

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

In the Matters of :

ETIWANDA SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent;

OAH CASE NO. N 2007030459

STUDENT,

Petitioner,

v.

ETIWANDA SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2007031002

DECISION

James R. Goff, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California (“OAH”), heard this matter on May 17, 18, 21, 22, 23, and 24, 2007, in Rancho Cucamonga, California.

Best Best & Krieger LLP, by Jack B. Clarke, Jr., Attorney at Law, represented Etiwanda School District (District). His associate Airionna Whitaker sat in the hearing one day. Dr. Jean Martin, Program Manager, West End SELPA, attended the hearing. Sylvia Kordich, Administrator of Special Programs, attended representing the District.

Law Office of Ralph O. Lewis, by Ralph O. Lewis, Attorney at Law, represented Student. Student’s Mother and Father attended the hearing.

Certain witnesses appeared with counsel. Witness Kristine Martin appeared at the hearing with counsel Mat Nortleaf, attorney for Applied Behavior Consultants, Inc. Witness Dr. Scott Cross appeared at the hearing with counsel, Eric Bennett, attorney for Lovass Institute For Early Intervention.

On March 14, 2007, District filed its request for a due process hearing in case number N2007030459. On March 29, 2007, Student filed his request for a due process hearing in case number N2007031002. On the same date, Student moved to consolidate the two matters and to continue the pending due process hearing. On April 9, 2007, OAH granted the consolidation and ordered that case timelines run according to the N2007031002 case filing.

Oral and documentary evidence were received and the matter remained open, upon the request of the parties, for submission of written closing briefs. The matter was submitted for decision on June 14, 2007.

ISSUES

The issues have been restated for purposes of addressing the merits of the claims:

1. Is the Student entitled to receive reimbursement for an Independent Education Evaluation (IEE)?
2. Did the District fail to provide Student with a free appropriate public education (FAPE) for the 2006-2007 school year, by:¹
 - A. Predetermining Student's placement and preventing Student's parents from participating in the IEP meetings?
 - B. Failing to develop goals at the September 29, 2005, and the December 21, 2006 IEP meetings that were appropriate, measurable and clear?
 - C. Failing to provide staff appropriately trained in the areas of Student's disability?
 - D. Failing to provide an appropriate classroom setting?

¹ Student initially raised this issue as it relates to the 2007-2008 school year as well as the 2006-2007 school year. However, no evidence was received as to the 2007-2008 school year. Similarly, Student raised in his written final argument contentions that were not included in the due process complaint. Such issues include the absence of a general education teacher at the IEP meetings, failing to complete an assessment within 60 days, failing to invite Student's private preschool teacher to the September 29, 2006 IEP, the lack of a transition plan, failing to supervise its ABA provider and failing to provide a clear, written offer of placement. Such contentions were not contained in Student's request for a due process hearing and therefore, were not at issue in this hearing. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

E. Failing to provide Student with intensive educational treatment?

CONTENTIONS OF THE PARTIES

Student contends that he was denied FAPE for the 2006-2007 school year as a result of the District's predetermination that a District preschool was the only program for him and the District's failure to allow his parents to participate in the individualized education plan meetings. He contends that the September 29, 2006, and December 21, 2006 IEPs failed to contain measurable annual goals that would permit him to make progress in the general curriculum. Student also contends that the goals were created outside of the individualized education plan process.

Student seeks reimbursement for a privately retained psychologist's report and services from the Lovass Institute for Early Intervention. Student asserts that his parents' action in replacing his applied behavior analysis provider with Lovass Institute for Early Intervention was appropriate because Applied Behavior Consultants, Inc. was not performing applied behavior analysis therapy for him. Student contends that the Lovass Institute for Early Intervention was the only appropriate applied behavior analysis provider and that Applied Behavior Consultants, Inc. was inadequate. He contends that the District's offer of placement at the District's preschool was inappropriate.

The District counters that it provided Student a free appropriate public education in the December 21, 2006 IEP. There was no predetermination involved in the District's recommendation of a District preschool. The District contends that the individualized education plan team developed measurable annual goals to meet Student's needs and that the goals were discussed at the individualized education plan meetings.

According to the District, placement at its preschool was appropriate and it was not necessary to provide Student with a home based 40-hour week applied behavior analysis program. Student made progress under the individualized education plan. The District's preschool program was appropriate for Student to address his needs regarding socialization and play skills.

The District further contends that parents are not entitled to reimbursement for the private psychologist's report or the parents' selection of Lovass Institute for Early Intervention as Student's applied behavior analysis provider. The District argues that it would be wrong to order an independent educational evaluation when the parents' disagreement was with the progress report of an applied behavior analysis provider. Similarly, the District contends that the parents are not entitled to reimbursement for the Lovass Institute for Early Intervention program because the parents did not ask the individualized education plan team to change providers; rather, they acted on their own.

FACTUAL FINDINGS

Jurisdictional Facts

1. Student will be five years old in September 2007. He attends a private preschool at Kindercare within the boundaries of the District. Student lives with his parents and a sister, within the District. When Student turned three, the Inland Regional Center referred Student to the District. Senia L. Vitale, Ph.D., diagnosed Student with autism on June 5, 2005. On September 16, 2005, Student qualified for special education services under the primary handicapping condition of autism-like.

Predetermination, Parental Participation in IEP Meetings and Request for an Independent Education Evaluation

2. There is a two part test in determining whether a school district has offered a child with a disability a free and appropriate public education (FAPE). First, the district must comply with the procedures set forth in the IDEA. Second, the district must offer a placement that is designed to meet the unique needs of the child, the placement must be reasonably calculated to provide the child with some educational benefit, the services provided must comport with the child's individualized education plan (IEP), and the placement must be in the least restrictive environment (LRE).

3. Student contends that the District committed procedural violations by predetermining his placement and preventing his parents from meaningfully participating in his IEP meetings. The parents of a child with a disability have the right to participate in a meaningful manner in IEP meetings. A school district violates this right by predetermining a placement offer at an IEP meeting. Predetermination occurs when a district adopts a "take it or leave it" attitude during the IEP process.

June 9, 2006 IEP

4. On June 9, 2006, the District conducted an IEP meeting for Student to discuss his options for the 2005-2006 extended school year (ESY) and a placement for the 2006-2007 school year. Under an IEP dated September 30, 2005, Student received a 40-hour home based intensive applied behavior analysis (ABA) therapy program, through a District contracted provider Applied Behavior Consultants, Inc. (ABC). Student also received speech and language therapy (S/L) and occupational therapy (OT) from the District. At the June 9 IEP, the parents discussed with the IEP team their visits to other potential placements. The District advised Student's parents that he was eligible for ESY at Creating Learning Opportunities and Understanding Differences in Students (CLOUDS) for preschool. CLOUDS is a development based learning program that emphasizes educating children through play. The parents indicated that they did not wish to enroll Student in preschool, but would like to continue S/L and OT services at Caryn Elementary, his home school. The parents indicated that they intended to enroll Student at CLOUDS for the fall term.

5. Karlye Louritt, a senior behavior consultant with ABC, provided Student's parents with the June progress report concerning the therapy that ABC was providing to Student. She discussed goals that Student had accomplished, goals he had made progress on and goals that needed additional time and effort before he attained a mastery level. Rick Gutierrez, Ms. Louritt's supervisor, advised the IEP team that Student had made progress in all areas of development. He reported that recently Student learned to ride a tricycle and became independent in toileting needs.

6. Mr. Gutierrez advised the IEP team that when Student enrolled in a preschool program, ABC would recommend an adjustment to Student's therapy. Under the recommendation, Student would get 15 hours a week of in-home ABA therapy, 18 hours a month of consultation and two hours a month of senior behavior consultation.

7. Student's parents acknowledged receipt of a copy of Special Education Procedural Safeguards and ABC's progress report. The parents consented to the goals and placement presented in the June 9, 2006 IEP. The District offered the same program until September 30, 2006, which included a 40-hour a week home based ABA therapy; 20 hours a month of behavioral consultation; S/L in either direct service, small group and/or consultation 50 minutes two times a week; and, OT direct service 30 minutes once a week.

September 1, 2006 IEP

8. On September 1, 2006, the District convened an IEP meeting at the request of Student's parents. Student's parents requested the meeting to inform the District that they had placed Student in a private preschool program called Kindercare.² The IEP team, including the parents, discussed Student's placement options: Kindercare at parent's expense, CLOUDS preschool program, and a county Special Day Class (SDC). Ms. Louritt discussed Student's progress and shared ABC's current report. Mr. Gutierrez from ABC reiterated the plan to fade out in home ABA therapy that he had outlined at the June 9, 2006 IEP. He recommended reducing the program to 25 hours a week at this time. He recommended a "confederate" aide in the classroom. A "confederate" aide was someone with whom Student was unfamiliar and who would provide ABA services to Student if he needed it, but otherwise would appear to serve all the students. The District continued the preexisting program until the next IEP, except that ABC would be providing part of their services in the Kindercare preschool setting for 15 hours a week.

September 29, 2006 IEP

9. On September 29, 2006, the IEP team reconvened for Student's annual review. The team discussed progress on Student's goals. Parents indicated a desire for more goals on socialization and generalization of skills. Parents expressed their concern that they were not experiencing the same success as reported by ABC. The team updated Student's present

² Father testified that he did not want his son in a regular school until "they got all the bugs out."

levels of performance. Parents and the IEP team agreed that the goals recommended for Student by ABC in the September 1, 2006 report would be incorporated into this IEP document. Additionally, the team drafted and adopted three new goals to address parents' concerns. The team, including the parents, agreed that Ms. Ludovico would retype all the goals after the meeting and circulate them to parents for addition and comment. Ms. Ludovico, Student's case carrier and the District's Preschool Coordinator, had previously served as Student's S/L therapist and was a co-founder of CLOUDS.

10. Parents requested updated assessments in all areas of suspected disability. The District agreed to conduct the assessments and developed an assessment plan for parental approval. The parents and the IEP team continued their discussion of possible placements for Student and arrangements were made to visit CLOUDS. The IEP team told parents and noted in the IEP document that services for Student in special education would continue no matter what placement was selected. Parents agreed to notify the District within two weeks their choice for placement.

11. On October 17, 2006, Ms. Ludovico sent to Student's parents the retyped IEP, an assessment plan, and a note that she had developed benchmarks for the three goals drafted at the September 29, 2006 meeting. She asked the parents for changes or comments that could be included in an updated version. The parents signed the assessment plan and acknowledged receipt of the IEP, but did not respond to the note and express any concern regarding the goals.

Independent Education Evaluation

12. A parent of a child with a disability has the right to obtain, at public expense, an independent educational evaluation (IEE) of the child if the parent disagrees with an assessment obtained by the school district. The district then must either pay for the requested assessment or request a due process hearing to defend the challenged assessment.

13. Parents contend that their request for an updated assessment of Student's areas of suspected disability was intended as a request for an IEE and that the District rejected the request at the September 29, 2006 IEP. Parents made no further request for an educational assessment, nor did they timely complain that no IEE was provided. At the September 29, 2006 IEP, Student's parents did not express concern with any educational evaluation completed by the District. Instead, Parents disagreed with a progress report provided by ABC.

14. Both Dr. Pellitteri and Ms. Ludovico attended the September 29, 2006 IEP meeting and stated that parents requested an updated assessment and not an IEE. The September 29, 2006 IEP document refers to a request by parents for an assessment. The parents agreed to the District's assessment plan and signed consent to the assessment. After consenting to the assessment, the parents retained Dr. Morris to conduct their own psychoeducational assessment of Student. Parents did not disclose this report to the District until February 27, 2007. Mother testified that she retained Dr. Morris because the District

was too slow in conducting the assessment. Dr. Pellitteri's and Ms. Ludovico's testimony was persuasive and is supported by the IEP document.

15. Parents' assertion that they requested an IEE is not persuasive. Parents did not disagree with an assessment performed by the District. Thus, the District need not reimburse Student's parents for the expense of the IEE prepared by Dr. Morris.

December 21, 2006 IEP

16. On December 21, 2006, the IEP team met for the Student's triennial review. The team met to consider the District's recent assessments³ and a current progress report from ABC. Based on the assessment date, the IEP team added two new assisted physical education (APE) goals. The IEP team discussed the new ABC progress report which again discussed use of a "confederate" aide. The team also discussed suggested target areas and frequency of services. The IEP team discussed the District's offer of placement which included 180 minutes four times a week at a public preschool (CLOUDS); 15 hours a week home based ABA therapy by ABC; 14 hours a month ABA consultation; S/L 20 minutes two times a week, small, group and consultation; OT 30 minutes two times a month direct service; two hours a month senior behavior consultation; and, 20 minutes two times a month of APE. Student's Father attended this IEP meeting. He indicated his intention to take the assessment reports and IEP document home to review with his wife. He further indicated that they wanted to visit Head Start before deciding on a placement. He said they would advise the District by the end of January 2007, their decision regarding placement. At this time, Student continued to attend Kindercare.

17. The IEP document was typed except for a few entries. The entries relating to "placement District" and "school" were handwritten. In the Present Levels of Academic and Functional Performance section there was a handwritten addition that "He [Student] has difficulty with balance and perceptual motor skills." The section on "Tests, Evaluations, and Information Relied Upon" had two handwritten notations added to the typed in tests. Added in were "ABC Progress Report" and "Health and Development by Nurse." The section "Comments" is all handwritten. The fact that the document was not completely typed supports District's position that the District did not predetermined the results of the IEP team meeting.

18. Parents did not notify the District regarding placement until February 27, 2007, when they sent a letter to the District informing that they had replaced ABC with the Lovass Institute for Early Intervention (LIFE). LIFE is a nonpublic agency that provides ABA services similar to ABC. Both programs are theoretically based on the work of Dr. Lovass at UCLA. The letter also informed the District that Parents had obtained an IEE from

³ The assessments conducted were by Dr. Pellitteri (psychoeducational), Ms. Ludovico (speech and language), Ms. Chavez (OT), and Brant Morpew (assisted physical education). These assessments were pursuant to the plan signed by Student's parents in October 2006.

Dr. Robin Morris, a private psychologist. The parents requested reimbursement for both services.

19. From as early as the June 9, 2006 IEP, Student's placement options were included in the IEP document. At the September 29, 2006 IEP meeting, placement options under parental consideration included CLOUDS, Kindercare, Head Start and the county SDC. These placement options were again discussed at the December 21, 2006 IEP and parents were to decide which placement option they preferred by January 2007. In the interim, the IEP document provided that services would continue no matter what choice they made regarding placement.

20. For the 2006-2007 school year, the District discussed placement options and arranged for parental visits to all options the parents expressed interest in. The District provided the parents with the goals to the September 29, 2006 IEP and sought their input. Parents' testimony that the District had a "take it or leave it" position regarding placement and did not give them an opportunity to discuss Student's progress or placement is not supported by the evidence. Similarly, the evidence is compelling that Student's parents were active participants in the IEP process. Parents helped draft goals, reviewed placement options, and were asked to review and approve other goals and IEP documents.

21. Student's parents participated in a meaningful manner in the IEP meetings regarding their son. The District did not predetermine a placement for Student at the IEP meetings.

Offer of FAPE

22. A school district offers FAPE if the placement of specialized instruction and related services is designed to address the unique needs of the child with a disability, the placement is reasonably calculated to provide the child with some educational benefit, the provided instruction and services comported with the child's IEP, and the placement was in the least restrictive environment (LRE).

Unique Needs

23. Student's unique needs were identified in the September 29, 2006 IEP document as difficulties in the areas of communication, socialization, and preacademics which adversely affect his participation with peers and adults in a general education setting. Student can attend to routine tasks but needs assistance when presented with novel situations. He demonstrates parallel play and is working toward independent joint play. There was no disagreement regarding Student's unique needs.⁴ Related services in S/L, OT and APE were provided to address Student's unique needs.

⁴ Student has a unique need in regard to his sensorimotor deficit, but this is addressed by the District's provision of OT services and by the APE goals.

Annual Goals

24. The individualized education plan (IEP) for a child with a disability must include a statement of measurable annual goals which are designed to address his unique needs as well as a description of how the child's progress toward the annual goals will be measured. With the exception of goals relating to APE, Student contends that the goals contained in the September 29, 2006 IEP, incorporated into the December 2006 IEP, were not appropriate, measurable or clear.

25. The September 29, 2006 IEP⁵ contained eight goals relating to play skills, the understanding of basic concepts, and socialization. Each of the goals included three benchmarks.

26. The first goal concerned the subject of "play" and provided that, by September 29, 2007, Student will be able to participate in joint play with peers during engaging activities independently in eight out of 10 opportunities, as measured by observation and documentation.

27. The second play goal also related to "play" and provided that, by September 29, 2007, Student will demonstrate expanded play skills beyond constructive play during play dates with peers in eight out of 10 opportunities, as measured by observation and documentation.

28. The third goal concerned the "understanding of basic concepts" and provided that, by September 29, 2007, Student will recall information regarding time concepts with 80 percent accuracy in eight out of 10 opportunities, as measured by observation and documentation.

29. The fourth goal concerned "understanding basic concepts" and "socialization" and provided that, by September 29, 2007, Student will discriminate when told to either "tell" or "ask" a person about a topic in eight out of 10 opportunities, as measured by observation and documentation.

30. The fifth⁶ goal concerned the subjects of "play" and "socialization" and provided that, by September 29, 2007, Student will maintain social proximity of one foot and maintain eye contact for a duration of five seconds of conversation with a peer in eight out of 10 opportunities, as measured by observation and documentation.

⁵ The September 1, 2006 ABC progress report included current levels of performance by Student with regard to his goals from the June 9, 2006 IEP. It recommended adoption of four new goals that the IEP team included in the September 29, 2006 IEP document.

⁶ The goals in the September 29, 2006 IEP are not numbered seriatim.

31. The sixth goal also related to “play” and provided that, by September 29, 2007, Student will independently join peers while they are playing for up to two minutes in eight out of 10 opportunities, as measured by observation and documentation.

32. The seventh goal also related to “play” and provided that, by September 29, 2007, Student will invite two peers to play with him a total of two times in one hour and imitate them in play during two specific play activities (e.g., going down a slide), as measured by observation and documentation.

33. The eighth goal also related to “play” and provided that, by September 29, 2007, Student will request information from two peers two times within one hour, as measured by observation and documentation.

34. Student’s parents contend that they did not understand certain terms used in the above-reference goals, such as “engaging,” “maximum, moderate, and minimal,” “imaginative play,” “time concepts,” “a four-part storyboard,” “three-part routine,” or “constructive play.” However, this contention was not persuasive. The IEP team members and ABC participants explained these concepts at the IEP meetings. At the September 29, 2006 IEP meeting, the parents participated in the drafting of the first three goals. Additionally, the parents agreed to the June 9, 2006 IEP that contained goals that referred to “engaging” activities, and Student’s mother stated that she understood “imaginative play” in the context of the LIFE program.

35. The goals were supported by information available to the IEP team and parents. ABC representatives presented Student’s progress at the IEP meetings. ABC’s Senior Behavioral Consultant met with Parents on at least 40 occasions for clinical meetings where Student’s ABA progress was documented and explained. ABC developed goals four through eight described above, and the ABC progress reports were attached to the IEP documents.

36. The District complied with the requirement of setting forth appropriate statements of measurable annual goals and descriptions of the manner in which the progress of Student will be measured in the September 29, 2006, and December 21, 2006 IEP documents. Such statements and descriptions were understandable, and the goals developed by the District met all of Student’s unique needs.

Placement, Services and Training at CLOUDS

37. Student contends that the offer of placement at CLOUDS was inappropriate because the staff was not trained in ABA, the academic level in the classroom is inappropriate, Student would not receive appropriate educational services and the District is unable to provide intensive educational treatment at CLOUDS.

38. In the December 21, 2006 IEP, the District offered, in part, fifteen hours a week at CLOUDS, a developmental based preschool program at Caryn Elementary which

was Student's home school. The CLOUDS program was developed in conjunction with Playtime, a developmental program. Student would have a "confederate" aide to begin school. The aide would fade out over time as Student adjusted to his new classroom. Ms. Jones, the teacher for the proposed class, was an experienced special education teacher teaching in a general education environment. She had training in programs directed at teaching autistic children. Ms. Jones had training in PECS,⁷ FloorTime⁸ and TEACCH⁹ programs, which she implemented in her classroom. She determined the student's level of learning and taught to that level and a little higher. The CLOUDS program itself is based on the developmental theories of Dr. Stanley Greenspan. It uses play therapy to provide benefit to its students. The program is divided 50-50 between children with disabilities and general education students. There was already one other autistic child in the class.

39. ABC indicated that Student was progressing through the levels of care offered by ABC and was nearing completion of his program. ABC recommended a regular class placement for Student and suggested a "confederate" aide for Student as a transition to CLOUDS. From the June 2006 IEP forward, ABC recommended a reduction in ABA services for Student as a result of his progress. In the IEP meeting held on September 29, 2006, ABC recommended 15 hours ABA in school, one-to-one aide and 25 hours in home ABA. In the IEP meeting held on December 21, 2006, ABC recommended 15 hours in home ABA, 14 hours of consultation with the transition "confederate" aide time coming from these ABA services until transition is complete, then a reduction to 15 hours of at home ABA therapy, with a fade out of in home ABA services to zero.

40. Dr. Morris opined that CLOUDS was inappropriate for Student because she felt that the other students in the class were not up to Student's level. Student was reading and was accomplished in math.

41. Student's contention that CLOUDS would not be appropriate is not persuasive. Student's need was in the area of socialization and play skills. His need was not in academics. Student would have been a leader in the CLOUDS program. Dr. Pellitteri and Ms. Ludovico considered Student a "poster child" for the CLOUDS program because they anticipated that he would make great progress there. The developmental program of CLOUDS that stresses play experience and learning from the other children would prove beneficial to Student's needs regarding socialization and play skills.

⁷ PECS is a method of communication for children who have little expressive language or vocabulary.

⁸ FloorTime is a developmental approach to dealing with children with disabilities. It was developed by Dr. Stanley Greenspan. It is based on a Developmental, Individual-difference, Relationship-based (D.I.R.) model. According to Dr. Greenspan, it works to help each child master the six fundamental development skills that underlie all our intelligence and interactions with the world.

⁹ TEACCH is a nationally known program for children with autism. It includes one-to-one instruction, and ABA techniques.

42. The opinion of Dr. Morris that CLOUDS would not be a sufficient challenge is not persuasive.¹⁰ As noted, in Ms. Jones, Student would have an experienced special education teacher. Student would not suffer at CLOUDS and he would be exposed to age-appropriate peers for his socialization. His academic success would make him an attractive roll model for his peers.

43. The emphasis on socialization over academics in the CLOUDS program did not constitute a substantive violation of IDEA. Student's primary needs were in the area of socialization and play skills. The CLOUDS placement was reasonably calculated to promote Student's educational success in those areas. Student's academic need was not a factor that made the placement at CLOUDS an inappropriate placement.¹¹

44. Student is not entitled to a maximization of his educational opportunity. He is entitled to an education that reasonably provides him some educational benefit. As indicated in Factual Findings 37-43, the CLOUDS program offered Student that education. Student will continue to receive ABA therapy while he transitions to CLOUDS and until the IEP team determines it is no longer necessary. The lack of an ABA component in the classroom is not a substantive violation of IDEA.

45. Student contends that CLOUDS would be an inappropriate placement for Student because of the absence of ABA trained staff. The class has no ABA component. However, this contention is not persuasive. As noted above, Student would have a "confederate" aide while transitioning to CLOUDS. The CLOUDS program had strategies that involved ABA techniques. One of Ms. Jones's aides had experience as an aide for an autistic child. Student still had an ABA home program to address any problems that arose in school.

Intensive Treatment

46. Student contends that CLOUDS would be an inappropriate placement for Student because the District is unable to provide intensive educational treatment at CLOUDS. Essentially, Student contends that he needs a one-to-one aide in the classroom and an ABA program of 40 hours a week in home and at school.

47. As indicated in Factual Findings 14 and 40, Dr. Robin Morris prepared a psychoeducational report in regard to Student. Her testing was not dissimilar to that of the

¹⁰ Dr. Morris's preference for Kindercare was not persuasive. Student did not call the Kindercare teacher as a witness and there was no other evidence presented at the hearing regarding the components of the Kindercare program.

¹¹ Based on the District's assessment, Student's academic performance in the testing ranks in the high average to average range. The S/L assessment indicates that Student's mean length of utterance is age appropriate. Dr. Pellitteri's testing indicates that Student's IQ is in the above-average range. Dr. Morris's testing ranked Student's IQ a bit higher. Dr. Morris's academic achievement testing ranked Student at an age-equivalent of a seven year-old in some areas.

District except her numbers on academics were a little higher. She was critical of ABC and CLOUDS. She recommended replacement of ABC, as an ABA provider, by LIFE, Children with Autism and Related Disorders (CARD) or Behavior Education of Children with Autism (BECA). She recommended a regular education class with a one-to-one aide for 15 hours a week, and 25 hours of in home ABA therapy. Dr. Morris said that ABC was not performing ABA therapy as she understood the concept.

48. LIFE assessor Francisco Chavez observed Student at home and at Kindercare. He felt that Student qualified for LIFE ABA services. He observed ABC aides to be merely babysitting Student and reinforcing maladjustive behaviors. Dr. Scott Cross, a director at LIFE, reviewed Dr. Morris's report and Mr. Chavez's report and attempted to contact the director at ABC to relate his concerns over the ABA service being provided to Student by ABC. LIFE provided Student a 40 hour a week ABA program at Kindercare preschool and at home.

49. Student's parents' complaint regarding placement is really an argument over methodology. The contention is that LIFE is better than ABC. Parents fail to show that LIFE is the only program that can provide educational benefit to Student. Dr. Pellitteri's testing of Student showed he made progress with ABC as his provider.¹² Even Dr. Morris acknowledged that Student made progress, although it was not what she would have expected to see.

50. The recommendations of Dr. Morris and Mr. Chavez were not persuasive in regard to ABC's performance as an ABA provider. Although Dr. Morris and Mr. Chavez emphasized the importance of data, neither bothered to examine the logbook that was accessible to them in regard to what Student was being trained on when they observed him working with an ABC aide. Neither asked the ABC supervisor about the provider's techniques they observed. Both ABC and LIFE programs are based on ABA, but ABC incorporates different behavioral teachings in its program. It was not possible to determine whether Dr. Morris and Mr. Chavez's criticism of ABC's provision of services stemmed from defective application of ABA practices or from ABC's application of its behavioral interventions when they were observed by the two critics.

51. Both Dr. Morris and Mr. Chavez felt that Student needed a one-to-one aide in any classroom. However, Dr. Pellitteri recommended that Student not use a one-to-one aide because it would interfere with Student's socialization goals and his relationships with the peers in Student's classroom. Her testimony in this regard was persuasive. Ms. Louritt had cautioned against the potential that Student could become aide dependent which was counter to the thrust of his training to become independent and more social. Under the District's

¹² Dr. Pellitteri tested Student using the Alpern Bogen Development Profile II, during her testing in 2005 and again in 2006, over that time period Student jumped from a +4 or normal academic rating to a +32 and an above average academic rating.

offer, Student would still have a “confederate” aide until he successfully transitioned to the CLOUDS program.

52. Dr. Morris’s credibility was eroded by her testimony that she was familiar with programs like ABC, but would not recommend them. Her apparent predetermination on the effectiveness of the program tainted any sense of objectivity that one would expect from an expert witness. Dr. Morris’s credibility was further undermined by conflicts with Student’s Mother in regard to providing the District with Dr. Morris’s report,¹³ and her failure to contact Dr. Pellitteri regarding Student’s assessment to attempt to prevent the subsequent duplication in testing that resulted.¹⁴

53. The testimony of Dr. Pellitteri, Mr. Gutierrez, Ms. Gutierrez,¹⁵ and Ms. Louritt was compelling that Student needed to fade out his dependence on an aide and that his success in the ABC program was an indication that he would be successful in his transition to the CLOUDS program.

54. ABC felt Student was nearing completion of its program and recommended a fade out of services. ABC recommended that Student attend CLOUDS with a “confederate” aide to help him transition. ABC personnel did not think that Student needed a 40 hour week ABA program. Based on her review of the LIFE logbook of Student’s ABA training, Ms. Louritt thought that Student’s increase in behaviors might reflect a reaction to too much therapy.¹⁶ There is no substantive violation of IDEA in the elimination of the aide and a reduction in ABA services.¹⁷ In the absence of proof that LIFE was the only ABA provider that could provide some educational benefit, methodology is left to the discretion of the District.

¹³ Dr. Morris testified that she recommended to Mother that she share Dr. Morris’s report with the District. Mother testified that if Dr. Morris had made that recommendation she would have shared the report with the District. Dr. Morris’s report recommends in writing sharing the report with the Regional Center but does not contain a written recommendation to share the report with the District.

¹⁴ See, Ethical Principles of Psychologists and Code of Conduct, American Psychological Association (APA), June 1, 2003, Principle B, and Ethical section 3.09-Cooperation With Other Professionals. Dr. Morris is a member of the APA.

¹⁵ Ms. Gutierrez was married to Mr. Gutierrez, but had extensive experience working with LIFE and reviewed the records of Student.

¹⁶ Mr. Chavez from LIFE acknowledged that they had instituted a “Thinking Chair” at Kindercare to deal with Student’s behavior. Student was required to sit on the chair missing part of his recess to address his behaviors. This appears to be an adaptation in Lovass training which originally emphasized only positive reinforcement and no negative treatment.

¹⁷ The District will need to hold another IEP to consider Dr. Morris’s report, the LIFE report and Student’s progress, and at that time the IEP team can reassess Student’s need of additional ABA or an aide.

LRE

55. One of the primary considerations in providing for a placement is that the IEP team must identify the placement that will allow the child to be educated with non-disabled children to the maximum extent appropriate. The team must consider if provision of supplementary aids and services will permit placement of a child with a disability in the regular education environment, rather than a more restrictive environment in which the child would otherwise be placed.

56. Student contends that CLOUDS is an inappropriate placement for Student because Kindercare is the least restrictive environment for Student. There are four factors to consider in determining whether a placement for a child with a disability is in the least restrictive environment: (1) the educational benefits of placement in full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect of the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the disabled child. In this case, consideration of the first factor indicates that Student would benefit more from the regular class than the unknown Kindercare curriculum. Consideration of the second factor also supports the placement offer at CLOUDS, in that, Student will have the benefit of more exposure to non-disabled peers.¹⁸ Regarding the third factor, there is no indication that Student would adversely affect the classroom at Kindercare or CLOUDS. The fourth factor similarly is also evenly balanced in that the costs are comparable to the extent that information was available. In balancing the factors, it is established that CLOUDS is the LRE for Student.

57. As indicated in Factual Findings 2, 16, and 22 through 56, the District offered Student FAPE at the December 21, 2006 IEP. Student provides no compelling evidence that the District committed either a procedural or substantive violation of the IDEA.

58. The District contends that it was inappropriate for Student's parents to replace the contracted ABA provider outside the IEP process. It further contends that it has no obligation to reimburse parents for their privately retained ABA provider. The parents of a child with a disability have the right to provide services for their child at their own expense; however, parents do not have the right to change service providers contracted by a school district.

59. ABC was the ABA provider for Student pursuant to the June 9, 2006 IEP to which parents consented. Sometime in January 2007, Student's parents hired private ABA provider LIFE to replace ABC without discussing the change with the District. Parents did not notify the District of its proposed change until the February 27, 2007, two months after the December 21, 2006 IEP.

¹⁸ At CLOUDS Student would be with 13 other students, seven of whom were regular education students. At recess he would have the opportunity to socialize with twice as many regular education students. There was no evidence that Student's other options would provide the opportunity for relating with non-disabled peers that were to be found at CLOUDS.

60. Student is not entitled to reimbursement from the District for the cost of services provided by LIFE.

LEGAL CONCLUSIONS

Applicable Law

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. Here each party filed for a due process hearing and bears the burden of persuasion as to the issues raised in their respective complaints.

Scope of the Hearing

2. The scope of the administrative hearing mandated by 20 U.S.C. section 1415(b)(2), is limited to the due process request filed to obtain the hearing. (*County of San Diego v. California Special Education Hearing Office, supra*, 93 F.3d 1458, 1465.)

General Principles

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

4. There are two parts to the legal analysis of whether a school district complied with IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Education v. Rowley* (1982) 458 U.S. 176, 206-07 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

5. To determine whether a district offered a student FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided FAPE, even if the student's parents preferred another program which would have resulted in greater educational benefit. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; *Van Duyn v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770, 776; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

The IEP

6. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the district cannot be "judged exclusively in hindsight . . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

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

8. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) Nevertheless, an IEP need not conform to a parent's wishes in order to be sufficient and appropriate. (*J.P. v. West Clark Community Schools* (S.D. Ind. 2002) 230 F.Supp.2d 910, 919; *Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

Methodology

9. IDEA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Department of Education* (E.D. Tenn. 2006) 2006 U.S. Dist. LEXIS 27570.)

10. Courts have determined that the most important issue in determining the substantive nature of FAPE is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Deal, supra*, at 2006 U.S. Dist. LEXIS 27570; *Rocklin Unified School District v. Student* (May 25, 2007) OAH CASE NO. 2006110278.)

11. As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.)

Least Restrictive Environment

12. In developing an IEP for a child with a disability, the school district must identify the placement that will allow the child to be educated with non-disabled children to the maximum extent appropriate. The IEP team must consider whether the provision of supplementary aids and services will permit placement of the child in the regular education environment, rather than a more restrictive environment in which the child would otherwise be placed. (34 C.F.R. §§ 300.114(a)(2)(i), 300.116(a)(2).)

13. School districts are required to provide each special education student with a program in the LRE, with removal from the general education environment occurring only when the nature or severity of the student's disabilities is such that education in a general education classes with the use of supplementary aides and services could not be achieved satisfactorily. To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i); Ed. Code, § 56031; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 [factors to consider: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the disabled child.])

Parental Participation and Predetermination

14. A District commits a procedural violation of the IDEA when it predetermines a placement. Predetermination occurs when the district assumes a "take it or leave it" position and/or denies the parents an opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484; *Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1133.)

15. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (34 C.F.R. §300.322(a)-(c); Ed. Code, §§ 56304, 56342.5.)

IEE

16. The parents of a child with a disability have the right to obtain, at public expense, an independent educational evaluation of the child if the parents disagree with an assessment of the child obtained by the school district, in accordance with part 300.502 of title 34 of the Code of Federal Regulations. (Ed. Code, § 56329, subd. (b).)

Changing Service Providers

17. The parents of a child with a disability are not entitled to their choice of service providers. (*N.R. v. San Ramon Valley Unified School District* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *B.V. v. Department of Education, supra*, 451 F.Supp.2d 1113; *Johnson v. Special Education Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1182.)

Reimbursement

18. The parents of a child with a disability may be entitled to reimbursement for the costs of services they have procured for their child when the school district has failed to provide FAPE, and the private services are considered appropriate under the IDEA. (20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148; *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371[105 S.Ct. 1996, 85 L.Ed.2d 385].) Education Code section 56174, provides that if student is offered FAPE by a public school district he is not entitled to payment for his private school attendance.¹⁹

Determination of Issues

Issue 1: Is the Student entitled to receive reimbursement for an Independent Education Evaluation (IEE)?

19. Factual Findings 12 through 15, and Legal Conclusion 16, establish that Student was not persuasive in his contention that he made a request for an IEE and that the

¹⁹ Since there was no IEE request, it is unnecessary to decide District's contentions that Student's parents should be denied reimbursement because they acted unreasonably in unilaterally placing Student in a private school, in unilaterally replacing ABC, as an ABA provider, in failing to participate in parent training and in refusing to participate in the IEP process to resolve their disagreements with the District. Similarly, it is unnecessary to decide whether parents can obtain an IEE based on disagreement with an ABA progress report. (*Casey F. v. River Falls School District* (7th Cir. 2001) 243 F.3d 329, 334 [no disagreement with diagnosis or educational methodology]; *Krista P. v. Manhattan School District* (N.D. Ill. 2003) 255 F.Supp.2d 873, 889 [District did not conduct an evaluation of the type detailed by these regulations].)

District denied that request. The record supports the finding that parents requested an updated assessment and that the District agreed and provided such assessment.

Issue 2: Did the District fail to provide Student with a FAPE for the 2006-2007 school year, by predetermining Student's placement and preventing Student's parents from participating in the IEP meetings?

20. Factual Findings 3 through 11, and 16 through 21, and Legal Conclusions 14 and 15, establish that Student was not persuasive in his contention that the District predetermined the placement and prevented Student's parents from participating in the IEP meetings. The District never presented the CLOUDS placement as a "take it or leave it" proposition. The District offered to consider any appropriate placement and engaged the parents in visits to review other proposed placements. The District considered parents' private placement at Kindercare. In addition, the District did nothing to prevent the parents from participating in the IEP meetings. Parents requested and the District held the September 1, 2006 IEP. When the parents raised concerns regarding Student's socialization, the IEP team drafted two new goals for that area. The parents were allowed to take home an IEP for review. The parents were sent the September 29, 2006 IEP to review Student's goals and to offer input. The fact that parts of the December 21, 2006 IEP were typed prior to the meeting did not constitute predetermination where other entries were added at the meeting and the team considered the parents views in completing the IEP.

Issue 3: Did the District fail to provide Student with a FAPE for the 2006-2007 school year, by failing to develop goals at the September 29, 2005, and the December 21, 2006 IEP meetings that were appropriate, measurable and clear?

21. Factual Findings 3 through 11, and 23 through 36, and Legal Conclusions 7 and 8, establish that the Student's September 29, 2006, and December 21, 2006 IEPs contained a statement of measurable academic and functional goals designed to meet Student's educational needs and to enable him to make progress. The IEPs had a description of how the goals will be measured. Student failed to establish that the goals were vague, inappropriate or unmeasurable. The IEPs provided sufficient goals to meet Student's needs and contained sufficient benchmarks such that Student's progress could be measured. Parents participation in clinic meetings weekly with ABC and their daily review of his ABC logbook documenting his daily progress gave the parent unique knowledge of Student's progress. Parents were also provided progress reports from ABC on a regular basis. The scope and nature of the goals were explained in detail at the IEP meetings.

Issue 4: Did the District fail to provide Student with a FAPE for the 2006-2007 school year, by failing to provide staff appropriately trained in the areas of Student's disability?

22. Factual Findings 2, 8, 23 through 33, 36 through 39, 41, 45 and 51 through 54, and Legal Conclusions 8 through 11, establish that the Student was not able to show that he needed ABA trained staff in order to gain an educational benefit. Student's areas of need

were not academics but socialization and play skills. The District's staff and the CLOUDS program, based on developmental theories that emphasized learning from play with other students, were particularly appropriate for Student. His teacher at CLOUDS was an experienced special education instructor who taught to the particular student's level of learning. The teacher had received training in FloorTime, PECS, and TEACCH, each of which is a recognized program for educating children with autism. Student received ongoing ABA training in the home program. During his transition to the CLOUDS program he would have a "confederate" aide trained in ABA. Another aide in the classroom had previous experience as an aide to an autistic child. It was not necessary that District staff be ABA trained to reasonably provide Student with an educational benefit.

Issue 5: Did the District fail to provide Student with a FAPE for the 2006-2007 school year, by failing to provide an appropriate classroom setting?

23. Factual Findings 2, 4, 8, 9, 16, 22, 23, 37-39, 41, 43 through 45, 54 through 56, and Legal Conclusions 3 through 5 and 9 through 13, establish that Student was not able to show that the CLOUDS classroom setting was inappropriate. CLOUDS classroom was half regular education students and nearly half special education students. Student's academic achievements meant he would be high up in the class as far as education was concerned. His primary areas of need were socialization and play skills. In this mixed class he had the opportunity to play with non-disabled peers. He would have a "confederate" aide to support him if he experienced difficulty with social contacts.

24. Factual Findings 55 and 56, and Legal Conclusions 12 and 13, establish that CLOUDS was the appropriate setting for Student in the least restrictive environment. LRE is a critical consideration in determining placement. (*Katherine G. v. Kentfield School District* (9th Cir. 2004) 2004 U.S. App. LEXIS 22085.)

Issue 6: Did the District fail to provide Student with a FAPE for the 2006-2007 school year, by failing to provide Student with intensive educational treatment?

25. Factual Findings 2, 4, 6, 8, 9, 16, 22, 23, 37 through 39, 41, and 43 through 46, 51 and 53, and Legal Conclusions 3 through 5 and 9 through 13, establish that the Student was unable to show that he needs intensive educational treatment to receive an educational benefit from the CLOUDS preschool program. Student continues to receive ABA therapy from ABC. His program providers at ABC believe that Student is near completion of his ABA program. The evidence that Student requires a one-on-one aide and 40 hours of ABA therapy to receive an educational benefit is not persuasive. All the experts agreed that Student needed to be in a regular education classroom. Student has demonstrated that he has progressed educationally from his program with ABC. The IEP team will conduct a review of Student's experience at CLOUDS and adjust his program appropriately.

26. Factual Findings 12 through 15, and 58 through 60 and Legal Conclusions 16 through 18, show that Student could not establish a basis for reimbursement for an IEE or LIFE services. Student's parents cannot change vendors outside the IEP process and expect

reimbursement for the privately retained vendor. Also, Student failed to persuade that the District failed to offer FAPE, thus parents are not entitled to reimbursement.

27. Based on all the Factual Findings and Legal Conclusions, District's offer of FAPE was appropriate.

ORDER

In light of the above Factual Findings and Legal Conclusions:

- a. All of Student's requests for relief are denied.
- b. The District's December 21, 2006 IEP offered Student FAPE.
- c. The District was successful in its contention that parents cannot be reimbursed for changing ABA providers.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues presented for determination.

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. (Ed. Code, § 56505, subd. (k).)

Dated: July 23, 2007



JAMES R. GOFF
Administrative Law Judge
Office of Administrative Hearings
Special Education Division