in a K-3 SDC at Kingsley that utilizes visual and sensory strategies, stimulus-response-consequence instruction⁶ and TEACCH methodology. The SDC meets from 8:15 a.m.-2:25 p.m. Monday through Friday (to 1:25 p.m. on Wednesdays), and has one teacher and two instructional aides. It was anticipated that the class would have four students to start.

⁶ At hearing and in some of the IEP related documents, this was clarified to mean ABA, discrete trial, techniques, if not intensive DTT or behavioral intervention.

B. Provision of designated instructional services (DIS) to include occupational therapy (OT) twice per week, 50 minutes each session; language and speech services (LSS) twice per week for 30 minutes each session; and Psych/Social Skills- twice per week for 30 minutes each session. The DIS offer also included daily transportation to and from school.

C. During the meeting, Student's parents asked about discrete trial intervention at home. They expressed concerns that they saw little growth in Student's skills for his age. However, the District disagreed that Student needed an in-home program to continue making progress towards his goals.

21. Parents agreed to the District's recommendations for the Fall placement. They signed the IEP on May 31, 2005, marking the box indicating their consent to implement the IEP. Parents also acknowledged receiving copies of the related assessment reports. They did not express any disagreement with the assessments nor with the IEP.

Dr. Morris' Independent Educational Evaluation

22. On July 2, 2005, Student's mother sent a letter notifying the District that she thought they had failed to properly assess Student, and that she had arranged for a private psychological assessment for which she would be seeking reimbursement. She also requested that the District schedule a time for the private psychologist to observe Student in the classroom. The District received the letter on July 8, 2005, and in a letter dated July 18, 2005, denied the parents' request for reimbursement for a private assessment. The District expressed the position that since it had assessed Student in November 2004, and then provided additional assessments discussed at the May 31, 2005 IEP meeting, a private assessment a District's expense was not warranted. The District requested that the parents contact the school in the Fall to schedule the requested observation.

23. Dr. Robin Morris assessed Student in her office on July 18, 2005, at the parent's expense. She is a licensed child psychologist with extensive experience assessing and providing therapy and counseling for children with autism.

A. Dr. Morris administered several standardized assessment tests, the results of which were consistent with those of the tests administered by the District. She found that Student's development was significantly delayed, particularly in the areas of fine motor ability, communication skills and attention. She also confirmed the diagnosis of autism.

B. Dr. Morris recommended one-on-one discrete trial training, both in home and in Student's current school placement, totaling 40 hours per week and parent training on a regular basis. She also recommended LSS four times per week for 30 minutes each session, with at least 90 minutes being reserved for individual speech time. Her recommendation for OT was for the same duration and frequency (twice per week for 50 minutes each session) as recommended in the May 31, 2005 IEP.

C. Dr. Morris wrote her evaluation in July of 2005. She wrote an addendum evaluation in October, after observing Student in his school setting on October 3, 2005. (This is discussed further below.) Dr. Morris did not observe Student in his home nor when engaged in discrete trial drills. Dr. Morris testified at hearing about her assessment and her recommendations.

24. On August 19, 2005, Student's mother wrote the District a letter stating:

Please be advised due to failure of District to offer [Student] an appropriate educational programme [sic] we have arranged for ABA programme at home for [Student], and will be seeking reimbursement from the school district.

2005-2006 School Year

25. The 2005-2006 school year began on September 5, 2005. Pursuant to Student's May 31, 2005 IEP, to which the parents had given consent, Student was placed in the K-3 SDC class at Kingsley taught by Ms. Lynch. Parents and Ms. Lynch were in communication by telephone and through a communication log.

26. Shortly after the school year started, a private behavior therapy company, Autism Behavior Consultants (ABC), performed its initial evaluations of Student in order to provide in-home services. Leonard Gutierrez, case supervisor for ABC, observed Student in the family's home on September 28, 2005 and October 3, 2005, and interviewed the parents as part of this intake evaluation. He prepared an "Initial Assessment" report on October 20, 2005.⁷ Provision of actual behavior therapy began in the home on November 1, 2005.⁸ In the October 20, 2005 Initial Assessment, Mr. Gutierrez recommended 40 hours per week of in-home behavior modification, with an additional 12 hours per month of supervision and four hours per month of consultation with the clinical director of ABC. In the February 1, 2005 Initial Assessment signed by both Mr. Gutierrez and Clover Anderson, clinical director, 35 hours per week of in-home behavior modification, with the additional 12 hours per month of supervision and four hours per month of consultation was recommended.⁹

⁷ An "Initial Assessment" report, dated October 20, 2005, was signed by Mr. Gutierrez only. An additional version of an "Initial Assessment" report, which differed only as to added dates of school observations and number of hours of therapy recommended, was dated February 1, 2006, and was signed by both Mr. Gutierrez and Clover Anderson, as "clinical director."

⁸ This date is gleaned from an ABC Progress Report, dated March 1, 2006.

⁹ Mr. Gutierrez and Ms. Anderson both testified at hearing. Neither Mr. Gutierrez nor Ms. Anderson held any form of teacher credential in the State of California. Mr. Gutierrez has a Bachelor's Degree, but no further advanced degree. Ms. Anderson holds a Master's Degree in Education. She has only worked in California since the summer of 2005, and her familiarity with California's rules and regulations regarding special education is limited. While perhaps experienced in providing behavior therapy, neither of these witnesses demonstrated strong knowledge or experience in special education. Their testimony and reports are viewed accordingly.

27. On October 3, 2005, Dr. Morris observed Student in his classroom and while engaged in occupational therapy. She drafted an addendum to her July 18, 2005 evaluation. In her report, Dr. Morris noted that during his one-on-one OT time, Student was able to be redirected quickly by the therapist, although he did need prompting. While he still needed hand-over-hand assistance for some tasks, Student showed interest in the activities, even smiling at one point. According to Dr. Morris, he did not seem to be distracted by outside noise, including noise from the classroom next-door or from the evaluator and therapist talking. Dr. Morris expressed concern that during classroom time, Student seemed to require more assistance than some of the other children, and still required adult assistance and prompting. She recommended a full-time aide both in the current classroom and at home, as part of the 40 hour per week program previously recommended.

28. The recommendations of Dr. Morris and Petitioner's witnesses differed from those of the District primarily in methodology. Specifically, Petitioner's witnesses advocated for a more intensive discrete trial training approach that utilized ABA techniques exclusively. The rationale for this position is that Student was lacking in the pre-academic skills necessary to benefit from participation in a school setting. However, based on the evidence offered at hearing, Student was in fact able to derive educational benefit from participation in the classroom based programs offered by the District. This progress, as documented by the District in its IEPs, assessment observations, classroom drill workbooks and communication logs, was significant, even if it was slower than the parents would have hoped for. In addition, Student demonstrated progress in social skills, and was able to derive significant benefit from social interactions in the classroom and school setting. Student is an only child, and has limited opportunities to interact with peers outside of the school setting. The school offered a less restrictive environment than his home in which to have contact with peers and adults other than his parents and teachers, while also providing the opportunity and physical space to work individually, one-on-one as needed.

29. October 10, 2005 was the last day Student attended Kingsley for the month of October before his mother unilaterally removed him from school. On October 12, 2005, Student's mother contacted Dr. Adams by telephone to request that Student's bus schedule be changed, because parents were only going to send Student to school in the afternoon for socialization. Student's mother informed Dr. Adams that she was having Student participate in a home program in the mornings and wanted him picked up and taken to school after that. Dr. Adams told Student's mother that the change in Student's program would require a new IEP, prior to any change in transportation being implemented. On October 19, 2005, Dr. Adams and Student's mother agreed to hold an IEP meeting on November 3, 2005. Student did not return to school until November 28, 2005, when he started coming in the afternoons only.

November 2005 IEP

30. On November 3, 2005, the District convened an IEP team meeting, as an annual review of the November 2004 IEP. Student's mother attended this meeting. Dr. Adams, special education teacher Tracey Lynch, school psychologist Marian Bamford,

language and speech specialist Jody Kandel, and occupational therapist Heather Mc Cormick also attended.

A. At the IEP meeting, Mother indicated that Student was working hard with therapists at home, especially with trying to follow the therapists' directions. She expressed concerns regarding Student's socializing skills, speech and language, and occupational therapy.

B. Student had made progress towards most of the goals set forth in the November 2004 IEP. He continued to make the progress previously observed at the May 31, 2005 IEP, though as of the November 3, 2005 IEP meeting, Student had been out of school for approximately three weeks. The IEP noted some new behavioral concerns. New goals and benchmarks were developed, with input from mother and teachers at the IEP team meeting. The behavior teaching/intervention plan was also reviewed and revised.

31. The District offered the following educational program at the November 3, 2005 IEP meeting:

A. Placement in an SDC for moderate to severely disabled students modeled after the TEACCH¹⁰ program, five days per week for six hours per day (it was noted that the six hours was an extended day for Kindergartners).

B. The District offer of DIS services included LSS four times per week, 30 minutes per session, three times individually and once in a group, to occur in class (an increase over the prior IEP). The offer for psychological services was also increased to three times per week, twice per week for 30 minutes in a group session, once per week for fifteen minutes individually, also to occur in class. OT to be provided by Gallagher was continued, but was changed to twice per week for 25 minutes each session, at school. The offer for services also included transportation, physical education to be specifically designed within the SDC, and extended school year services. A new BTIP was developed.

C. At the November 3, 2005 IEP meeting, Student's mother agreed with the IEP team's modification of the provision of OT and psychological services. However, she did not agree with the full day placement in an SDC. She wanted to continue to bring Student to school later in the day, after his in-home therapy. The occupational therapist and some of the IEP team expressed concern about Student's not being in class in the mornings, when he was "fresh" and attends better. They felt that he might benefit more from the interventions if he came to class in the earlier part of the day. The record does not indicate what, if any, response to this concern was offered by Student's mother, at the time of the IEP or at any time since then. As of the time of the IEP, the IEP team and ABC were not in direct communication.

¹⁰ As set forth above, TEACCH programs utilize a variety of teaching methodologies, including some in stimulus-response-consequence and/or ABA discrete trial format.

D. Student's mother declined to sign the IEP at the November 3, 2005 meeting. She expressed the desire to take the IEP home and think about it. Student's mother did, however, sign the assessment plan for the District to consider the evaluation conducted on July 18, 2005 by Dr. Morris, which had not yet been provided to them.

32. On November 16, 2005, Student's mother submitted a copy of the signature page of the IEP. The box indicating informed consent to implement the IEP was marked, but the box beneath that was not signed. In space provided for additional comments, Student's mother handwrote, "I do not agree that the District is offering a free appropriate public education to [Student]. I request a private ABA program of up to 40 hours per week provided at home and at school. Until our disagreement has been settled, [Student] will attend school from 12:00 to 2:25 per day and receive the services described in the IEP."

33. Student returned to school on November 28, 2005, attending for the afternoon, as requested by Student's mother.

34. On November 30, 2005, Dr. Adams and Student's mother again conferred by telephone. Student's mother indicated she was not in agreement with the IEP. She did agree with the proposed goals and benchmarks, and with the DIS. However, Student's mother declined to implement the placement in Kingsley's SDC for the full day, and indicated that tutors were being provided by ABC. The District allowed Student to continue to attend school in the afternoons for two and one-half hours Monday, Tuesday, Thursday and Friday, and one and one-half hours on Wednesday (when the school dismissal time is an hour earlier). Student received the agreed upon services. Since the IEP placement was not agreed to, the District attempted to meet with the parents again on December 21, 2005, but parents declined to attend the meeting.

35. Between November 28, 2005 and March 10, 2006, Student attended school at Kingsley for between approximately 36 percent and 40 percent of the time called for in the IEP.

36. On March 15, 2006, the District sent Petitioner written notice of a modified offer of FAPE for the 2005-2006. The modification spells out that 20 of the offered 30 hours in school would be spent in one-on-one DTT for twenty hours per week, outside of the classroom, provided during the regular school day. Supervision and coordination of the DTT program would be provided by the classroom teacher. In addition, Student would be provided with a one-on-one DTT trained aide within the classroom. Monthly Integration Intervention Program review meetings would be held and would include the classroom teacher, one-on-one instructional aide interventionist, speech therapist, supporting psychologist, occupational therapist and parent. As of hearing, Student's parents had not accepted this placement.¹¹

¹¹ Petitioner offered this document into evidence, and their being no objection, it was entered.

LEGAL CONCLUSIONS

Discussion of Applicable Law

1. The Individuals with Disabilities Education Improvement Act (IDEIA),¹² seeks to ensure that all children with disabilities have available to them a free appropriate public education (FAPE). (20 U.S.C. § 1400 (d)(1)(A).) Pursuant to the IDEIA, and State special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code § 56040(a).)

2. School districts must create an individualized education program (IEP) for each disabled child. (20 U.S.C. § 1414(d); Ed. Code § 56340 *et seq.*) If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. (20 U.S.C. §1415(f); Ed. Code §56501(a).) Once a child is identified as having a disability, the local education agency must identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (20 U.S.C. Section 1412; Ed. Code §56345) The IDEIA leaves to each State the responsibility for developing and implementing educational programs for disabled children, but imposes significant requirements in the discharge of that responsibility. (*Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, (1982) 458 U.S.176, 183.) The statute establishes a cooperative process between parents and schools. *Rowley, supra* at 205-206. The central vehicle for this collaboration is the IEP process. (*Schaffer v. Weast*, (2005) ___ U.S. ___; [126 S.Ct.528, 532].)

3. Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child, must be included as members of the IEP teams, and have the right to examine any records relating to their child. In addition, parents have the right to obtain an independent evaluation of their child. (20 U.S.C. §1415(b)(1).)

4. A student's IEP must be designed to meet the student's unique needs and be reasonably calculated to provide the student with some educational benefit, but that the IDEIA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board Of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200.) In addition to providing specially designed instruction, the District must provide related supportive services as may be required, to assist the student to benefit from special education. A school district must provide "a basic floor of opportunity... [consisting] of access to specialized instruction and related services which are individually designed to

¹² The IDEIA became effective on July 1, 2005. It reauthorized and updated its predecessor, the Individuals with Disabilities in Education Act of 1997 (IDEA), which was the applicable law until June 30, 2005. Some provisions of the State Law have been amended to be consistent with the changes in Federal law. Unless otherwise indicated, with certain express exceptions, all statutory references cited in this Decision are to the IDEIA.

provide educational benefit to the [child with a disability]." (*Rowley*, 458 U.S. 176 at 201.) The intent of the IDEA is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Id.* At p. 192.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

5. The IEP team must include parents of a child with a disability; not less than one regular education teacher of such child (if the child is, or may be, participating in the regular education environment); not less than one special education teacher, or where appropriate, not less than one special education provider of such child; a representative of the local educational agency; and individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and, whenever appropriate, the child with a disability. (20 U.S.C. Section 1414(d) (1) (B).¹³) This duty is mandatory, not discretionary. (*M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 643 (9th Cir. 2005).) However, "[n]ot all procedural flaws require a finding of denial of IDEA rights." (*Ford ex. Rel. Ford v. Long Beach Unif. Sch. Dist.*, 291 F.3d 1086, 1089 (9th Cir. 2002).) To determine whether a procedural error denies a student's rights under the IDEA, the court must examine whether it resulted in a loss of educational opportunity. (*Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); *W.G. Bd. of Trustees of Target Range Sch. Dist. No. 23 of Missoula, Mont.*, 960 F.2d 1479, 1484 (9th Cir. 1992).)

6. Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he is entitled and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) However, procedural flaws do not automatically require a finding of a denial of FAPE (*Rowley, supra*, 458 U.S. 197; *W.G. v. Bd. Of Trustees*, 960 F.2d 1479, 1484.) Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *Target Range, supra*, 960 F.2d at 1484.) Therefore, the inquiry in special education cases is twofold. The first question is whether the school district has complied with the procedures set forth in the IDEA. The second is whether the IEP developed through the procedures is reasonably calculated to enable the student to receive an educational benefit.

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d

¹³ This provision was not substantially modified in the new IDEA, and therefore the citation is the same whether considering IEPs that occurred prior to July 1, 2005 or since then.

1141, 1149.)¹⁴ "An IEP is a snapshot, not a retrospective." (*Id.* at p.1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) 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), *supra*, 811 F.2d at p. 1314.)

8. 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 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams, supra*, 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.*, 155 F. Supp.2d 1213, 1230-32 (D.Ore. 2001); *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, 361 F.3d at 84.) In *Adams*, at, parents of a toddler with autism sought a one-on-one, 40 hour per week ABA/DTT program modeled after the research of Dr. O. Ivar Lovaas. In that case, 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...IDEA and case law interpreting the statute does 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*, 195 F.3d 1149-1150; citing *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

9. Under the California Education Code, the District is responsible for providing the services delineated in the IEP. However, the Legislature recognizes that some pupils may not meet or exceed the growth projected in the IEP's annual goals and objectives. (Ed. Code § 56345, Subd. (c).)

10. 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 aides and services could not be achieved satisfactorily. To the maximum extent appropriate, special education students

¹⁴ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals has applied the analysis in *Adams* to other issues concerning an IEP (See *Christopher S. v. Stanislaus County Off. Of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D.Ore. 2001) 155 F. Supp.2d 1213, 1236).

should have opportunities to interact with general education peers. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code § 56031.)

11. To summarize *Rowley* and its progeny, in order to constitute an offer of FAPE, the educational program offered by the District must meet the following four substantive requirements: (1) be designed to meet the student's educational needs; (2) be reasonably calculated to provide the student with some educational benefit; (3) comport with the student's IEP; and (4) provide the student with an education in the least restrictive environment.

12. California Education Code Section 56239, subdivision (b) provides that a parent has the right to obtain, at public expense, an independent educational evaluation of the pupil by qualified specialists, if the parent disagrees with the results of the assessment conducted by the District. California Education Code Section 56329, subdivision (c) further provides that if the District establishes at a due process hearing that its assessment is appropriate, it is not required to pay for the independent evaluations.

13. For an assessment to be appropriate, testing and assessment materials and procedures must be selected and administered so as to not be racially, culturally, or sexually discriminatory; must be provided and administered in the public's primary language or other mode of communication; must be administered by trained personnel in conformance with test instructions and must be validated for the specific purpose for which they are used. (Ed. Code § 56320, subd. (a) and (b).) The pupil must be assessed in all areas of suspected disability. (Ed. Code § 56320, subd. (f).) The assessment must be conducted by persons competent to perform the assessment, as determined by the school district, county office or special education local plan area. (Ed. Code § 56322.)

14. Student, as the petitioner, has the burden of proving her contentions at the hearing. (*Schaffer v. Weast*, (2005) ___ U.S. ____; [126 S.Ct. 528].)

Conclusions

1. The District provided Student with a FAPE during the 2004-2005 school year and extended school year.

A. Failure to include Student's preschool teacher in the November 2004 IEP team meeting was a procedural violation of Title 20, United States Code, section 1414 (d) (1) (B). However, failure to include Student's preschool teacher in the IEP team meeting in November of 2004 did not prevent parents from meaningfully participating in the IEP process, nor did it result in a loss of educational opportunity for Student. The parents were present at that meeting, and did not object to the preschool teacher's absence. In addition, the Transdisciplinary Assessment Team observed Student in his preschool, and interviewed his preschool teacher. They obtained the teacher's input in the form of answers to standardized questionnaires from which data was provided for their assessment. The parents were not

hindered in their participation in the IEP process due to the teacher's absence from the IEP meeting. Petitioners failed to establish that the teacher's absence from the November 2004 IEP meeting resulted in a loss of educational opportunity.

B. The District provided student with an educational program that was designed to meet his unique needs, was reasonably calculated to provide some educational benefit, and comported with his IEPs, in the least restrictive environment. The November 2004, viewed as a 'snapshot and not a retrospective,' was designed to meet Student's needs as determined by the District's assessment, which included data as reported by Student's parents, pre-school teacher and the observations of District personnel. The District continued to develop and implement appropriate and effective strategies, administered additional assessments and implemented additional services according to Student's developing needs. Petitioner failed to establish that the District's offer in November 2004 was not reasonably calculated to provide some educational benefit.

C. With regards to the OT and BTIP, although the OT assessment and the addendum to the IEP adding a BTIP occurred in March 2005, and the Functional Behavioral Assessment and related additional new IEP developed in May of 2005, the District began implementing actual changes in methodology and implementation of tools to meet Student's needs almost immediately after he entered their school in December of 2004.

D. The District's staff of teachers, psychologists, and other special education program specialists was qualified to evaluate Student's educational needs and develop and implement an appropriate educational program for him.

E. Petitioner failed to that establish that any of the District's assessments were inappropriate.

2 The District offered Student a FAPE for the 2005-2006 school year.

A. The May 31, 2005 IEP was designed to meet Student's unique needs and was reasonably calculated to provide some educational benefit in the least restrictive environment.

B. The November 3, 2005 IEP was designed to meet Student's unique needs and was reasonably calculated to provide some educational benefit in the least restrictive environment

C. It was not established that the home-based, intensive behavioral intervention program modeled after the Lovaas method of ABA and DTT was necessary in order for Student to access the educational curriculum or to make progress towards his educational goals.

3. Parents are not entitled to reimbursement for the costs of the independent psychological evaluation by Dr. Robin Morris.

A. Parents initially did not express disagreement with any of the District's assessments performed between October 2004 and June 2005. As to the most recent assessment performed in May of 2005, Parents signed the May 31, 2005 IEP indicating that they agreed with the findings and consented to its implementation. A little over a month after consenting to and agreeing with the May 31, 2005 IEP, parents did express written disagreement with the most recent assessment. However, Petitioner failed to establish that the District's assessments were inappropriate. Dr. Morris' evaluation utilized different assessment tools, and came up with slightly varying results, but overall her findings were consistent with those of the District's assessments. That her recommendations as to methodology were different than the District's does not establish that the District's assessments were inappropriate. The District may consider the private evaluation, but the parent is not entitled to reimbursement. (Ed. Code § 56329, Subd. (c).)

D. Parents did not provide the District with a copy of Dr. Morris' evaluation for consideration at the November 3, 2005 IEP meeting. Since the District did not have Dr. Morris' assessment available to them as of the time of the November 3, 2005 IEP meeting, failure to consider its findings did not constitute a substantive or procedural violation. Indeed, the District was willing to consider Dr. Morris' evaluation, but Student's parents declined the District's offers of further IEP meetings and modified educational programs.

4. Since it was not established that for either of the school years at issue, the District failed to provide Student with a FAPE, Student's parents are not entitled to costs of reimbursement for behavior therapy provided in the home by ABC. (See 20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.)

ORDER

Student's requests for relief are hereby denied.

PREVAILING PARTY

Pursuant to California Education Code § 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

The District prevailed on all issues heard.

RIGHT TO APPEAL THIS DECISION

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

Dated: June 6, 2006

Martha J. Rosett
Administrative Law Judge
Office of Administrative Hearings
Special Education Division