

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

In the Matter of:

ROCKLIN UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006110278

CORRECTED DECISION

Administrative Law Judge (ALJ) Gary A. Geren, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Rocklin, California, on March 5-9 and March 19-22, 2007.

Marcy Gutierrez, Attorney at Law, represented Rocklin Unified School District (District).

Bob N. Varma, Attorney at Law, represented Student. Student's mother and father (Parents) were present during the entire hearing.

The hearing followed District's filing of an amended due process hearing request on January 16, 2007.

ISSUES

1. Whether Student was offered free appropriate public education (FAPE) for the 2006-2007 school year (Student's kindergarten year) based on his proposed Individualized Education Plan (IEP) dated May 25, 2006, and modified on August 18, 2006, and more specifically whether the IEP included:

- A. appropriate goals and objectives,
- B. adequate supervision and aide supports, and

- C. an appropriate transition plan.
2. Whether District's use of an "eclectic" method of instruction was appropriate.

CONTENTIONS OF THE PARTIES

District contends the proposed IEP and the method of instruction would have provided Student with a FAPE.

Student contends that the goals and objectives contained in the proposed IEP were inappropriate because they did not incorporate goals and objectives developed by Therapeutic Pathways (TP), a nonpublic agency (NPA), from whom Student received services at the time District drafted his proposed IEP.

Student also contends that the proposed IEP failed to provide him with adequate supervision and aide supports, principally because District's employees lacked appropriate training.

Student also contends that the period provided to phase out Student's use of an aide provided by TP was based on an arbitrary timeline, and not on a qualitative assessment of Student's ability to adapt to the transition.

Student also asserts that the legal standard by which to gauge the appropriateness of offers of FAPE has changed because of the re-authorization of the Individuals with Disabilities in Education Act (IDEIA) of 2004. Because of these changes, Student contends, District should have drafted Student's proposed IEP based on his *potential* for development, and not on his ability to make educational *progress*.

Student also contends that District's offer was inappropriate because District intended to use an eclectic approach to implement the proposed IEP, and not the Applied Behavioral Analysis (ABA) method. Student asserts that the re-authorized IDEIA requires district methodologies that have been subjected to peer-review and contends that only the ABA method has received such review. Lastly, Student contends that recent studies show that the use of eclectic methodologies is ineffective in educating students with autism.

FACTUAL FINDINGS

Background

1. Student is a six-year-old boy who was born on December 16, 2000. He was approximately 22 months old in October 2002, when his parents observed his abnormal language development. In July 2003, Student was diagnosed as having Autistic Disorder, a

condition on the Autistic Spectrum Disorder (ASD). Soon after receiving Student's diagnosis, Parents obtained remedial services for him. In October 2004, Student began receiving services provided by TP, which continued through the 2005-2006 school year.

2. In February 2006, District and Parents, through the IEP process, began planning for Student's transition from his in-home program to a kindergarten class at Valley View Elementary School, located in District. With Parents' consent, District conducted a comprehensive assessment of Student in order to identify his educational needs. District prepared a report titled, "Transition to Kindergarten Assessment Report." The report is 14 pages long and includes assessments conducted in an approximately 40 categories and subcategories, as well as a section titled Summary and Recommendations. This assessment was thoroughly prepared and it accurately identified Student's relative educational strengths, as discussed below.

3. Following the May 25, 2006 IEP team meeting, District proposed an IEP for Parents' acceptance. Parents rejected the proposed IEP.

4. On August 18, 2006, the IEP team was reconvened and District modified the proposed IEP in an effort to meet Parents' requests. Parents refused to accept the modified IEP, choosing instead to enroll Student in the nonpublic Phoenix School.

5. Student's program at the Phoenix School placed him in a general education environment while accompanied by an aide from TP. The Phoenix School program was not an ABA-based program; TP continued to provide ABA type services to Student in his home.

6. Parents and District were unable to agree on an IEP for Student's kindergarten year. District requested this hearing seeking an Order declaring that its offer to provide special education and related services would have provided Student with a FAPE.

Issue 1.A--Whether the IEP Contained Meaningful Goals and Objectives

7. The proposed May 25, 2006 IEP contained 14 goals and 28 objectives (two objectives for each goal). The goals and objectives were designed to address Student's needs in the areas of speech, conversational skills, expressive language, receptive language, social skills, social interaction, safety skills, attending skills, school readiness, and academics.

8. In developing the goals and objectives, District personnel reviewed the following: (1) records from TP, including extensive reports TP prepared in November 2005, January 2006, and April 2006; (2) the "Transition to Kindergarten Assessment Report"; (3) a report prepared in September 2005 by Dr. Tom Leigh (a private consultant retained by Parents); (4) a report prepared in October 2005 by Colleen Sparkman, an administrator at TP; (5) reports of observations of Student made by District employees while he attended the Phoenix School; (6) reports of observation of Student made by District employees while he was in his home; and (7) substantial input and detailed information provided by Parents

regarding Student's needs, including Parents' belief that Student's "primary area of need continues to be in speech..."

9. Based on its review of the above, District identified Student's primary deficit to be in the area of spontaneous, fluent, and functional speech, an area defined as functional communication. In short, Student lacked the "ability to use language to get what he wanted." Student had relative strengths in visual processing, visual motor skills, and writing skills.

10. Parents agreed that the goals and objectives contained in the May 2006 IEP were appropriate; however, Parents also wanted the goals contained in TP's educational plan to be expressly incorporated into the District's proposed IEP. TP's plan contained 324 goals.

11. District established that the educational members of the IEP team considered TP's 324 goals when they drafted the proposed IEP, yet had good reasons for not specifically including them. Many of TP's specific goals were imbedded in District's 14 goals and 28 objectives, and therefore, to have combined the goals contained in the two educational plans would have resulted in an IEP that had redundant goals. Also, some of TP's goals were covered by the State of California's general education kindergarten standards; therefore, those goals were implicitly a part of the proposed IEP. Additionally, Student met some of TP's goals by the time the proposed IEP was drafted and therefore did not need to be included. Also, some of TP's goals addressed subject matters outside of the IEP process (e.g. goals that specifically addressed Student's needs at home). District established that had it attempted to implement Student's IEP that contained 338 goals (the total of TP's and District's proposed goals, not including the proposed 28 objectives), it would have diluted District's effort to remediate Student's principle deficit in the area of functional communication.

12. The goals and objectives contained in the proposed IEP were drafted, in part, by Jean Crouse. Ms. Crouse has a Master of Arts degree in special education (1997), from Saint Mary's College, where she authored her thesis titled, "Teaching Expressive Language to Young Children with Autism and Developmental Delays." She has been a special education educator since 1994. Ms. Crouse has extensive experience working with children with autism. Ms. Crouse believed the proposed IEP contained accurate present levels of performance for Student, and believed that the goals and objectives addressed all areas of Student's needs, and appropriately contained an emphasis on improving Student's functional communication. Ms. Crouse was a well-qualified witness whose opinions were given substantial weight.

13. District diligently evaluated Student using a variety of assessment tools and strategies to gather relevant information that allowed District to assess his special education needs. District's proposed IEP addressed Student's unique needs and was reasonably calculated to provide Student with some educational benefit that would have allowed him to make educational progress.

Issue 1.B--Whether the proposed IEP included adequate supervision and aide supports

14. The proposed IEPs of May and August 2006, and subsequent letters, dated August 23, 2006, September 19, 2006, January 5, 2007, and January 19, 2007, made clear how Student's IEP would be supervised. The proposed May 2006 IEP included two hours per month of supervision by a school psychologist and two hours per month of case management by a Resource Specialist Program (RSP) teacher. District also established that Katy Kirk, the general education kindergarten teacher at Valley View Elementary School, would supervise Student's general education curriculum, that a speech therapist would oversee his speech services, and that an occupational therapist would address Student's motor skills. Jennifer McGinty would be Student's aide, under the proposed IEP.

15. Elizabeth (Betty) Di Regalo, Director of Special Education for District, has 35 years of experience in special education. Ms. Di Regalo was a knowledgeable, candid, and persuasive witness, who established that she is dedicated to seeing that special education students within District receive appropriate educations. Ms. Di Regalo established that there are approximately 1000 special education students within the District, ranging in ages from three to 22 years old. There are 66 special education students who have been identified with having a condition on the ASD, 85 percent of whom receive special education services provided by District. Ms. Di Regalo has seen these students make educational progress under IEPs with a similar organizational structure as that outlined in Student's proposed IEP. Ms. Di Regalo's confidence in District's staff to provide appropriate supervision and support to Student was well-founded. Her testimony was given considerable weight based on her experience, as well as her demeanor, manner, and attitude when testifying.

16. Allette Brooks, Ph.D., a school psychologist, was employed by District prior to Student's August 18, 2006 IEP meeting. Under the proposed IEP, Dr. Brooks was to spend a minimum of two hours each month overseeing Student's IEP to ensure that he was making adequate progress towards reaching the proposed goals and objectives. Dr. Brooks is a highly qualified professional, with an extensive background in educating children with autism. She holds a Bachelor of Science degree in psychology from Occidental College, 1972, and a Ph.D. in educational psychology from the University of California, Berkeley, 1983. She is an adjunct professor at Santa Clara University and a co-founder, board member, and director of training for *South Bay Autism Service*, a nonprofit organization that provides training to educators and parents regarding the needs of individuals with autism. Dr. Brooks was an invited member of the *California Department of Education's Task Force on Autism*, for whom she provided expert input towards the development and publication of the state's position paper titled, "*Best Practices in Autism*," issued in 1995. The California School Board Association awarded her its highest honor in the area of special education to for her work on educating students with autism in December 2005. Dr. Brooks established that students with autism who have received educational and related services while under her supervision have made meaningful progress. Dr. Brooks was well-qualified to oversee the implementation of Student's proposed IEP.

17. Kate Kirk was designated to be Student's kindergarten teacher. She graduated Summa Cum Laude from California State University, Sacramento, with a Bachelor of Arts degree in psychology in 1995. By her testimony, Ms. Kirk established that she is a dedicated and competent teacher, fully capable of addressing the challenges presented by Student's disabilities. Ms. Kirk testified in an articulate and convincing manner that she could effectively supervise Student's general education curriculum. Her testimony provided persuasive evidence of District's ability to supervise Student's education.

18. Michelle M. Strand Heffernan is a credentialed speech and language pathologist with nine years experience in providing speech and language therapy services to disabled students. She holds Bachelor of Science and Master of Science degrees in speech pathology and audiology from California State University, Sacramento, graduating with honors in 1996 and 1998, respectively. She has over 100 hours of additional education in subjects related to teaching children with autism. Ms. Strand Heffernan has participated in over 100 IEP meetings, 40 to 50 of which involved children on the ASD. She participated in drafting the goals and objectives contained in Student's IEP. Ms. Strand Heffernan stated that with respect to Student's proposed IEP, she sees similar "approaches work every day." Ms. Strand Heffernan is a creative educator, well-qualified to oversee the speech component of Student's proposed IEP. Ms. Strand Heffernan was a credible witness and because of her education and experience, her testimony was given substantial weight.

19. Under the proposed IEP, Student's Resources Specialist would have been Nancy Stansfield. Ms. Stansfield is also experienced in educating children on the ASD. During Student's kindergarten year, she had fewer students in her class than the maximum allowed under the state's standards. Accordingly, she would have had adequate time to supervise Student while he was in her program.

20. Jennifer McGinty was assigned to be Student's one-to-one aide. Ms. McGinty testified in a manner that established that she possessed the necessary compassion and patience required of one performing such work. Ms. McGinty has worked as an aide to children with autism, in both the classroom and the home setting. She received extensive training from NPA providers for whom she previously worked on how to be an effective aide to an autistic child. She also received similar training from District, including her completion of the course titled, "Competency for Facilitating Growth in Independence and Students with ASD," a 46-hour course. Ms. McGinty is trained and experienced in data collection. The data collection method she was to use with Student was known as the ABC method, wherein she would collect data regarding antecedents, behaviors and consequences of Student's behaviors. She is certified as an aide under the, "No Child Left Behind Act." She enjoys a good working relationship with Ms. Kirk and Dr. Brooks, with whom she could consult if she needed assistance to address any concerns she had regarding aiding Student.

21. Bryna Siegel, Ph.D., a well-respected expert in the area of autism research and treatment, and Director of the Autism Clinic at the University of California, San Francisco, testified that Ms. McGinty had more experience than did 75 percent of the aides employed by other school districts. Dr. Siegel has extensive experience in reviewing the appropriateness

of school districts' special education programs for students with autism, including the assessment of the skills possessed by students' aides, and therefore, her opinion regarding Ms. McGinty's qualifications to work as Student's aide provided persuasive testimony on the issue.

22. Ms. Di Regalo described Ms. Mc Ginty as being "fully capable" and a "very effective lady." Ms. Di Regalo has personally observed Ms. McGinty successfully work as an aide to a student on the ASD, concluding that "kids love her." Ms. DiRegalo's high opinions regarding Ms. Mc Ginty's abilities were supported by the manner, demeanor, and attitude, with which Ms. McGinty testified. Ms. McGinty was well-qualified to act as Student's aide.

23. The education, training, and experience of District's staff established that the proposed IEP could be appropriately supervised and supported by them. This supervisorial model used by District is consistent with the 10 model autism programs reviewed by the National Research Council, and has been successfully used by District in providing supervision and support of other students on the ASD. Student's main criticism of the education, training and experience of District's employees is that they lack specific training in the ABA methodology. As explained later, District is not required to provide a particular methodology, and therefore, it need not ensure that their employees are trained to implement a specific methodology.

Issue 1.C--Whether the proposed IEP included a plan for Student's smooth transition into kindergarten

24. The May 25, 2006 proposed IEP provided that an aide from TP would work alongside Ms. McGinty at Valley View Elementary School, with the TP aide "phasing out" over a two week period. The August 18, 2006 proposed IEP extended the "phase out" period to approximately three months. District established that the three month period was sufficient. Ms. Di Regalo has overseen successful transitioning of students on the ASD from home based NPA's to the public school environment. Ms. Di Regalo established that during her tenure as the Director of Special Education, approximately 70 to 100 students on the ASD have successfully transitioned into District's programs. Such transitions usually occur over less than a three month period, including in those instances where students had serious behavioral problems (a condition that usually requires a longer period for which to provide for a smooth transition). Student does not have serious behavioral problems. On those occasions when a problem arose during a student's transition, District called an IEP to address the problem. Ms. Di Regalo and Ms. Brooks established District would do the same with the instant case should a problem arise with Student's transition. The three month transition period was not an arbitrary deadline, as Student contended, but was rather a reasonable estimate of the time frame necessary to complete Student's "smooth and successful transition," described in the proposed IEP and was based on District's actual experience in conducting transitions for students on the ASD.

25. Ms. McGinty has successfully worked as an aide for children on the ASD transitioning from in-home programs to a public school, an additional factor that supports the finding that the three month transition plan set forth in the proposed IEP was appropriate.

Issue 2.--Whether the use of the eclectic approach was appropriate

26. Expert witnesses testified for both parties regarding the status of the research on appropriate methods for educating children with autism. Each expert was competent and qualified to offer the opinions they expressed. Their opinions can be divided into two camps: 1) The witnesses called to testify by District believe it is appropriate to blend different methodologies when implementing an IEP in order to better address the specific symptoms and deficits of the child (the eclectic approach); and 2) The witnesses called to testify by Student believe that ABA is the only methodology that has been proven effective to meet the educational needs of children with autism.

27. Despite the differences of opinion among the experts, there were areas of consensus that are relevant to the determination of this issue. For example, the experts' testimony established:

(A) A large body of research exists regarding the treatment of children with autism; however, a considerable amount of research remains to be completed in order to better identify those strategies and methodologies that constitute the "best practices" for educating children with autism.

(B) Presently, two commissions, one funded by the State of California, and the other funded at the federal level, are reviewing available research that addresses the education of children with autism. Both commissions' findings are expected to be published later this year. The commissions include acknowledged experts in the field of autism research and treatment. Both the eclectic and the ABA approaches are among the methodologies being studied and assessed by the commissions.

(C) Legal and moral constraints prohibit the truest form of scientific research: where researchers would randomly select children with autism, place them in different groups using different methodologies with which to educate them, and then compare the results of those treatments to a sample of children who received no intensive treatment at all.

(D) There is no single form of an eclectic methodology, since by definition, the educators who use this approach choose components drawn from an array of methodologies in an effort to tailor a program to address the specific deficits of a particular student. Therefore, in the scientific sense, a true "ABA versus eclectic" methodology study is difficult to complete, and those that have attempted to conduct such a study have had the scientific validity of their studies questioned.

(E) Finally, the definitive answer to the question of to how to best educate children with autism is presently unknown. Absent a definitive answer to the question, the professionals will continue to engage in a legitimate debate as to which approaches are considered appropriate to use when educating children with autism.

Student's position

28. Dr. Gina Green, an expert witness called on behalf of Student, testified that the proposed IEP was inappropriate because it did not require District to use a purely ABA approach. Dr. Greene holds a Bachelor of Arts in psychology, graduating with high honor from Michigan State University, 1973, a Master of Arts in psychology, graduating with honor from Michigan State University, 1975, and a Ph. D. in psychology, with an emphasis on analysis of behavior, from Utah State University, 1986. Dr. Green is a board-certified behavior analyst. In Dr. Green's opinion, any educational plan for a student on the ASD that uses an eclectic method would be inappropriate. Dr. Green's opinion in this regard is consistent with the other experts who testified on Student's behalf, in that they too believed that the ABA methodology is the only methodology that has been subjected to the peer-review process; therefore, ABA is the only appropriate method by which to educate all students on the ASD.

29. Dr. Green established the uncontroverted fact that the majority of school districts in the State of California, as well the nation, use the eclectic approach to educate their students who are on the ASD.

30. Dr. Jane Howard testified as an expert witness on behalf of Student. Dr. Howard received a Bachelor of Arts degree in psychology from Mount Holyoke College, graduating cum laude, 1973. She received her Master and Ph. D. degrees in psychology from Western Michigan University in 1977 and 1978, respectively. Dr. Howard testified in detail about a study that she co-authored which concluded that the eclectic approach is ineffective in educating children with autism. That study is discussed subsequently. Dr. Howard also testified that in her opinion, District did not have a good "track record" in educating students on the ASD.

31. Colleen Sparkman is a licensed speech pathologist who testified on behalf of Student. Ms. Sparkman holds a Bachelor of Arts and master's degree from California State University, Fresno, receiving her degrees in 1977 and 1979, respectively. Ms. Sparkman is also a Director for TP. Ms. Sparkman testified principally regarding the program provided by TP and why she believed the program was appropriate and should have been continued by District. The focus, however, in determining whether a district provided a FAPE, is on the program offered by a district, and not whether another program is better. Accordingly, Ms. Sparkman's testimony was given little weight.

32. Maureen Hurley is a Clinical Supervisor for TP. She is a board certified behavior analyst. She received her Bachelor of Arts in psychology from the University of North Carolina, Greensboro in 1996. She received her Master of Science in ABA, from Northwestern University in 2001. She received her Master of Education from Cambridge College in 2006. Ms. Hurley testified regarding the services Student received from TP. The crux of Mr. Hurley's testimony was that the District's aide was ill-prepared and improperly trained to collect data regarding Student's progress compared to the aides at TP. Having found that Ms. McGinty was qualified in this respect, Ms. Hurley's opinion to the contrary was given little weight.

33. Melanie Machado is a certified behavior analyst. She received her Bachelor of Arts from San Diego State University, in psychology in 1994. She received her Master of Science from California State University, Stanislaus. Ms. Machado was a clinical supervisor for TP from 1998 to 2006, and worked with Student during that time. Ms. Machado testified that District should have included the goals developed by TP in the proposed IEP. Having found that the goals and objectives contained in the proposed IEP were appropriate, Ms. Machado's contrary opinion was afforded little weight.

34. Dr. Ronald Huff is the Director of Alta California Regional Center. He holds a Bachelor of Arts in psychology from Florida State University, Tallahassee. He holds a Master of Arts in experimental psychology and a Ph. D. in behavioral psychology, from The Ohio State University. Dr. Hoff is a proponent of the ABA approach, testifying that he has been "hooked on it since 1965." Dr. Huff agreed that his opinion in this regard remains the subject of debate among the professionals in the field.

The Studies relied on by student to establish that the eclectic method is ineffective

35. Student contends that District should have departed from the mainstream practice of using an eclectic approach, because among a virtual sea of research on the treatment, three studies indicate that the eclectic method is ineffective in educating children on the ASD.

36. The studies relied on by Student were authored by Eikeseth, Smith, Jahr, and Eldevik, in January 2002 (Eikeseth Study); Howard, Sparkman, Cohen, Green and Stanislaw, in September 2004 (Howard Study); and Cohen, Amerine-Dickens, and Smith, in April 2006 (Cohen Study). The validity of the studies, and their respective contribution to the body of research on autism, was the subject of debate among the experts who testified. How those studies relate to the appropriateness of the proposed IEP at issue is discussed below.

37. The Eikeseth study is but one study addressing the efficacy, or lack thereof, of the eclectic approach. Its findings, published fifteen years ago, did not end the debate on this issue. Nor were the study's findings sufficiently dispositive of the issue that the community of professional educators abandoned using an eclectic method, as there were other models, like TEACCH, that were developed and supported the use an eclectic-based method. The Eikeseth study did not establish that District's use of the eclectic method was inappropriate.

38. The findings of the Howard Study, co-authored by Dr. Green, have been called into question by various reviewers, as well as District's experts. The authors of the Howard study divided students with autism into three different groups: one group received intensive ABA-based intervention from an NPA (TP is Student's NPA provider in this matter), another group received intensive eclectic interventions in a public school setting, and the third group received non-intensive intervention in a public school setting. Central among the criticisms of this study is that the study groups were not randomly selected. Rather, the parents of the children were asked which groups they would prefer to place their child in. It stands to reason that parents, who chose to place their children in a non-intensive, public education environment, were less informed and involved in their children's education, than those parents who chose to place their children in the intensive, private setting. As the NRC recognizes, parental involvement is an essential component in the education of children with autism, and children whose parents chose the intensive program were likely more involved parents regarding educating their children. Therefore, parental involvement, combined with the intensive intervention, may have resulted in superior test results achieved by that study group.

39. Student's IEP was primarily developed in May 2006. It is unreasonable to conclude that the educational members of the IEP team should have considered and adopted this study's findings while they were drafting the proposed IEP. It would have been imprudent for the educational members of the IEP team to ignore the common practices of fellow profession educators and instead prepare an IEP premised on a study that was published nearly contemporaneously with the preparation of the proposed IEP. Additionally, evidence established that the eclectic approach is still being considered by the commissions to be among the best practices for the education of students with autism. In short, the Howard Study did not end the debate among the professional educators and researchers regarding the efficacy of the eclectic approach any more than the Eikeseth and Cohen Studies did.

40. Student's experts' opinions represent a narrow view on the efficacy of available approaches in educating children with autism--ABA only; District's experts' opinions are consistent with the majority of professional opinions on the topic. District's choice to use an eclectic methodology to educate Student did not render its offer of a FAPE inappropriate since the eclectic method was peer-reviewed to the extent practicable.

District's position

41. Dr. Brooks provided detailed testimony regarding different methodologies District intended to blend together in order to implement Student's proposed IEP. For social communication, the Social Communication, Emotional Regulation and Transactional Support (SCERTS) model would be used; visual cues and schedules, the Treatment and Education of Autistic and related Communication-handicapped Children (TEACCH) method would be used; and Student's communication skills would be developed, in part, by using "Social Stories." Other methods included Relationship Development Intervention (RDI); Pivotal Response Training (PRR); and for simple task instruction, the ABA, discrete trial

training method was to be used. Dr. Brooks established that these methodologies were supported by peer-reviewed research. For example, Dr. Brooks testified that she had “several binders of research” supporting the effectiveness of the TEACCH method to provide educational benefits to children on the ASD.

42. Ms. Di Regalo described District’s methodology as a “multidisciplinary approach.” As the Director of Special Education, she stated that she “stays on top of the research” regarding autism. Based on her knowledge and experience, she believed District’s use of an eclectic approach is consistent with the current state of “best practices.” Her experience in observing the eclectic method in the actual education of students with autism, has led her to conclude that the method represents a “synergistic approach.” By drawing upon the skills of a “very powerful team” of experts from varying disciplines, she believes District has provided meaningful educational benefits to its students on the ASD who receive instruction under the eclectic approach. Given her position as a professional educator, her opinion in this regard is given significant deference. Her testimony was credible and persuasive on this point, and her empirical observations support the finding that District’s use of the eclectic approach was appropriate.

43. Dr. Siegel’s education and background made her testimony particularly persuasive. Dr. Siegel has spent 30 years working in the field of autism. Dr. Siegel holds a Bachelor of Arts degree in clinical psychology, 1974; a Master of Arts degree in education from Stanford University, 1977, and a Ph.D. in child development from Stanford University (1980). She is an adjunct professor in the Department of Psychiatry, at the University of California, San Francisco (UCSF). As previously mentioned, she is the Director of the autism clinic at UCSF; The clinic treats approximately 250 new cases of children with autism per year. She currently lectures approximately 30 times per year on various topics dealing with autism. She also teaches at the UCSF medical school. She has helped to develop best practices standards for the treatment of children with autism.

44. Dr. Siegel explained that there are 12 symptoms that make up the ASD. The particular symptoms experienced by a child affects the way in which that child learns. Dr. Siegel “likes the eclectic approach” for educating students on the ASD. In her opinion, the methods used to educate children with autism “are not pitted against each other.” Rather, the various methodologies are “hybrids” of the ABA approach and may be effectively blended such that a student’s relative strengths may be used to help remediate his or her deficits. Dr. Siegel established that the eclectic approach recognizes what she termed a “Convergent Validity,” wherein educators draw from what is known to be true regarding educating children with autism. She likened the eclectic approach to an “Autism Toolbox.” Dr. Siegel established that the consensus among the professionals studying autism holds that no one method has been established as being *the* most appropriate method by which to educate children with autism. In light of Dr. Siegel’s education and vast experience, her testimony in this regard is given substantial weight; she provided a persuasive, cogent explanation in support of the efficacy of the eclectic approach in educating children with autism.

45. Dr. Siegel also explained that the ABA discrete trial training approach preferred by Parents, is most effective when used with younger students. In her view, as children approach Student's age, educators need to switch to a broader based program that better addresses more complicated functions, such as functional speech. Dr. Siegel explained that this is what District's proposed IEP attempted to do here, and therefore, District's approach was consistent with the best practices. Dr. Siegel also noted that under the proposed IEP, Student would still receive 20 hours of discrete trial training, which is rarely provided under IEPs. Her testimony was accorded substantial weight on these points, as well.

46. Aaron A. Stable, an expert in ABA, was called to testify by District. Mr. Stable holds a Bachelor of Arts in psychology from Whitman College, 1998, and a Master of Arts in psychology, from the University of Pacific, with an emphasis in ABA, 2002. Mr. Stable established that District offered student an educational program that was consistent with peer-reviewed research. Principal among this research were the findings of the National Research Council which concluded that the key components in educating children with autism include early intervention, intensity, ongoing evaluation, planned instruction, parental involvement, and a low student to teacher ratio. These components were included in the educational program District offered Student. Mr. Stable was a credible witness and his opinion in this regard further supports the finding that the program offered by District was appropriate.

Findings regarding the efficacy of the eclectic method

47. The opinions of Student's experts are at odds with the practices, and inferentially the opinions, of the majority of professional educators charged with the obligation to provide meaningful educations to students on the ASD. Whereas District's choice to use an eclectic method by which to educate Student was consistent with the approach taken by the majority of educational professionals.

48. District did not act inappropriately by choosing to implement Student's IEP using the eclectic approach, despite the conclusions reached in the three studies relied on by Student's experts. The studies did not provide a definitive answer regarding the efficacy of the eclectic approach, as this matter is still being debated among the acknowledged professionals in the field of autism. The testimony of Student's experts merely expressed one point of view in this debate.

CONCLUSIONS OF LAW

Burden of Proof

1. District filed the request for a hearing seeking approval of the proposed IEP, and District, herefore, has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

Elements of a FAPE

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), 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, § 56000.¹) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8) (IDEA 1997); 20 U.S.C. § 1402(9) (IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

3. School districts receiving federal funds under IDEIA 2004 are required under 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (*See also*, Ed. Code, § 56345, subd. (a).)

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.

¹ All statutory citations to the Education Code are to California law, unless otherwise noted.

198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) De minimus benefit or trivial advancement, however is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d at p. 130.)

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

6. 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 1141, 1149.)² 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), 811 F.2d 1307, 1314.)

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

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

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define “free appropriate public education”:

² Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*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. Or. 2001) 155 F.Supp.2d 1213, 1236).

The term 'free appropriate public education' means special education and related services which:

- (A) have been provided at public expenses, under public supervision and direction, and without charge,
- (B) meet the standards of the State educational agency,
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
- (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. (1401(18)).

The Supreme Court then went on to announce the standard for evaluating the appropriateness of an IEP, as set forth in Conclusion 4.

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

10. Student's contention that amendments to the IDEA significantly changed the educational standard for special education to one of "high expectations" and superseded the *Rowley* standard, above, is rejected. Student cited *J.L. and M.L. v. Mercer Island School District* (2006) 46 Ind. Dis. Educ. Law Rptr. (IDELR) 273 (W.D.Wash.). If Congress had intended to overturn *Rowley*, it would have said so. The Ninth Circuit as well as the United States District Court for the Northern District of California, have recently reaffirmed that the appropriate standard for determining whether an IEP provides FAPE is still whether it is "reasonably calculated to enable the child to receive educational benefits." (*Park Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F3d 1025, 1031 (citing *Amanda J v. Clark county School Dist.* (9th Cir. 2001) 267 F.3d 877); and *San Rafael Elementary School District v. California Special Education Hearing Office* (9th Cir. March 28, 2007) 2007 U.S. Dist. LEXIS 27764.)

Peer-reviewed research

11. The *Rowley* opinion established that, as long as a school district provides an appropriate education, the choice regarding the methodology to be used to implement the IEP is left up to the district's discretion. (*Rowley*, 458 U.S. at p. 208.) Subsequent case law confirms that this holding is squarely on point in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, 361 F.3d at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour per week ABA/DTT program modeled after the research of Dr. Lovaas. The Ninth Circuit Court of Appeal held:

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

12. IDEIA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (See

Deal v. Hamilton County Dept. of Educ. (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57³; which provides a comprehensive summary of decisions discussing the matter.

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

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

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

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

Comment: A significant number of commenters recommended the regulations include a definition of “peer-reviewed research,” as used in Sec. 300.320(a)(4). One commenter recommended

³ Student cited *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d. 840 for the proposition that the Lovaas program outcomes were significantly better than the eclectic program offered by the appellee school district so that the school district’s eclectic program denied student FAPE. However, the Sixth Circuit did not make a finding that the Lovaas program was the only effective program for autistic students. The Sixth Circuit remanded the case to the District Court to take further evidence regarding the Lovaas program requested by parents, and the school district’s eclectic program, which the District Court did in its 2006 decision cited above.

that the definition of peer-reviewed research be consistent with the work of the National Research Council.

Discussion: ‘Peer-reviewed research’ generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, *there is no single definition of ‘peer reviewed research’ because the review process varies depending on the type of information to be reviewed.* We believe it is beyond the scope of these regulations to include a specific definition of “peer-reviewed research” and the various processes used for peer reviews.

Changes: None.

Comment: Some commenters recommended revising Sec. 300.320(a)(4) to require special education and related services, and supplementary aids and services, to be based on ‘evidenced-based practices’ rather than ‘peer-reviewed research.’ A few commenters recommended revising Sec. 300.320(a)(4) to require special education and related services, and supplementary aids and services to be based on peer-reviewed research, evidenced-based practices, and emerging best practices. Many commenters recommended clarifying the meaning and intent of the phrase “to the extent practicable.” One commenter recommended requiring all IEP Team meetings to include a focused discussion on research-based methods and to provide parents with prior written notice when the IEP Team refuses to provide documentation of research-based methods.

Discussion: Section 300.320(a)(4) incorporates the language in section 614(d)(1)(A)(i)(IV) of the Act, which requires that special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. The Act does not refer to ‘evidenced-based practices’ or ‘emerging best practices’ which are generally terms of art that may or may not be based on peer-reviewed research. Therefore, we decline to change Sec. 300.320(a)(4) in the manner suggested by the commenters. *The phrase ‘to the extent practicable,’ as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research.* We do not believe further clarification is necessary.

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

Changes: None.

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

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

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

Changes: None.

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

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

Changes: None.

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

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

Changes: None.

Comment: A few commenters requested that the regulations require programs provided to a child with a disability to be

research-based with demonstrated effectiveness in addressing the particular needs of a child.

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

Changes: None. (Italics added).

16. The U.S. Department of Education's discussions regarding peer-reviewed research makes clear that the definition to be given the phrase depends on the type of information being considered, as well as, the availability of peer-reviewed material. Districts are required to use peer-reviewed methodologies only to the extent that it is practicable. Dr. Brook's point is well taken: if the component parts of a plan are peer-reviewed, then it follows that the sum of those parts should be considered as peer-reviewed as well, particularly in light of the moral, legal and ethical constraints that prevent the truest form of scientific study from being conducted. The ultimate test is not the degree to which a methodology has been peer-reviewed, but rather, whether the methodology chosen was believed by the IEP team to be appropriate to meet the individual needs of the child.

DETERMINATION OF ISSUES

Issue 1(A)--The goals and objectives in Student's proposed IEP were designed to address Student's unique educational needs and were reasonably calculated to provide Student with some educational benefit

1. Pursuant to Findings 7-13 and Conclusions 2-10, District properly assessed Student's needs and developed appropriate goals and objectives that were reasonably calculated to provide him with some educational benefit and that would have allowed him to make progress.

Issue 1(B)--The proposed IEP included adequate supervision and aide supports

2. Pursuant to Findings 14-23, and Conclusions 2-10 and 12-13, the District's proposed IEP contained adequate supervision and supports. District's employees were well-qualified, and District's supervision and aid support model was known to District to have worked well in the past with students on the ASD.

Issue 1(C)--The proposed IEP contained a plan that would have allowed Student to make a smooth transition into kindergarten

3. Pursuant to Findings 24-25, and Conclusions 2-10, District's proposed IEP included an adequate transition plan. District successfully made similar transitions in the past. Had a problem arose with Student's transition, an IEP meeting would have been held to address it. The proposed IEP ensured that Student would receive a smooth transition into his kindergarten class.

Issue 2--The use of the eclectic approach was appropriate

4. Pursuant to Findings 26-48, and Conclusions 2-16, District was free to choose the methodology with which to provide special education services to Student. Additionally, District's choice to use an eclectic method of instruction was appropriate since it met the individual needs of Student and the approach was based on peer-reviewed research to the extent practicable.

ORDER

1. District met its burden of proof to establish that its offer to Student for the 2000-2007 school year, was an offer that would have provided Student with a FAPE.

2. The parties' request to have official notice taken of various documents and websites filed contemporaneously with their closing briefs is denied.

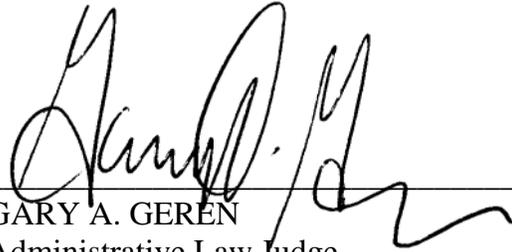
PREVAILING PARTY

District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

DATED: May 25, 2007



GARY A. GERÉN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division