

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

In the Matter of

STUDENT,

Petitioner,

v.

TORRANCE UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2006030068

**DECISION**

Administrative Law Judge (ALJ), Dennis C. Brue, Office of Administrative Hearings, (OAH), Special Education Division, State of California, heard this matter on September 18, 19, 21, and 22, 2006, in Torrance, California.

Bruce Bothwell, Attorney at Law, represented Petitioner (Student). Student's parents (Parents) were present throughout the hearing.

Respondent Torrance Unified School District (District) was represented by Sharon A. Watt, Attorney at Law. Aaron P. Benton, District's Director of Special Education, was present throughout the hearing.

On March 1, 2006, Student filed a Request for Due Process Hearing and Mediation. On March 28, 2006, OAH granted District's Motion to Continue. Sworn testimony and documentary were received at the due process hearing and the record remained open to allow submission of closing briefs. On October 10, 2006, closing briefs were received, the record was closed and the matter was submitted.

## ISSUES<sup>1</sup>

1. Did the District fail to provide Student a free appropriate public education (FAPE) by failing to implement the May 24, 2004 IEP by reason of its non-public agency (NPA) vendor's failure to provide the specified number of in-home applied behavior analysis (ABA) special education service hours?
2. Did the District fail to offer Student a FAPE from May 16, 2005, to July 21, 2006, by:
  - A. Failing to invite at least one general education preschool teacher to either the May 16, 2005 or the June 22, 2005 individualized education program (IEP) team meetings;
  - B. Failing to include measurable annual goals and benchmarks in the May 16, 2005 IEP relating to non-verbal communication, the pragmatics of social communication, social interaction and reciprocal play;
  - C. Failing in the May 16, 2005 IEP to provide placement in the least restrictive environment;
  - D. Offering ABA services in the May 16, 2005 IEP which were not based on peer-reviewed research;
  - E. Failing in the May 16, 2005 IEP to provide sufficient amounts of ABA individual one-to-one instruction, assistance, and therapy, and conditioning a change in ABA providers upon elimination of Student's existing ABA program;
  - F. Failing to provide sufficient amounts of speech and language services;
  - G. Physically mishandling Student on November 11, 2005;
  - H. Failing to offer an appropriate program for the 2005 extended school year?

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<sup>1</sup> For purposes of clarity and organization, the ALJ has reorganized and renumbered Student's issues as identified in the due process hearing request and clarified at the telephonic prehearing conference. While referenced in the Due Process Hearing Complaint, Student's allegations regarding improper amounts of occupational therapy were waived at the prehearing conference and again at the due process hearing. At hearing, Student waived any issues concerning District's assessment of Student, and excluded the educational program arising out of the July 13, 2006 IEP from this hearing and decision.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. Student, born on June 8, 2001, is five years, three months old and eligible for special education services on the basis of autism. He resides within the District's boundaries but does not attend any District school. Student currently attends kindergarten at Ascension Lutheran School, a private school program funded by his Parents.

### *Failing to Implement the MAY 24, 2004 IEP*

2. Student contends that District's NPA vendor failed to provide the required hours of home-based behavior intervention services (also referred to as "ABA") and thereafter failed to "make up" for the lost hours, as they represented that they would. Student's May 24, 2004 IEP included 10 hours of home-based ABA services to be provided by District's vendor Autism Spectrum Therapies (AST). In a progress report dated October 13, 2004, AST stated that because of an unforeseen staffing shortage, they had not been providing in-home services to Student. AST planned on resuming home services in November of 2004. In an attempt to compensate Student, his in-school support hours were increased from 12 hours to 15 hours weekly, a gain of three hours each week.

3. AST was unable to make up the hours as planned. At hearing, AST Program Coordinator Faye Carter acknowledged writing an email to Student's mother, dated August 20, 2005, wherein she stated that AST planned on providing all 163<sup>2</sup> hours of outstanding compensatory services over a six-week period during July and August of 2005. The email also noted that these hours had to be utilized prior to September 2, 2005, or there was risk of forfeiting them.

4. Ms. Carter testified that she believed the 163-hour figure quoted in her email was inaccurate. She offered no explanation as to how or why the figure was mistaken, or how it was included in her e-mail. She did, however, testify that she believed that all of the compensatory hours had been made up during the six weeks in July and August as proposed. Her belief was predicated on proposed therapy schedules she recalled. Unfortunately, Ms. Carter's recollection of these schedules was scant at best as she did not review any documentation regarding the compensatory hours prior to appearing at the due process hearing, nor did she provide these schedules for introduction into evidence.

5. Ms. Carter produced AST billing invoices for services rendered to Student during the summer of 2005. However, the invoices only documented 44 hours of compensatory service hours having been provided in July of 2005. Adopting a generous interpretation of how some of the hours were billed, it is possible to support the provision of

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<sup>2</sup> The figure of 163 hours at 10 hours per week calculates out to approximately 16 weeks or four months of lost classroom and in-home services to Student.

another 16 hours to Student. This still leaves in excess of 100 hours of services unaccounted for and not provided to Student<sup>3</sup>.

6. Ms. Carter admitted she had no firsthand observation or knowledge of the outstanding services being provided, nor was she in possession of any additional documentary proof supporting her belief that the hours had been made up.

7. Student's mother did not recall the outstanding hours being made up at either her home or at Student's preschool. Heidi Liao, Student's primary one-to-one aide, did not recall providing the outstanding compensatory hours. AST Program Supervisor Diana Daranyi had no recollection of scheduling additional compensatory hours for Student.

8. Thus, District denied Student FAPE when it failed to implement the provisions of the May 24, 2004 IEP by reason of the failure of District's NPA vendor to provide the required 10 hours per week of in-home ABA services. AST's efforts to "make up" the lost hours were unsuccessful and AST still "owes" Student approximately 100 hours of ABA services. Relief in the form of compensatory education is discussed in a separate section within the Legal Conclusions.

*May 16 and June 22, 2005 IEP<sup>4</sup>*

*Failing to Invite Student's Preschool Teachers to IEP Meetings*

9. As discussed in Legal Conclusion 16, when convening an IEP team meeting, the District is required to invite not less than one general education teacher if the student is, or may be, participating in the general education environment. This includes children attending preschool if the school district is one which provides general education preschool classes. As discussed in Legal Conclusion 15, a procedural violation denies FAPE only if the parents were prevented from meaningfully participating in the IEP team meeting or the student was denied educational benefit as a consequence.

10. IEP team meetings for Student were held on May 16, 2005, and June 22, 2005. Student contends that his private preschool school teacher should have been invited to these IEP team meetings.<sup>5</sup> At the time of the meetings, Student was attending Tuvia School of Temple Menora preschool, a private religious preschool. He was placed there by his parents who were paying the tuition. Student was receiving special education services provided by

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<sup>3</sup> The number of outstanding hours would actually exceed this figure as an unknown amount of supervisory hours are unaccounted for. Neither party attempted to quantify the number of supervisory hours currently outstanding.

<sup>4</sup> The initial IEP and June 16, 2005 addendum are considered as a single IEP for purposes of these findings.

<sup>5</sup> Although Petitioner specifically contends that the District should have invited the private preschool (Tuvia) teacher, as the discussion in the Legal Conclusions makes clear, it was the District's general education school teacher that should have been included, and the issue is addressed as if that were the contention.

District including speech and language therapy, occupational therapy, and behavior intervention services at home and in school. As noted above, the ABA behavior intervention services were provided by AST under contract with District. The special education services were provided in accordance with a May 24, 2004 IEP and July 6, 2004 Addendum to the IEP.

11. The May 16, 2005 IEP team consisted of AST Program Coordinator Faye Carter, AST Program Supervisor Diana Daranyi, District speech and language pathologist Christina Allred, District occupational therapist Heidi Baker, and both of Student's parents. Student's private preschool teacher was not invited to the IEP meeting, nor did any other representative from the private preschool participate or attend. No District general education teacher attended the meeting. The IEP proposal listed the same services that Student had been receiving and described the recommended placement as "[Student's] current placement in a private typical preschool...." The identified locations for provision of services were the NPA<sup>6</sup>, home, private school, and a District therapy room (for language and speech services and occupational therapy). There were discussions about the possibility of Student attending the District's Kidzone preschool. Kidzone preschool was located at District's Arlington Elementary School. The school offered preschool classes consisting of approximately 16 typically developing children who were not receiving specially designated instruction and up to four children with exceptional needs. The class was taught by one regular education teacher, one special education teacher, and two instructional aides. Student's parent's declined the placement. Parents otherwise consented to the described program and services.

12. On June 22, 2005, an IEP team meeting was held to discuss an addendum to the May 16, 2005 IEP, in the form of a change in placement from Tuvia to District's Kidzone preschool five days a week for 180 minutes each day. No Tuvia teacher attended the addendum meeting nor did any of District's general education teachers.

13. At both meetings, the parties discussed placement in the District's preschool, which while it did include up to four special education students, was a general education preschool class. Therefore, at least one general education teacher should have been present at each meeting. District's failure to include at least one such teacher constitutes a procedural violation.

14. However, Student failed to establish that either procedural violation significantly impeded his parents' opportunity to participate in the decision-making process involving the provision of FAPE to Student or deprived Student of educational benefits. On the first occasion, the District obtained a signed, written waiver from Parents regarding the absence of Student's private preschool teacher. After discussions with the District, Student's parents agreed that it was not necessary for Student's private preschool teacher to be present and signed the District's waiver. While Student's mother testified at the due process hearing that she was unaware that the private preschool teacher should have attended the meeting,

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<sup>6</sup> This refers to AST.

her testimony was contradicted by the fact that the District prepared a waiver, indicating that the private preschool teacher should attend, and Student's mother signed the waiver. More importantly, the IEP simply continued the placement and services which Student had been receiving based on the 2004 IEP and addendum. Thus, the absence of at least one District general education teacher at the May 16, 2005 IEP meeting did not prejudice Parents in any demonstrable way and District did not deny Student FAPE.

15. Prior to the June 22, 2005 IEP addendum meeting, a District representative obtained a telephonic waiver of the attendance of Student's prospective general education teacher. At the IEP addendum team meeting, Student's mother agreed to District's previous offer of placement, and that Student would begin attending the District's Kidzone preschool in the fall of 2005. Student produced no evidence to suggest that his parent's ability to participate was compromised or that the absence of a general education teacher deprived him of educational benefits. Therefore, no substantive violation of FAPE was established.

*Adequacy of Goals and Benchmarks Relating to Non-Verbal Communication, Pragmatics of Social Communication, Social Interaction, and Reciprocal Play*

16. As discussed in Legal Conclusion 7, an IEP for a preschool child must include the manner in which the disability of the individual affects his or her participation in appropriate activities. The IEP must include a statement of measurable annual goals and benchmarks designed to meet the student's needs and a description of the manner in which the progress of the student towards meeting such goals will be measured. Student contends that the May 16, 2005 IEP failed to provide adequate annual goals relating to nonverbal communication, the pragmatics of social communication, social interaction and reciprocal play.

17. There is no dispute between the parties as to the student's unique needs in the areas of nonverbal communication, pragmatics of social communication, social interaction, and reciprocal play. Student did not raise any issues related to the assessments, assessment process, or identified needs.

18. The May 16, 2005 IEP included at least three annual goals relating to the areas identified above. Each goal had prescribed benchmarks reflecting partial accomplishment of the annual goal. The goal designated number two was a speech and language goal in the area of receptive and expressive language. The then-present levels of performance in this area were that Student could describe simple routines and procedures as well as obvious characteristics about pictures. He had difficulty sequencing four to five pictures and predicting what might happen next. The annual goal was that Student would sequence and describe four to five pictures and predict what could happen next, without cues from the therapist and using age appropriate grammar.

19. The next relevant goal was designated goal number three, also in the area of speech and language and in the more specific area of expressive language and pragmatics. The then-present levels of performance were Student's ability to answer simple "wh"

questions about a story, but difficulty in answering questions (recalling information) about locations and characters (and their emotions). The annual goal was the ability to retell a story without visual cues and to include information about locations, characters and emotions, using age-appropriate grammar and minimal cues (less than two) from the therapist.

20. The goal designated number four was also designed to address speech and language needs and more specifically, pragmatics. Student's then-present levels of performance were described as the ability to describe simple routines and procedures but difficulty in describing what he had done in school or activities performed in the past. He required cues and reminders to elaborate on events and to use age appropriate grammar. The annual goal was to recall and describe information about a past experience at home, school, or elsewhere to a peer and/or an adult using age-appropriate grammar and appropriate body posture, eye contact, and emotion.

21. In addition to the expressed IEP goals identified above, District accepted the AST recommended goals and incorporated them into the IEP document. This followed a discussion regarding the previous year's goals including those which had been met. AST prepared a report dated April 25, 2005, which is the document incorporated into the May 16, 2005 IEP. The first section includes a list of program goals met in the previous year and a detailed description of progress towards the previous year's IEP goals. Areas addressed included getting the attention of a peer or adult before commenting, communicating needs or making requests, initiation of interaction with peers, approach and interacting with a peer possessing a toy, and reciprocal exchanges with peers.

22. The first area addressed among the newly recommended AST goals was "Social," with an annual goal of using appropriate phrases or sentences and/or gestures (e.g. tapping arm) to attain a peer or adult attention, without prompting, when Student is excited by environmental stimuli.

23. The second area was "Play," with three separate goals. The first of these was to act out, with minimal prompting, one of four offered pretend roles, e.g., going to the doctor, driving to Disneyland, a day at the zoo, or fire rescue. The second goal was to retell an activity or event to an adult or peer, using age-appropriate sentences, upon request and with minimal cues. The third play goal was to respond verbally to common questions from an adult or peer, i.e., "Do you want a cookie?" or "Do you want to go outside?"

24. The third area is "Behavioral," with two identified goals. The first goal was a reduction in self-stimulating behaviors, e.g., licking lips with minimal prompts. The second goal required compliance with instructions given by an adult, e.g., "Clean up."

25. The May 16, 2005 IEP annual goals and progress measures (benchmarks), including the incorporated AST goals, adequately addressed Student's identified needs in non-verbal communication, the pragmatics of social communication, social interaction and reciprocal play. These goals were formulated following a discussion relating to Student's

actual progress in the previous school year in these areas and his continuing needs. AST reported progress in Student's acquisition of social, play and communication skills. In the section entitled "Current Needs," AST emphasized the need to address Student's reaction to others when over-exciting or when others engaged him. It is noteworthy that the needs identified in the May 24, 2005 IEP and presumably adequately addressed in the previous school year, were the same as those identified in the May 16, 2005 IEP. In sum, although the titles given the goals did not precisely match the identified need categories, they did adequately address the actual needs of Student based on his observed behaviors and were designed to address the manner in which his disability affects his ability to participate in appropriate preschool activities.

*Least Restrictive Environment (LRE)*

26. Student contends that the District's offer of placement at Kidzone preschool fails to constitute the LRE for him. As discussed in Legal Conclusion 11, the IDEA requires that all special education eligible students, including preschool-aged children, be educated in the LRE, i.e., they must be educated in the regular education environment with typically developing, non-disabled peers, to the maximum extent appropriate. As further discussed in Legal Conclusion 12 and 13, while preschool-aged children do not typically attend public schools, districts must nonetheless provide, at a minimum, opportunities for disabled children to participate on a part-time basis in either public or private programs with non-disabled peers. The present dispute is whether the District's offer of Kidzone is less restrictive than Tuvia. As discussed in Legal Conclusion 14, when comparing two programs, the law requires that the ALJ balance, in pertinent part, the educational benefits of the programs and the non-academic benefits of the programs.

27. As noted above, at the time of the May 16, 2005 IEP team meeting, Student was attending Tuvia School, a private religious preschool. Student was receiving small-group speech and language twice a week for 20 minutes per session, two 30 minute sessions per week of individual occupational therapy, 12 hours of school-based behavior intervention, two hours a supervision of school-based behavior intervention, 10 hours of home-based behavior intervention, and two hours per week of supervision of the home-based behavior intervention. All of these services arose out of the prior May 24, 2004 IEP and July 6, 2004 Addendum.

28. District representatives did write in the May 16, 2005 IEP that Student's "current placement in a private typical preschool (Tuvia) appears to be the least restrictive environment to meet his educational needs." However, this followed Parents' rejection of the Kidzone alternative suggested by the District IEP team members. At hearing, AST representative Faye Carter and District speech and language pathologist Christina Allred credibly testified that Kidzone placement would address Student's needs and allow him to continue to make educational progress. Christine Allred observed Student at Tuvia on a monthly basis. She observed him for an hour at a time and then interviewed the AST aide. It was her professional opinion that the Tuvia staff was hindering Student because they did not allow him to initiate conversations and social interactions to a sufficient degree.

29. The totality of the evidence established that the Kidzone placement was a less restrictive educational environment than Tuvia and that it was the least restrictive public school environment offered by District. Although the Kidzone class included up to four special education students, these students were interspersed among 16 typical peers who were not receiving special education services. Student would be provided with more meaningful opportunities to communicate with his typically developing, non-disabled peers at Kidzone. As a result, Student would receive greater educational and non-academic benefits as Kidzone as compared with Tuvia.

#### *ABA Services*

30. Student contends that District failed to offer sufficient amounts of ABA services. The District's May 16, 2005 IEP offer of ABA service levels was based largely upon the progress report drafted by AST Program Coordinator Faye Carter and AST Program Supervisor Diana Daranyi. As noted above, this report was presented and discussed at the IEP team meeting. It summarized the observations of AST personnel and documented Student's educational progress and deficits at that time.

31. The AST progress report determined that in order for Student to successfully access the typical preschool setting and benefit both academically and socially, the acquisition of social interaction and self-regulation skills was necessary. In this regard and to fully support Student, it was recommended that he continue to receive the support of an instructional assistant, but to a lesser degree. AST proposed a fade out plan for its services, by which AST intended to create conditions for Student to independently self-regulate his behaviors and fine-tune his social/language skills. Once Student reached this proposed level of independence, it was envisioned that Student's classroom teacher would check in with him on a consistent basis in order to ensure maintenance of goals, ending the necessity of instructional assistant support.

32. The AST fade out plan proposed a step down process regarding services. From June through August 2005, Student would receive a total of 17 hours of ABA services per week. From September through December 2005, Student would receive 15 hours. From January through June 2006, Student would receive a total of eight hours of services per week.

33. Based upon the Student's unique needs and the goals that were drafted, the District offer of 17 hours of ABA services from June through August and 15 hours from September through December was appropriate.

#### *One-to-One ABA Instructional Assistance*

34. The District's offer of one-to-one ABA instructional assistance services arising out of the May 16, 2005 IEP meeting was 10 hours per week of one-to-one home based services, and 12 hours per week of school based services, for a total of 22 hours per

week (excluding supervision hours). This level of services was to continue from May 16, 2005, to June 30, 2005.

35. From July 1, 2005, through May 16, 2006, Student was to receive a total of 14 hours of one-to-one services, excluding supervision hours. Ms. Faye Carter was persuasive in her testimony regarding the appropriateness of the District's offer of one-to-one services to Student.

36. Student offered the testimony of Scott Cross<sup>7</sup> and Melanie Lenington, Ph.D.<sup>8</sup> in support of the contention that the ABA service offer was inadequate. Dr. Lenington expressed that Student requires intensive treatment from a one-to-one aide that would provide learning experiences with particular attention to the development of social/emotional and play skills (including non-verbal imitation and enhanced pragmatic language and an understanding of social rules). She strongly recommended a minimum of 40 hours per week for Student to derive educational benefit and to facilitate Student's ability to function at a level commensurate with his overall cognitive ability. In her view, these services should be delivered within the home setting and with integration into a typical preschool classroom setting. She also felt that a minimum of two hours per week for a minimum of eight hours per month of supervision should also be provided. Mr. Cross essentially concurred.

37. Student's expert witnesses were less persuasive than those called by the District regarding the appropriateness of the District's offer of ABA one-to-one instructional services. Both Dr. Lenington and Mr. Cross focused their testimony on the benefits of Lovaas style ABA services and specifically the "signature" delivery of a minimum of 40 hours of services per week. There was no scientific evidence presented indicating that the District's offer of ABA services was deficient only that its results were "lesser" in comparison with Lovaas according to Dr. Lenington's and Mr. Cross's own research and beliefs. As discussed further under Legal Conclusion 9, the analysis of this issue must focus on the District's offer and whether such offer addressed Student's unique needs and was reasonably calculated to provide Student some educational benefit. Moreover, the choice among appropriate methodologies is a matter within the District's discretion. Thus the type of ABA one-to-one instructional services offered and provided by District, and the amounts of such services, were appropriate.

### *Speech and Language Services*

38. As explained in Legal Conclusion 2, the speech and language services offered by District must be designed to meet Student's unique speech and language needs. The District's offer of speech and language hourly services was small group therapy for one hour

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<sup>7</sup> Mr. Cross has a M.A. in Psychology and is a doctoral candidate at Florida State. He is also a board certified behavioral analyst. Scott Cross is the Clinical Director of the Lovaas Institute.

<sup>8</sup> Dr. Lenington is a licensed Clinical Psychologist.

per week. From May 16, 2005, through July 31, 2005, therapy was for 30 minutes, twice weekly. For the 2005-2006 school year, it was for one hour, once a week.

39. Student's expert witness Dr. Lenington wrote in her November 30, 2005<sup>9</sup> evaluation that Student should receive speech and language services to address the issues of his uneven receptive and expressive language difficulties in addition to his pragmatic language difficulties. In her opinion, these needs should be addressed in an individual and intensive fashion. Dr. Lenington suggests such services two times per week for one hour at a time, an increase of one hour per week over the District's service level. District witness Christina Allred, who at times had daily contact with Student, was more persuasive as to the appropriateness and efficacy of the District's offer of speech and language services. Dr. Lenington lacked sufficient and intimate contact with Student to successfully rebut Ms. Allred's testimony. Student failed to establish that District's offer of speech and language services was inadequate to address Student's unique needs in this area.

#### *Change in ABA Services*

40. As noted above, on the strength of the AST written observations and program recommendations, Student's weekly ABA services were reduced from a total of 22 hours per week to 14 hours per week with a concurrent reduction in supervision hours from four to three hours per week, for a total of 17 hours of ABA therapy per week.

41. District's fade out plan for reducing Student's level of services was expressly contingent upon Student meeting his annual IEP goals and objectives and then the convening of another IEP team meeting to discuss whether there was a continuing need for an instructional assistant and the then-appropriate level of ABA services. This plan preserved Student's procedural safeguards, guaranteeing the involvement of Student and his parents, as well as knowledgeable professionals, in the formulation of Student's educational program. By predicating any change in services upon a future IEP team meeting, Student's ability to request a due process hearing was not adversely affected.

42. Student presented no evidence to suggest that the level of ABA services to be provided was conditioned on anything other than Student's success. Thus, Student failed to prove such contention.

#### *ABA Services Based on Peer-Reviewed Research*

43. As discussed in Legal Conclusion 8, the IEP must include "a statement of the special education and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided the [Student]." Student contends that the ABA program offered by District did not meet the statutory requirement that such program be

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<sup>9</sup> District did not have the benefit of Dr. Lenington's November 2005 evaluation and analysis at the earlier May 16, 2005 IEP team meeting.

based on peer-reviewed research. Student essentially contends that the Lovaas program is the only such program which meets this requirement.

44. AST Program Supervisor Robert Haupt explained that AST utilizes pivotal response therapy (PRT), which he described as non-traditional ABA therapy. PRT is largely based upon the academic studies and writings<sup>10</sup> of Drs. Robert<sup>11</sup> and Lynn Koegel. PRT is based upon peer reviewed research. It is a variation of ABA and uses a discrete trial format. Discrete trial interventions and ABA have been subjected to extensive peer-reviewed research. Mr. Haupt expressed the opinion that straight ABA therapy (as employed by Lovaas adherents) may be counterproductive by making children prompt-dependant.

45. Scott Cross testified for Student about the particulars of Lovaas methodology and its perceived efficacy. Both Dr. Lenington and Mr. Cross focused their testimony on the benefits of Lovaas style ABA services and specifically the signature delivery of a minimum of 40 hours of services per week. However, Student offered no scientific evidence that the type of ABA services provided by AST on District's behalf was not based on peer reviewed research or otherwise deficient. Moreover, as discussed further under Legal Conclusion 9, as long as the District offers an appropriate program, methodology is a matter within the District's discretion.

#### *Physically Mishandling Student*

46. On November 16, 2005, while present in Student's class, Mother witnessed the AST aide, Heidi Liao, grab Student's hand/wrist in a manner that she viewed as inappropriate. To Mother, Ms. Liao appeared tired and aggravated. Ms. Liao testified at hearing, stating she only dimly recalled the incident. She said that she utilized a physical prompt to redirect Student, and that she was not inappropriate or overly aggressive with Student.

47. The event was witnessed by AST Program Supervisor Robert Haupt who was present for an observational visit unrelated to Student. Mr. Haupt related that the preschool class had begun to clean up after one of their projects and Student was engaging in non-compliant/defiant behavior because he did not want to participate in policing the classroom. Mr. Haupt observed Ms. Liao use a "hand over hand" physical prompt as Student attempted to bolt. Mr. Haupt described the types of physical prompts which are appropriate under various conditions. He supported Ms. Liao's actions.

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<sup>10</sup> *Pivotal Response Treatments for Autism, Communication, Social, and Academic Development*, Brookes Publishing Company (October 2005).

<sup>11</sup> Robert Koegel, Ph.D., is the Director of the Koegel Autism Center at University of California at Santa Barbara (UCSB), where he is also Professor of Clinical Psychology and Professor of Special Education. Lynn Koegel, Ph.D., is Clinical Director of Autism Services at the Koegel Autism Center at UCSB.

48. Student's mother subsequently complained to AST and Ms. Liao was replaced as Student's aide. While all witnesses agreed the incident occurred, there were multiple interpretations as to the appropriateness, nature, and extent of what occurred. While Mother credibly testified as to her distress upon witnessing this incident, no evidence of injury, medical care, or intervention by school administration or the police was offered. There was also no evidence as to how, if at all, the incident denied Student any type of educational opportunity.

#### *2005 Extended School Year (ESY) Speech and Language Services*

49. Student contends District offered an insufficient and inappropriate program during the 2005 ESY as he received no speech and language services from July 31, 2005, through September 8, 2005. The provision of ESY services is appropriate when a student with special needs requires special education services in excess of the regular academic year and when an interruption of the student's regular education program may cause regression.

50. The parties do not dispute that Student required ESY services. The May 16, 2005 IEP forms included boxes to indicate whether an ESY would be provided and the "yes" box was checked. The stated justification was "maintain skill development." The May 16, 2005 IEP included small group speech and language for 30 minutes two times per week through July 31, 2005, with resumption of such services for 60 minutes once a week beginning on September 8, 2005, and extending through May 16, 2006. There was no break in ABA services to be provided Student at home or at his private school during the summer recess.

51. Student failed to establish that the loss of one month of speech and language services would result in significant regression. Moreover, many of the ABA goals necessarily included speech and language training. Thus, District did not deny FAPE to Student by its failure to provide speech and language services for approximately one month in the summer of 2005.

## LEGAL CONCLUSIONS

### Applicable Law

#### *Burden of Proof*

1. Petitioner, as the party seeking relief, has the burden of proof. (*Schaeffer v. West* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

## *FAPE Generally*

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. (20 U.S.C. § 1400(d), Ed. Code, § 56000.) 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. § 1401(9) (IDEIA 2004), Ed. Code § 56040, subd. (a).) "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. § 1401(29) (IDEIA 2004), Ed. Code, § 56031.)

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.C. 3034] (hereafter *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 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. (*Rowley*, at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley*, at p. 201.)

4. California's definition of special education includes both specially designed instruction to meet the unique needs of individuals with exceptional needs and related services enable them to benefit from such specially designed instruction. (Ed. Code, § 56031). Related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

5. To determine whether a school 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 school 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 a FAPE, even if the student's parents preferred another program and even if his or her parents' preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of the 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.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

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

#### *Required Measurable Annual Goals for a Preschool Student*

7. The IEP for special education students, including preschool students, must include measurable annual goals designed to meet the student's needs that result from the disability to enable the student to be involved in and make progress in the general education curriculum and meet the student's other educational needs that result from the disability. The IEP must include a description of how the student's progress towards meeting such goals will be measured and when periodic reports will be provided. (20 U.S.C. § 1414(d)(1)(A), Ed. Code, § 56345, subds. (a)(2), (3)).<sup>12</sup> For preschool children, the IEP must include, where appropriate, the manner in which the student's disability affects his or her involvement and progress in appropriate activities, which suggests that the goals should be geared towards making progress in involvement and making progress in appropriate activities for preschoolers. (20 U.S.C. § 1414(d)(1)(A)(I)(bb), Ed. Code, § 56345, subd. (a)(1)(B).)

#### *Services Based on Peer-Reviewed Research and Particular ABA Methodology*

8. An IEP must contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), Ed. Code, § 56345, subd. (a)(4).)

9. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, at page 208.) This rule has been applied in situations involving disputes regarding methodologies for educating children with autism. (See *Adams, supra*, 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D.Ore. 2001) 155 F. Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.) In *Adams*, parents of a toddler with autism sought a one-on-one, 40 hour per week ABA/DTT<sup>13</sup> program modeled after the research of Dr. O. Ivar Lovaas. In that case, the Ninth Circuit Court of Appeal explained:

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<sup>12</sup> These IDEA and Education Code sections required "benchmarks or short term objectives" before changes in federal and state law effective July 1, 2005 and October 7, 2005, respectively. The issue of appropriate benchmarks is addressed in the relevant Factual Findings.

<sup>13</sup> DTT is the acronym for discrete trial training.

Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children...IDEA and case law interpreting the statute does not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (*Adams*, at pp. 1149-1150; citing *Gregory K.*, at p. 1314.)

*Extended School Year Services (ESY)*

10. The provision of extended school year (ESY) services are appropriate when a student with special needs requires special education services in excess of the regular academic year and when an interruption of the student's regular education program may cause regression. (Cal. Code of Regs., title 5, § 3043 subd. (a).)

*Least Restrictive Environment (LRE)*

11. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aides and services could not be achieved satisfactorily. To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.)

12. Each child with a disability must participate with children who are not disabled in nonacademic and extracurricular services and activities, such as meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F.R. § 300.553.) The child's placement must be in the least restrictive environment (LRE), based on the child's IEP, and as close as possible to the child's home. (34 C.F.R. § 300.552(a)(2), (b)(2), (3).) A student's placement decision must be made in conformity with the requirements concerning the LRE for the child. (34 C.F.R. § 300.552(a)(2).) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

13. An exclusively mainstream environment is not required to meet the IDEA's LRE mandate for all children. (*L.B. v. Nebo School District* (10th Cir. 2004) 379 F.3d. 966.) School officials are not required to provide an exclusively mainstream environment in every case, and partial integration may well constitute the provision of an LRE to the "maximum extent appropriate." (*T.R. v. Kingwood Bd. of Education* (3d Cir. 2000) 205 F.3d 572, 579.) The IDEA does not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. (*Daniel R.R. v. State Bd. of Education* (1989 5th Cir.) 874 F.2d 1036, 1045.)

14. The Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, at p.1403, adopted a balancing test that requires the consideration of four factors when determining whether a student's placement in a setting more restrictive than the general education environment is the LRE. The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student had on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

#### *Procedural Violations Generally*

15. A state must comply both procedurally and substantively with the IDEA. (*Rowley*, at p.206). Not every procedural flaw constitutes a denial of a FAPE. Procedural flaws must result in the loss of educational opportunity to the student, or seriously infringe on the parent's participation in the IEP process, to constitute a denial of a FAPE. (*Rowley*, at pp. 206- 207; *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free appropriate public education. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1482.) These principles are now codified in 20 United States Code § 1415 (f)(3)(E) and Education Code section 56505, subdivision (f)(2), which provide that an ALJ may find that a child did not receive a free appropriate public education *only* if the procedural violation did any of the following: (A) impeded the student's right to a FAPE; (B) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the student; or (C) Caused a deprivation of educational benefits.

#### *Requirement that General Education Teacher Attend IEP Meeting*

16. Special education students must have IEP teams that include not less than one regular education teacher if the student is, or may be, participating in the general education environment. (20 U.S.C. § 1414(d)(1)(B)(ii); Ed Code, § 56341, subd. (b)(2).) Neither state nor federal law provides any exception for preschool children. The federal Department of Education has adopted the view that if a school district provides regular education preschool services to non-disabled children, teacher participation requirements apply as they do with older children with disabled children. (34 C.F.R. § 300, Question 3 (1999 Regulations), appen. A.)

17. Current law expressly permits a parent to waive, in writing, the participation of a regular IEP team member if that member's area of curriculum or related services is not being modified or discussed at the meeting (20 U.S.C. § 1414 (d)(1)(C); Ed. Code, § 56341, subd. (f).) However, this amendment did not go into effect until July 1, 2005<sup>14</sup>, and there was no such provision in applicable California or federal law previously.

### *Compensatory Education*

18. Compensatory education is an equitable remedy which may be available when a school district has denied a student a FAPE. (*Parents of Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The purpose of compensatory relief is to replace lost educational services and to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*; See also *Todd v. Andrews* (11th Cir. 1991) 933 F.2d 1576; *Moubry v. Independent School District No. 696* (8th Cir. 1996) 951 F.Supp. 867.)

19. The law does not require that day-for-day compensation be awarded for time missed. (*Parents of Student W. v. Puyallup School District, supra*, at p. 1497.) The requestor must present specific evidence as to how the compensatory education should be calculated. (*Reid v. District of Columbia* (D.D.C. Cir.2005) 401 F.3d 516, 524.)

### Determination of Issues

Issue 1: Did the District fail to provide Student a FAPE by failing to implement the May 24, 2004 IEP by reason of its NPA vendor's failure to provide the specified number of in home ABA service hours?

21. Yes. In accordance with Factual Findings 2 through 8 and Legal Conclusions 2 through 6, District failed to provide Student FAPE by reason of the failure of its NPA vendor to provide Student with approximately 100 hours of ABA services required by Student's May 24, 2004 IEP.

Issue 2: Did the District fail to offer Student a FAPE from May 16, 2005, to July 21, 2006, by:

A. Failing to invite at least one general education preschool teacher to either the May 16, 2005 or the June 22, 2005 IEP meetings?

22. No. In accordance with Factual Findings 9 through 15 and Legal Conclusions 15 and 16, although District's failure to include at least one general education preschool teacher at the IEP meetings was a procedural violation, there was no substantive denial of FAPE.

B. Failing to include measurable annual goals and benchmarks in the May 16, 2005 IEP relating to non-verbal communication, the pragmatics of social communication, social interaction and reciprocal play?

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<sup>14</sup> The Education Code provision implementing the change in federal law was effective October 7, 2005.

23. No. In accordance with Factual Findings 16 through 25 and Legal Conclusions 7, District included measurable annual goals and benchmarks designed to meet Student's needs and a description of the manner in which the progress of the Student towards meeting those goals would be measured. Thus, no denial of FAPE was established.

C. Failing in the May 16, 2005 IEP to provide placement in the LRE?

24. No. In accordance with Factual Findings 26 through 29 and Legal Conclusions 11 through 14, Student failed to establish that the District's proposed placement in the Kidzone SDC was not Student's LRE.

D. Offering ABA services in the May 16, 2005 IEP which were not based on peer-reviewed research?

25. No. In accordance with Factual Findings 43 through 45 and Legal Conclusions 8 and 9, District's offered ABA program was based on peer-reviewed research and Student was not denied FAPE in this regard.

E. Failing in the May 16, 2005 IEP to provide sufficient amounts of ABA individual one-to-one instruction, assistance, and therapy, and conditioning a change in ABA providers upon elimination of Student's existing ABA program;

26. No. In accordance with Factual Findings 40 through 42 and Legal Conclusions 2 through 6 and 8 and 9, District did not fail to provide adequate amounts of ABA and related services and did not condition a change in ABA providers upon elimination of the ABA program offered.

F. Failing to provide sufficient amounts of speech and language services?

27. No. In accordance with Factual Findings 38 and 39 and Legal Conclusions 2 through 6, District provided sufficient amounts of such services to meet Student's unique speech and language needs and in a manner reasonably calculated to provide him educational benefit.

G. Physically manhandling Student on November 11, 2005?

28. No. In accordance with Factual Findings 46 through 48 and Legal Conclusions 2 through 6, Student did not establish that he was "manhandled" by his one-to-one aid on the date in questions. More importantly, Student failed to establish that the incident adversely affected his access to education in any way.

H. Failing to offer an appropriate program for the 2005 ESY?

29. No. In accordance with Factual Findings 49 through 51 and Legal Conclusion 10, District provided an appropriate ESY program, including the provision of speech and language services during the ESY with the exception of approximately one month.

#### ORDER

1. Student's request for compensatory education is granted. District is ordered to provide 100 hours of in school ABA one-to-one instructional assistance.
2. Student's other requests for relief are denied.

#### 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. The following findings are made in accordance with this statute:

1. Student prevailed on Issue 1.
2. District prevailed on Issue 2, A through H.

#### 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).)

IT IS SO ORDERED THIS February 14, 2007.

  
DENNIS C. BRUE  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division