

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

In the Matter of:

STUDENT,

Petitioner,

v.

PAJARO VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2006110472

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Watsonville, California, on March 12-15, 2007.

Bob Varma, Attorney at Law, represented Student. Student was not present during the hearing. Student's Mother was present during the entire hearing, and Father was present on March 12-14, 2007.

Laurie E. Reynolds, Attorney at Law, represented the Pajaro Valley Unified School District (District). Also present was Carol Lankford, District's Special Education Local Area Plan (SELPA) Director, and Linda Saranto, District's SELPA Program Director.

On November 17, 2006, Student filed a request for mediation and due process hearing. The due process hearing was continued on December 12, 2006, and began on March 12, 2007. At the close of the hearing, the parties requested the opportunity to file written closing argument. That request was granted. The matter was deemed submitted upon receipt of written closing argument on April 2, 2007.

ISSUES¹

1. Did the District's September 18, 2006 Individualized Education Program (IEP)², as modified on October 2, 2006, and October 27, 2006, fail to offer Student a free appropriate public education (FAPE) because the District's IEP:

- A. does not contain sufficient goals?
- B. contains inaccurate present levels of performance regarding Student's goals?
- C. does not contain receptive identification goals?
- D. does not include either required group or individual parent training?
- E. contains annual goals in the areas of joint attention and joint attention/initiating interaction, and group instruction which are inappropriate for Student because Student lacks the prerequisite skills?
- F. provides that Parents will be responsible for implementing Student's goals, but the IEP does not provide for a home program?
- G. does not provide for a one-on-one teacher/aide ratio during the entire school day?
- H. does not provide for an accurate means of data collection to measure Student's goals?
- I. does not provide for adequate development and implementation of social goals during the school day?
- J. did not develop new goals for Student, but merely took goals drafted by the Bay School for Student's Individual Family Services Plan (IFSP)?

2. Did the District fail to provide Student with FAPE because the District's proposed autism preschool program is not supported by peer-reviewed research?

¹ Student raised for the first time in the closing brief the contention that the District denied Student FAPE because the District predetermined Student's placement. Therefore, Student did not properly raise this issue for hearing.

² The District presented this IEP to Parents on August 31, 2006, and on September 18, 2006. The District made the formal offer of services and placement on September 18, 2006.

3. Did the District fail to provide Student with FAPE in the September 18, 2006 IEP by not offering Student adequate speech and language and occupational therapy services to meet Student's unique needs?

4. Did the District fail to provide Student with FAPE in the September 18, 2006 IEP by not making a clear offer of speech and language and occupational therapy services to meet Student's unique needs?

CONTENTIONS OF THE PARTIES

Student contends that the District's proposed autism preschool program is not supported by peer-reviewed research. Student asserts that District's eclectic autism preschool program's use of various models of instruction for autistic children, which includes Applied Behavioral Analysis (ABA), Treatment and Education of Autistic and related Communication Handicapped Children (TEACCH), Relationship Development Intervention (RDI), and Floor Time, as some of its components, has been shown in recent journal articles not to be an effective method of educating preschool children with autism. Student's position is that an ABA-only program, like the program Student received at the Bay School, is the only program which is supported by peer-reviewed research as an effective program for autistic preschoolers.

Student also contends that the District's September 18, 2006 IEP contains numerous deficiencies and does not provide Student with FAPE. Student asserts that the IEP's present levels of performance did not accurately measure Student's abilities regarding his pragmatic and expressive language, speech production and articulation, social skills and gross and fine motor skills. Student alleges that the District did not develop adequate goals to meet Student's needs regarding joint attention, speech and language and occupational therapy. Student asserts that the District's IEP requires Parents to be responsible for implementing portions of Student's IEP and tracking whether Student met his goals. Student argues that the District's IEP does not provide Parents with training, even though Parents are purportedly responsible for implementing some of Student's goals. Student also contends that the IEP fails to provide Student with one-on-one instruction to meet his needs. Student asserts that the District's offer of speech and language and occupational therapy services was not clearly defined, and does not meet Student's unique needs in these areas.

As a remedy, Student requests that the District reimburse Parents for Student's continued placement at the Bay School since October 23, 2006. Student requests, as compensatory education, speech and language and occupational therapy services for the sessions Student has missed. Student also requests an increase in the speech and language and occupational therapy services the District offered, plus future placement at the Bay School at District expense.

The District contends that its preschool program for autistic children can meet Student's educational needs and that its program's major components are based on peer-

reviewed research as reflected by their inclusion among the best practices guidelines issued by the California Department of Education and National Research Council. The District maintains that its September 18, 2006 IEP, as modified on October 2, 2006, and October 27, 2006, is reasonably calculated to provide Student with some educational progress in the least restrictive environment. The District asserts that the goals and objectives offered in the IEP provide Student with FAPE as they meet Student's unique needs, as noted in the District's assessments that accurately determined Student's present levels of performance. The District further contends that it accurately documented Student's present levels of performance in the IEP.

FACTUAL FINDINGS

Background

1. Student, born August 23, 2003, lives with his Parents within the District boundaries. Student began receiving services from the San Andreas Regional Center (SARC) in its Early Start program in September 2005.³ Beginning December 2005, after being diagnosed with an autism spectrum disorder, Student attended the Bay School, a non-public school, in its Early Intervention preschool program.

2. Student became eligible to receive special education services from the District on his third birthday. Although the parties do not dispute that Student is qualified for special education under the primary classification of autistic-like behaviors (autism), Student has not received services from the District as Parents have not consented to a District IEP. Student still attends the Early Intervention preschool program at the Bay School 15 hours per week, with six hours per week of home services. The District also determined that Student is eligible for special education services under a secondary classification of a speech and language disorder, which Student does not dispute.

3. The District convened an IEP meeting on August 31, 2006, which was continued to September 18, 2006. At the conclusion of the September 18, 2006 IEP meeting, the District stated that the IEP offer it made provided Student with FAPE. The District offered Student 20 hours per week in a special day class for preschool students at Duncan Holbert, a District school for special education students. The District offered to provide Student with individualized speech and language and occupational therapy services.

4. Parents did not accept the District's September 18, 2006 IEP offer. Parents have privately funded Student's attendance at the Bay School since October 23, 2006, and Student has not received speech and language or occupational therapy services since that date.

³ SARC started to provide Student with speech and language and occupational therapy services before Student was officially diagnosed with having an autism spectrum disorder in December 2005.

Appropriateness of District's Preschool Program for Autistic Students

5. A district must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. A district is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. A school district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student. In developing a student's educational program, the district must provide a program that is based on peer-reviewed research to the extent practicable. Student contends that he cannot make adequate educational progress in the District's preschool program with its eclectic model.

Peer-Reviewed Research

6. The District described its present preschool program for autistic preschoolers at Duncan Holbert as an eclectic program that uses various methodologies to educate autistic students. The comprehensive program incorporates different methodologies, such as an ABA program developed by Dr. Ivar Lovaas, the TEACCH program, Picture Exchange Communication System (PECS), RDI, social stories and Floortime.

7. The ABA program created by Dr. Lovaas primarily involves intensive behavior modification therapy, one-on-one repetitive drills, or discrete trial training (DTT), by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition.

8. TEACCH uses different approaches and methods, including several techniques in combination.

TEACCH emphasizes structured teaching, organizing the physical environment, developing schedules and work systems, making expectations clear and explicit, and utilizing visual materials to develop skills. Visual cues and concepts of sensory integration therapy are emphasized to assist students in gaining independence and managing aberrant behaviors. TEACCH was developed based on research studies performed between 1964 and 1990 through the University of North Carolina School of Medicine at Chapel Hill. Follow-up studies have documented gains in students who received TEACCH services. (Citations deleted)

(Student v. Pomona Unified School District (June 6, 2006) OAH No. N2006010049, p. 7.

9. PECS is a program designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication. The RDI program, developed by Steven Gutstein, Ph.D., is based on the premise that individuals on

the autism spectrum lack certain abilities necessary for success in managing changeable real life environments, and addresses deficiencies autistic individuals have in managing social situations, such as the need to read another person's emotions and to react appropriately.

10. Social stories, developed by Carol Gray, is an instructional method for autistic students that presents appropriate social behaviors in the form of a story. Floortime, developed by Dr. Stanley Greenspan, involves engaging with the autistic child on the floor to work on six areas of developmental milestones.

11. The goal of the District's autistic preschool program is to work on the student's educational, behavioral and social skills deficiencies as stated in the IEP to permit the student to eventually attend a regular education classroom. The program also incorporates occupational therapy and speech and language services in the daily curriculum, as designed by the District's occupational therapy and speech and language specialists. Students who attend the District's preschool program for autistic children do not have serious behavioral problems. The District uses the Bay School for preschool children whose needs cannot be met at Duncan Holbert.⁴ The District's autism preschool program at Duncan Holbert is in a large, stand-alone room and does not permit students to interact with typically developing peers as the classroom and play area are isolated from the rest of the school, which is for special education students.

12. Approximately three and a half years ago, the District revamped its preschool program for autistic children. The District convened a task force of outside experts, District personnel and parents. The taskforce looked at research in this area from various sources. The District also involved Bryna Siegel, Ph.D., a recognized expert in the field of autism, in the development of its preschool program.⁵ Dr. Siegel observed the District's preschool program and made recommendations, which included the use of an eclectic program. The task force recommended the use of an eclectic program, based on the model recommended by the National Research Council, California Department of Education and Dr. Siegel's own publications.

13. Melissa Ross is the current autism preschool teacher at Duncan Holbert and oversees the behavior technicians who provide instruction and collect data in this program. Ms. Ross has taught in the District for the past four years. Ms. Ross began teaching this preschool class at the beginning of the 2006-2007 school year. Ms. Ross is qualified to teach autistic preschoolers as she received a level one teaching credential in 2006 from the California State University, Monterey Bay (CSUMB) and is enrolled in the CSUMB master's program, which includes extensive study and work with autistic children with an emphasis on ABA instruction. Ms. Ross has completed coursework for her level two

⁴ During the time period of this action, the District had preschool students in the Bay School's Early Intervention program.

⁵ See, *Student v. Downey Unified School District* (November 28, 2005) OAH No. N2005070481, p.35, for a brief description of Dr. Siegel's qualifications and publications.

credential, but must work two years with a level one credential before being eligible for a level two credential. Ms. Ross has completed her coursework to obtain a Board Certified Associate Behavior Analyst (BCABA) credential, and the next BCABA exam is in August 2007. Ms. Ross provides training to the behavior technicians, along with the training they receive from the program consultants. Ms. Ross also makes home visits to observe children and to assist parents.

14. Ms. Ross described the preschool program as primarily relying on ABA techniques. Ms. Ross stated that the District incorporates the other methodologies described above into a student's program to meet a particular need or goal for a student with the intent that the student will transition to a regular education kindergarten. For example, Ms. Ross described the need to teach a student skills needed to attend to circle time and to use circle time to learn skills such as attending, communication, turn taking, and motor skills. The behavior technicians provide instruction to students according to the student's goals and objectives, and collect required data. However, Ms. Ross explained that to meet a student's individual needs, the District can tailor a student's instruction at Duncan Holbert to consist primarily of an ABA program.

15. The District uses a behavioral consultant and a behavioral inclusion specialist from the Easter Seals to provide support and training to Ms. Ross, the behavior technicians and parents. The District began to use Easter Seals at the beginning of the 2006-2007 school year. Amber McLeary is the present behavioral inclusion specialist, and she began in October 2006. Ms. McLeary previously worked at the Bay School for four and a half years, including its Early Intervention program, progressing from an instructor to a behavior consultant to a teacher and staff manager. Ms. McLeary has a Bachelor of Science in psychology, has taken graduate level coursework in behavior analysis and moderate to severe special education, and holds a BCABA certificate. Ms. McLeary received extensive ABA training at the Bay School. Based on Ms. McLeary's education, work experience and training, Ms. McLeary is qualified for her position.

16. Jennifer Ann Amos is the behavior consultant for Duncan Holbert. Ms. Amos has a Bachelor of Arts in Child Welfare, a Master of Science in Special Education, and holds a BCABA certificate. Ms. Amos has worked with the Easter Seals since August 2005, and with Duncan Holbert from the start of the 2006-2007 school year. Previously, Ms. Amos worked at the Bay School, advancing from an instructor to head special education manager to Early Intervention program manager. Ms. Amos is qualified for her position based on her education, work experience and training.

17. In her present position, Ms. McLeary provides 15 hours per week of services for Duncan Holbert. Ms. McLeary's duties include instituting data collection systems, charting a student's progress, assessing a student's progress, assessing behavioral issues and developing behavior plans, providing training to parents and staff, and visits to a student's home. Ms. Amos provides five hours per week of services to Duncan Holbert and performs similar duties as Ms. McLeary, along with conducting Functional Analysis Assessments and being a program consultant.

18. As noted below, Student requires speech and language and occupation therapy services. Beyond direct speech and language and occupation therapy services provided to a student by a qualified therapist, the District incorporates speech and language and occupational therapy services in its autistic preschool program in a variety of methods. The District's speech and language and occupational therapists work with the teacher to incorporate speech and language and occupational therapy services into the children's daily programs. For example, during circle time students may be working on both language skills and fine motor skills.

19. Claudia McCauley has been a program specialist with the District since 1991. She has a Bachelor of Arts in psychology and master's degree in special education. Ms. McCauley was involved in the creation of the current Duncan Holbert model and is trained and familiar with the different components of the model; Ms. McCauley has worked extensively with students in the Duncan Holbert program. In Ms. McCauley's experience, the Duncan Holbert program has been successful in educating autistic preschoolers. Ms. McCauley has found that about 75 percent of the preschoolers in the program have showed sufficient educational and behavioral improvement to move to a less restrictive setting.

20. Ethan Long, Ph.D., is the Executive Director of the Bay School, which Student currently attends. Dr. Long described the Bay School's Early Intervention program as an ABA-only program for autistic preschoolers. Dr. Long is a Board Certified Behavior Analyst (BCBA) and is presently involved in a project for the California Department of Developmental Services (DDS) to develop best practices guidelines for working with autistic children. As part of this project and his continuing education, Dr. Long has reviewed literature regarding the efficacy of ABA programs for preschool children. Dr. Long is of the opinion, based on his experience and review of peer-reviewed journal articles, that an ABA-only program, like the Bay School program, is the most effective program for autistic preschool children, and that peer-reviewed research does not support the efficacy of an eclectic autism preschool program.

21. For his opinions, Dr. Long relied heavily on a study by Howard, Sparkman, Cohen, Green and Stanislaw described in *A Comparison of Intensive Behavior Analytic and Eclectic Treatments for Young Children with Autism* (2005) 26 Research in Developmental Disabilities, pages 359-383 (Howard Study).⁶ The Howard Study compared the progress in 61 Central California preschool children diagnosed with an autistic disorder or pervasive developmental disorder placed in either an ABA-only program or an eclectic preschool

⁶ Dr. Long also mentioned a Norwegian study for the proposition that an ABA-only program is more effective than an eclectic program. (Eikeseth, Smith, Jahr, Eldevik, *Intensive Behavioral Treatment at School for 4-to-7-Year-Old Children with Autism* (January 2002) Vol. 26 Behavior Modification No. 1, pp. 49-68.) The study's authors noted the limitations of this study in the article, especially the small sample size, and noted possible reasons why the scores of the eclectic control group were lower than ABA-only control group. However, this study does support Dr. Long's position, which the District does not dispute, that autistic students do benefit from a well structured and supervised ABA program.

autism program. Dr. Long noted that the Howard Study showed that an eclectic preschool model, as described in the study, is not as effective as an ABA-only program.

22. Dr. Long admitted that the studies he has reviewed regarding the effectiveness of preschool programs for autistic children have all involved ABA programs, and that he has not researched whether there is peer-reviewed research that supports an eclectic preschool program model. Dr. Long also admitted that he has not observed the District's program at Duncan Holbert and is not aware how this program integrates the various methodologies to instruct children.⁷ Dr. Long also stated that he was not aware if the District's preschool program was comparable with the controlled, eclectic program in the Howard Study. Dr. Long also stated that the DDS study is not complete, which means that he cannot state whether the DDS study will eventually recommend an ABA-only or eclectic model. Therefore, Dr. Long did not have any direct evidence to support his contention that the District's preschool program is not effective, nor would the results obtained in the Howard Study be replicated with the District's program. A review of the Howard Study findings does not state that students in an eclectic preschool model did not make adequate progress in meeting their educational goals.

23. The difference between the Bay School, Parents' preferred program, and the District program at Duncan Holbert is that the Bay School is an ABA-only program, while the District is an eclectic program, albeit with a focus on ABA techniques. Ms. Ross and Ms. McLeary stated that the District's primary program for Student would be an ABA program, with the District using the other methodologies where appropriate to meet Student's unique needs. The District established that its preschool program for autistic students at Duncan Holbert has been successful in the past in meeting the special education needs of students. While Parents may prefer the Bay School's ABA-only model, Student did not establish that the Bay School is the only preschool that could meet Student's special education needs.

24. When the District created its eclectic preschool program for preschoolers, it did so based on the available research and recommendations by acknowledged experts in the field. The testimony of Ms. Lankford and Ms. McCauley established that the three important components of the District's comprehensive program- ABA, TEACCH, and PECS- are supported by peer-reviewed research. The scientific research regarding the various methodologies to teach autistic children is still emerging and inconclusive at best. Based on the current ambitious efforts underway to study the various methodologies, establishing the relative efficacy of current methodologies in a manner which comports with scientific principles has thus far been impractical. Additionally, Dr. Long's testimony and the Howard Study did not establish that the District's program is not effective in meeting the individual needs of a student. As noted in Legal Conclusions 8 and 9, the Individuals with Disabilities

⁷ Dr. Long criticized the District's autism program because Ms. Amos only had a BCABA certificate. Dr. Long stated that an autism program consultant needs to have a BCBA, like himself, according to the guidelines of the private organization that issues these certificates. However, California law does not impose any certification requirement for a person to be an autism program consultant.

Education Act does not mandate a particular methodology if the educational agency can establish that its chosen methodology is based on peer-reviewed research to the extent practical and that the methodology will allow the student to make an adequate education progress. The District established, based on empirical evidence, that students who attended its preschool program at Duncan Holbert have made adequate progress as students have transitioned to District's regular education program or moved into a less restrictive District special education classroom.

District's September 18, 2006 IEP Offer

Present Levels of Performance

25. Student asserts that the District's present levels of performance in the September 18, 2006 IEP do not accurately measure his abilities regarding his pragmatic and expressive language, speech production and articulation, social skills and gross and fine motor skills. The District obtained Student's present levels of performance regarding his pragmatic and expressive language and his speech production and articulation from the speech and language assessment conducted by Cheryl Maruyama, District speech and language pathologist, and the psychoeducational assessment conducted by Doris Takayama, District psychologist. Ms. Takayama's assessment also provided information regarding Student's social skills and gross and fine motor abilities. Susan Ramos, District occupational therapist, also provided information regarding Student's gross and fine motor skills in her assessment. The assessment results, with which Student does not take issue, became the basis for present levels of performance for each area in which the IEP recited annual goals.

26. The District started to assess Student in June 2005 as part of Student's transition from the Early Start Program. The District's assessments were to determine Student's eligibility for special education services, and if eligible, the program and services Student required. The District began the assessment process at this time because District staff would soon be on summer recess. Doris Takayama, District school psychologist, assessed Student for eligibility under the category of autism. Ms. Takayama was the school psychologist at Duncan Holbert at this time. Ms. Takayama assessed Student's then-present levels of performance to determine his strengths and weaknesses and his unique needs. Ms. Takayama observed Student at the Bay School, worked with Student in his home, and spoke to Parents. She also reviewed the diagnosis of autism spectrum disorder by Kaiser Permanente, Student's IFSP, and Bay School records. Ms. Takayama sent a draft of her assessment report to Mother in July 2006 for review and comment. Ms. Takayama made changes to her report in response to Mother's comments and presented her final report at the August 31, 2006 IEP meeting.⁸

27. Ms. Takayama conducted the Southern California Ordinal Scales of Development to assess Student's development in cognition, communication, social affective

⁸ Parents agreed to extend the IEP and assessment timelines because Parents wanted Dr. Long to attend the IEP meeting, and he was not available on the District proposed date of August 23, 2006.

behavior, practical abilities, and gross and fine motor abilities. Ms. Takayama noted that Student could do many of the tasks that required visual orientation, like placing pegs in the correct slot and letter pieces in the correct insert. Student also exhibited the ability to find and remember objects that were hidden. Student showed delays in his ability to model his behaviors after others, which is an important ability to learn. According to Parents, Student did not spontaneously imitate Parents' household routines, like sweeping, and Ms. Takayama observed that Student had a limited repertoire regarding playing with toys and objects. Ms. Takayama also noted that Student had a flat affect when playing with a jack-in-the-box toy, as Student showed little response when "jack" popped-out.

28. To assess Student's adaptive behaviors Ms. Takayama used the Vineland Adaptive Behavior Scales (Vineland), which consisted of a structured interview with Mother. Ms. Takayama found Mother to be a reliable historian regarding Student. Ms. Takayama used the Vineland Adaptive Behavior Scales to determine Student's developmental level and to obtain Student's levels of performance to develop Student's goals. Ms. Takayama determined that, based on Mother's responses, Student's overall adaptive behavior was significantly delayed, falling below the first percentile. Ms. Takayama found that Student exhibited autistic-like behaviors that significantly hindered his adaptive functioning in the areas of communication, daily living, socialization and fine motor skills.

29. The Vineland indicated that Student had significant deficits in receptive and expressive communication, which corresponded to Ms. Takayama's observations. Student could understand simple commands. Student's expressive language consisted primarily of sound vocalizations and echoic pre-speech sounds. Student also had significant delays regarding self-help skills in the areas of dressing, toileting, bathing and fastening. Student could independently feed himself using utensils and could undress himself. Ms. Takayama noted that Student had a lack of self-awareness that posed safety problems, such as the danger posed by electrical sockets or hot items. Regarding socialization, Student expressed more interest in interacting with adults than children, and his ability to express emotions was severely delayed. Student displayed mild gross and fine motor skills delays.

30. Ms. Takayama also administered the Pervasive Developmental Disorders, Behavior Inventory, which assesses typical areas of deficits that autistic students exhibit, and is standardized on children already diagnosed with autism. Ms. Takayama obtained scores based on Parents' responses. Ms. Takayama determined that Student's scores fell within the average range of students diagnosed with autism. Student displayed difficulty in understanding social situations and how to react to other children. Student also did not display emotions, failed to make eye contact with others, and lacked joint attention skills.

31. Ms. Takayama concluded that Student displayed strengths in the ability to match items by shape, color and picture, the ability to plan ahead and to find hidden items, and the ability to follow adult direction. Student showed deficits in expressive and receptive language, ability to attend, joint attention, fine and gross motor skills and adaptive behaviors in communication, socialization, self-help and motor development.

32. Student did not dispute the accuracy of Ms. Takayama's assessment report findings. Rather, Student disputes the present levels of performance that the District recited in Student's IEP for the August 31, 2006 IEP meeting. While Ms. Takayama attended this IEP meeting, she did not draft Student's present levels of performance or the goals. Sarah Aldrich, who replaced Ms. Takayama as the school psychologist for Duncan Holbert, drafted them. Ms. Aldrich obtained her Master of Arts in educational psychology in 2005 and Educational Specialist degree in 2006, both from the University of Minnesota. Ms. Aldrich's employment at the District was her first as a school psychologist and she had the appropriate credential for her position.

33. Ms. Maruyama conducted the District's speech and language assessment. Ms. Maruyama observed Student in mid-June 2006 at the Bay School working with the Early Intervention instructor and Student's speech and language therapist. Ms. Maruyama interviewed Parents and reviewed Student's Bay School speech and language therapist's May 23, 2006 progress report. Ms. Maruyama's assessment noted that Student had made significant development regarding his communication ability as Student was making vowel and consonant-vowel combination imitation sounds and vocalizing requests for favorite items. Student's receptive, expressive and pragmatic language abilities and deficits, as noted by Ms. Maruyama, mirrored those noted by Ms. Takayama in her assessment. Ms. Maruyama recommended that Student continue to receive speech and language services to improve Student's receptive, expressive and pragmatic language skills, specific speech imitation and production, and social interaction.

34. Ms. Ramos conducted the District's occupational therapy assessment. Ms. Ramos observed Student twice at the Bay School and reviewed a September 2005 report prepared by Student's occupational therapist. Ms. Ramos interviewed Father and Student's teacher at the Bay School, Sarah Boone. Ms. Ramos's assessment looked at Student's gross and fine motor skills, perception, sensory processing and postural skills. Ms. Ramos noted that Student had slightly below normal gross motor skills, and that Student had difficulty with his balance while sitting in a kneeling position and while standing. Ms. Ramos also documented that Student's fine motor and visual motor skills were slightly below normal and, based on Parents' comments, depended on his interest level on a task. Regarding Student's ability to process sensory information, Student did not display hypersensitivity to sound or other stimuli. Father reported that Student was engaging in less self-stimulatory activity and becoming more aware of other people and objects around Student. Ms. Ramos spoke with Student's then-current occupational therapist at the Pediatric Therapy Center, who confirmed Ms. Ramos's observations of Student. Ms. Ramos recommended occupational therapy services to improve Student's gross motor skills, stability and balance, visual motor skills and sensory processing.

35. Ms. Aldrich reviewed Ms. Takayama's, Ms. Maruyama's and Ms. Ramos's assessment reports, Student's goals and objectives in his IFSP, and the May 2005 progress report by the Bay School. Ms. Aldrich did not have any personal contact with Student before drafting Student's present levels of performance and annual goals. She drafted them based on the information she had reviewed. Ms. Aldrich drafted Student's communication and

language, social skills, pre-academic, self-help and behavior goals and the present levels of performance for these goals. Ms. Ramos drafted the motor skills goals and the present levels of performance. The IEP team discussed Student's needs and present levels of performance briefly at the August 31, 2006 meeting. Because Parents did not have adequate time to review the District's offer of placement and services at this meeting, the IEP team reconvened on September 18, 2006, at which time the parties had further discussion about Student's present levels of performance and the goals.

36. Mother stated at the September 18, 2006 IEP team meeting that the District's present levels of performance regarding Student's pragmatic and expressive language, speech production and articulation, social skills and gross and fine motor skills did not reflect Student most recent progress at the Bay School, as reflected in the Bay School's August 2006 IFSP progress report. However, Mother did not state at the IEP meetings or at the due process hearing that the information in the District's assessments did not accurately represent Student's present levels of performance at the time the assessors prepared their reports. Also, Mother's testimony did not demonstrate any significant difference between Student's present level of performance when the District conducted its assessment and the IEP meetings.

37. Andrea Gold, Ph.D., Director of Education at the Bay School, and Ms. Boone attended both IEP meetings. Neither Dr. Gold nor Ms. Boone, based on their contact with Student, indicated that the District's present levels of performance were significantly inaccurate. Ms. Boone and her August 2006 IFSP progress report did not show that Student's present levels of performance were significantly different than what the District documented on the September 18, 2006 IEP. Therefore, the District developed adequate present levels of performance that accurately and appropriately reflected Student's abilities.

Use of Goals Developed in Student's IFSP for his IEP Goals

38. Student contends that the District did not develop new goals for Student, but merely copied the goals from the May 2006 IFSP developed by the Bay School. Student's IEP was the first IEP for a preschool student that Ms. Aldrich had drafted. Ms. Aldrich had worked with autistic preschool children as part of her graduate level practicum, and received ABA training as part of her graduate program. Ms. Aldrich credibly testified that she reviewed the District's assessment; Student's previous Early Start records, including information from the Bay School; and Student's IFSP regarding Student's progress, which included Student's May 2006 speech and language report from the Bay School. Student offers no logical reason why the District could not rely upon the goals drafted by the Bay School only three months previously to ensure consistency in Student's program and to continue to work on Student's needs that both the Bay School and District identified. While the District's IEP contains goals taken from May 25, 2006 IFSP, the District's goals and objectives are not identical to those drafted by the Bay School. Ms. Aldrich properly developed Student's goals, based on the District's assessments, to meet Student's unique needs.

Development of Student's Social Skills, Joint Attention, Initiating Interaction and Group Instruction Goals

39. Student has social skills deficits which are typical for autistic preschool children. Social skills are important skills for any student to learn to succeed in grade school and appropriate for a school district to incorporate into any student's preschool educational program. Information obtained from the Bay School and Ms. Takayama indicated at the time of the August 31, 2006, and September 18, 2006 IEP meetings that Student's social skills regarding his interaction with adults were progressing as Student would make eye contact with adults, and follow the adult's eye gaze. Student could also follow simple verbal commands and make simple vocalization sounds to form requests. In contrast, Student expressed very little interest in other children and did not play, communicate or make eye contact with other children. Student did not exhibit significant behavioral problems, sensitivity to sensory inputs, like screaming if he heard a loud sound, or manifestation of repetitive or self-stimulatory behaviors, like excessive focus on an item or spinning around in a circle.

40. Ms. Ross prepared a proposed schedule for the September 18, 2006 IEP meeting, which indicated that Student would spend approximately 70 minutes during the four-hour day schedule in circle-time instruction with other students. The Duncan Holbert program also has built into the daily schedule opportunities for Student to interact with other students, such as at the breakfast or lunch table, daily outside walks and recess. The schedule at Duncan Holbert would provide Student with opportunities for Student to develop his social skills in relation to adults and other children.

41. The District's September 18, 2006 IEP contains numerous social goals to improve Student's interaction with adults and other children. The District developed social goals regarding joint attention, initiating interaction, and group instruction. The District's IEP proposed that Student work on responding to his name when called and when the instructor is hidden, for Student to follow the eye gaze of the instructor and to work on Student initiating eye contact in a variety of social situations. The IEP also proposed for Student to engage in simple, age appropriate games and activities, and to expand Student's developing pretend play beyond the toys with which Student then played.

42. Parents objected to the District's inclusion of social goals of joint attention, initiating interaction and group instruction because, in their view, Student lacked the requisite skills to make adequate educational progress to meet these goals. Parents stated in the IEP meetings that Student could not adequately follow or seek an adult's request for joint attention, such as pointing to an item and he could not initiate interaction with an adult or peer to get that individual's attention. Parents also stated that Student could not adequately participate in circle time to learn appropriate behaviors, such as being able to sit and attend to the instructor and participate in group activities.

43. Student's evidence regarding his purported lack of requisite skills for the social skills, joint attention, initiating interaction and group instruction goals derived from

Mother's observation of Student. Ms. Boone, who prepared the Bay School's August 2006 progress report and who had observed Student as an instructor, did not indicate that Student was not ready for group instruction or that the District's goals and objectives were not proper for Student. Ms. Takayama's assessment report documents that Student had emerging skills in interacting with other children and that Student had the requisite attention skills to attend to the adult instructor and to respond to the instructor's prompting to adequately participate in circle time. Therefore, the District's offered adequate goals because Student had the requisite skills to adequately participate with these goals and to make sufficient progress to meet his needs in these areas.

Need for One-on-One Instruction

44. The District's September 18, 2006 IEP did not expressly state that the District would provide Student with one-on-one instruction. Parents expressed during the IEP meeting that Student required one-on-one instruction to meet his educational and behavioral needs. Student received one-on-one instruction at the Bay School. The District did not dispute at the August 31, 2006, and the September 18, 2006 meetings that Student required one-on-one support at all times to make some educational progress to receive FAPE.

45. The District did not specifically include one-on-one instruction in the IEP because the District felt that the enrollment at Duncan Holbert provided for one-on-one support for Student. The District's offer stated that Student would start attending Duncan Holbert on September 25, 2006. However, when the District made the offer, the preschool program at Duncan Holbert had five children in care, overseen by Ms. Ross and three behavior technicians. The District did not inform Parents at either IEP meeting how the District could provide Student with one-on-one instruction with the present staffing levels. The District's verbal offer of one-on-one instruction did not constitute a clear, written offer regarding the level of instruction that Student required to receive FAPE. Therefore, Parents could not meaningfully participate in the educational decision making process as Parents had no written assurance that the District would provide Student with one-on-one instruction.

Parental Responsibility to Implement Goals and Determine if Benchmarks Had Been Met

46. The September 18, 2006 IEP stated that the classroom teacher, classroom staff and parents would implement Student's social, cognitive (motor imitation), pre-academic, self-help, and behavior goals. Additionally, the occupational therapist, classroom staff and parents would implement Student's gross motor, bilateral and visual motor skills goals. These goals provided benchmarks and methods to determine if Student met the benchmarks. Mother felt, after reviewing Student's IEP, that she and her husband would be responsible for not only implementing the goals, but also for collecting data to assist in determining whether Student met the stated benchmarks.

47. The District explained, at the due process hearing, that the IEP lists Parents on the goals as persons to implement them because parents of an autistic child are an important

part of a student's education. Parents typically assist the school in helping a student generalize on the outside the skills learned at school by providing consistency between school and home. Thus, the District generally hopes that parents will assist autistic students with the goals, such as working on fine and gross motor skills or social skills, at home. The District adequately explained that it did not expect Parents to collect data to measure Student's progress in meeting the goals, nor did it expect Parents to determine if Student met his goals. Rather, Parents' involvement in Student's goals would allow Parents to participate in the educational decision making process regarding Student's progress, and help determine whether changes needed to be made to meet Student's needs. Thus, the District did not deny Student FAPE because the District did not delegate any of its duties to Parents to ensure that Student met his goals and related benchmarks.

*Parent Training*⁹

48. As stated in Legal Conclusions 3 and 4, an IEP is to include the related services, or in California, designated instruction and services, a student requires to benefit from the educational program and that parent training is a designated instruction and service. While the September 18, 2006 IEP provided for designated instruction and services, like speech and language and occupational therapy, the IEP did not state that the District would provide Parents with training.

49. After reviewing the IEP, Parents raised the issue regarding parent training at both IEP meetings. The District indicated to the Parents during the September 18, 2006 IEP meeting that the District's preschool program has built in parent training. The District had monthly group training sessions for all parents with children in the preschool program presented by the program consultants, Ms. Ross and the behavior technicians. Ms. Ross and the program consultants would also provide parents with additional training at school or at the home when requested by parents.

50. The District does not dispute that it must provide Parents with training to ensure that Student receives FAPE through their involvement as reflected above. Parents require training to ensure consistency with the District's instruction at preschool and Parents' instruction at home, and to ensure that Student can generalize what he learns at school in other environments with Parents. While the District verbally informed Parents about parental training at the IEP meetings, the District could not explain why it did not present Parents with any written information regarding parent training before or during the IEP meetings. The District had a summary of its preschool program at Duncan Holbert, which included a discussion on parent training, at the time of the IEP meetings. However, the District did not provide Parents with a copy until October 2, 2006. Thus, the District's September 18, 2006 offer did not provide a clear, written offer regarding parent training because neither the IEP nor any documents provided to Parents as part of the IEP process

⁹ Student alleged sufficient facts in Paragraph 10 of the Complaint to put the District on notice regarding the contention that the District did not make a clear offer of parent training in the September 18, 2006 IEP.

discuss with sufficient clarity parent training. This failure denied Parents a meaningful opportunity to participate in the educational decision making process.

Data Collection

51. The District's September 18, 2006 IEP did not contain a statement regarding how the District would collect data concerning Student's progress in the autism program. Both the District and Student agreed that data collection was important to determine Student's progress in a preschool program, and when and where to make modifications in Student's educational program. However, Student did not establish that the District's data collection methodology could not meet Student's unique needs because none of Student's witnesses from the Bay School reviewed the District's data collection methodology nor gave an opinion regarding the adequacy of the District's methodology. Dr. Gold and Ms. Boone's testimony regarding data collection focused on the Bay School's methodology, and not whether the District's methodology could meet Student's unique needs. Neither Dr. Gold nor Dr. Long stated that the District needed to include how it would collect data regarding Student on the IEP for a parent to meaningfully participate in the educational decision making process. Therefore, Student did not establish that the District needed to include information regarding data collection in the September 18, 2006 IEP for Student to receive FAPE.

Receptive Identification

52. Student contends that the District failed to include a goal regarding receptive identification. However, Student did not present any evidence to establish that Student had a need in this area or the manner in which the District failed to meet this alleged need.

Speech and Language

53. At the time of the IEP meetings, Student received speech and language services at the Bay School, two times per week, 30 minutes per session. The District originally offered, on August 31, 2006, to provide Student with 60 minutes per week of direct, individualized, and small group speech and language services, plus 30 minutes per month of consultation services. The District made this offer based on Ms. Maruyama's assessment. As noted above, Ms. Maruyama properly assessed Student and the District developed proper present levels of performance based on her assessment.

54. Based on Parents' concerns, the District modified its offer to provide Student with only individualized speech and language services for sixty minutes per week, and to increase the consultation to 60 minutes per month. Student did not present testimony from individuals who worked with Student at the Bay School, or any other qualified witness, that the District's speech and language offer was not sufficient to meet Student's needs in this area. The August 15, 2006 assessment conducted by Ms. Rogers does not state that Student requires additional speech and language services beyond those she had been providing.

Therefore, the District made a clear and understandable offer in the September 18, 2006 IEP that was sufficient to meet Student's speech and language needs.

Occupational Therapy

55. At the time of the IEP meetings, Student received occupational therapy services from Pediatric Therapy Center one hour per week. The District originally offered on August 31, 2006, to provide Student with 30 minutes per week of direct, individualized, and small group occupational therapy services, plus 30 minutes per month of consultation services. The District made this offer based on Ms. Ramos's assessment. As noted in above, Ms. Ramos properly assessed Student and the District developed proper present levels of performance based on her assessment.

56. Based on Parents' concerns, the District modified its offer to provide Student with only individualized occupational therapy services, but kept the amount of services per week the same. Student did not present testimony from individuals who worked with Student at the Bay School, the Pediatric Therapy Center, or any other qualified witness, that the District's occupational therapy offer was not sufficient to meet Student's needs in this area. In addition to the direct services by the occupational therapist, the District integrates occupational therapy into a student's daily program, such as recess, by using play equipment and an obstacle course set up by the occupational therapist in the Duncan Holbert classroom. Therefore, the District made a clear and understandable offer in the September 18, 2006 IEP that was sufficient to meet Student's occupational therapy needs.

Providing September 18, 2006 IEP to Parents

57. Mother stated that the District did not give Parents a copy of the September 18, 2006 IEP at the conclusion of the meeting.¹⁰ Ms. Aldrich stated that she gave Parents a copy of the September 18, 2006 IEP at the conclusion of the meeting. Parents did not state in their September 22, 2006 (misdated October 22, 2006) letter to the District that the District did not give them a copy of the IEP. In this letter, Parents went over their opposition to the District's IEP in detail. The detail in Parents' opposition to the District's offer suggests that Parents had a copy of the September 18, 2006 IEP which corroborates the testimony of Ms. Aldrich. Therefore, Student did not establish that the District failed to give a copy of the September 18, 2006 IEP to Parents.

Modification of September 18, 2006 IEP

58. At the conclusion of the September 18, 2006 meeting, the District requested that Parents place in writing their concerns regarding the District's offer. The Parents' September 22, 2006 response details their objections to the District's eclectic program versus

¹⁰ The District's IEP form does not have a "check box" to indicate whether a parent acknowledges receipt of the IEP.

the Bay School's ABA-only program. Parents also objected to the District's failure to include full time, one-on-one instruction and the contemplated use of pictures as a means of communication for Student's language goal and group instruction goals. Parents contended that the District's goals underestimated Student's abilities and that the IEP contained inaccurate baseline information.

59. In response to this letter, SELPA Program Director Ms. Saranto wrote to Parents on October 2, 2006. In her letter, Ms. Saranto responded to the Parents' concerns regarding whether the District's program was supported by peer-reviewed research. Ms. Saranto agreed that the District would specifically provide Student with one-on-one instruction in the IEP due to Student's need. The District also agreed to remove the group instruction goals. Ms. Saranto also included in her letter a copy of the District's May 2006 Autism Intervention Program description.

60. The Autism Intervention Program description contained a summary of the parent training available to parents with children at Duncan Holbert. This information corresponded with the information that the District provided to Parents verbally at the prior IEP meetings. Parents could not explain at the due process hearing why the monthly group training sessions provided by Ms. Ross and the Easter Seals program consultants, with the availability of individualized training, did not meet their needs. Parents' concerns focused on their desire to have the same level of individualized training that the Bay School provided.

61. Ms. Aldrich contacted Mother at the request of Ms. Saranto to discuss revisions to Student's IEP regarding the goals and present levels of performance. Ms. Aldrich also reviewed the Bay School's August 2006 progress report to update Student's levels of performance. Ms. Aldrich made changes to the goal pages to correct date information. Ms. Aldrich corrected the speech and language goals to change the prompt levels from "5," which would mean that Student required no prompting as Student reached independence, to "4," which means that Student can perform the requested skill or task without prompting, but still requires supervision to monitor Student and to refine Student's responses. Ms. Aldrich updated Student's present levels of performance based on the new Bay School information, and corrected the speech and language goals to correct any inconsistencies between the computer file and the hard copy presented at the prior IEP meetings.

62. Ms. Aldrich also changed Student's expressive and pragmatic language goals by removing pictures as a form of communication, per the Parents' request. Ms. Aldrich corrected the levels of performance to the receptive language-labeling goal and speech production/articulation goal, plus increased the number of sounds Student needed to meet for this goal. Ms. Aldrich deleted the group instruction goal per the Parents' request. Finally, Ms. Aldrich requested clarification from Parents regarding the present level of performance for the motor imitation goal if the level that Ms. Aldrich wrote was incorrect. Ms. Aldrich emailed the revised IEP to Mother on October 27, 2006, but received no response. Parents did not consent to the revised IEP goals, or the changes to the IEP in Ms. Saranto's October 2, 2006 letter.

63. The District's October 2, 2006 letter by Ms. Saranto and October 27, 2006 email from Ms. Aldrich corrected the deficiencies in the September 18, 2006 IEP. The District agreed to provide Student with full time, one-on-one instruction. Regarding data collection, Ms. McLeary had begun to implement changes in the data collection process and training in the Duncan Holbert classroom based on the extensive ABA training she received at the Bay School so the District could adequately monitor his progress. Finally, Ms. Aldrich updated Student's levels of performance and corrected the prompt levels for certain goals. However, the changes to Student's level of performance information were not significant changes to invalidate the present levels recited in the September 18, 2006 IEP.

64. Parents received Ms. Aldrich's email, but did not respond. The District separately sent Parents notice of an IEP team meeting on November 3, 2006. Parents responded that they had retained Mr. Varma and that the District should contact Mr. Varma regarding scheduling any IEP meeting. After the Parents' response, Ms. Saranto located a letter sent by Mr. Varma that informed the District that Student would be filing a due process complaint. The District did not attempt to schedule an IEP meeting with Mr. Varma.

65. Even if the District had arranged an IEP meeting with Mr. Varma and Parents, the District's attempt to obtain Parents' consent to the District IEP offer would have been futile. Parents would not have accepted the District's offer of placement at Duncan Holbert because of the District's use of an eclectic program as Parents' position was that they would only accept an ABA-only program. Therefore, the District's October 2, 2006 letter and October 27, 2006 email constitute the IEP offer that the District would have made on or about November 3, 2006. The fact that the District did not present this offer at an IEP meeting did not violate Parents' procedural right to meaningfully participate in the educational decision making process. The October 2, 2006 letter and October 27, 2006 email adequately explained the District's modifications to the September 18, 2006 IEP offer, which Parents would not consent to because of the placement at Duncan Holbert.

CONCLUSIONS OF LAW

Burden of Proof

1. Student has the burden of proof as to the issues designated in Issues 1 through 4, of this Decision. (*Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

Elements of a FAPE

2. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA) and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to

prepare them for employment and independent living. (Ed. Code, § 56000.¹¹) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child’s IEP. (20 U.S.C. § 1401(8) (IDEA 1997); 20 U.S.C. § 1402(9) (IDEIA 2004).) “Special education” is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25) (IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

3. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(22) (IDEA 1997); 20 U.S.C. § 1402(26) (IDEIA 2004).) In California, related services may be referred to as designated instruction and services. (Ed. Code, § 56363, subd. (a).) Parent training is a designated instruction and service. (Ed. Code, § 56363, subd. (b)(11).)

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

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) De minimus benefit or trivial advancement, however is insufficient to satisfy the *Rowley*

¹¹ All statutory citations to the Education Code are to California law, unless otherwise noted.

standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d at p. 130.) Rather, a child’s academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child’s potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3 1114, 1121.)

6. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of each district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student’s IEP, then the district provided a FAPE, even if student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit. School districts are also 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 aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹² It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), 811 F.2d 1307, 1314.)

Peer-reviewed Program and Services

8. The *Rowley* opinion established that, as long as a school district provides an appropriate education, methodology is left up to the district’s discretion. (*Rowley*, 458 U.S. at p. 208.) Subsequent case law confirms that this holding is squarely on point in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F. Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, 361 F.3d at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).) “Beyond the broad questions of a student’s general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be

¹² Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.” (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour-per-week ABA/DTT program modeled after the research of Dr. Lovaas, the Ninth Circuit Court of Appeal explained:

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

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 Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57¹³; case provides summary of recent cases in which the issue of the purported superiority of a Lovaas program was presented by parents.) Courts have determined that the most important issue is whether the proposed instructional method meets the student’s needs and whether the student may make adequate educational progress. In *Deal*, the federal District Court noted that the scientific evidence does not support the contention that there is only one correct way to educate an autistic child. (*Deal*, at pp. 65-68.) Finally, the addition of the language “to the extent practicable” regarding the use of peer-reviewed research supported education programs and services does not mandate that an educational agency cannot use an educational program or service that does not have peer-reviewed research supporting its use where it is impracticable to provide such a program.

Procedural Violations

10. *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA as part of the FAPE analysis. Pursuant to title 20 of the United

¹³ Student cited *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d. 840 for the proposition that the Lovaas program outcomes were significantly better than the eclectic program offered by the appellee school district so that the school district’s eclectic program denied student FAPE. However, the Sixth Circuit did not make a finding that the Lovaas program was the only effective program for autistic students. The Sixth Circuit remanded the case to the District Court to take further evidence regarding the Lovaas program requested by parents, and the school district’s eclectic program, which the District Court did in its 2006 decision cited above.

States Code section 1415(f)(3)(E)(ii), of IDEIA, for a procedural violation to deny the student FAPE the procedural violation must either: 1) impede the student's right to FAPE; 2) significantly impede a parent's opportunity to participate in the education decision making process; or 3) cause a deprivation of educational benefits. (*see, W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Required Measurable Annual Goals for a Preschool Student

11. 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, subs. (a)(2), (3).) 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).)

District's Modification of the September 18, 2006 IEP

12. Pursuant to title 20 of the United States Code section 1415(b)(3), a school district is required to provide written notice to the parents of the child whenever the school district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.¹⁴

13. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the school district did not present parents with a written offer regarding the student's proposed program. A school district may modify its formal written offer subsequent to an IEP meeting, if the district involves the parents in the development of the IEP. In *San Ramon Valley Unified School District v. Student* (December 15, 2005) OAH Case No. N2005071031, pages 14-15, the school district made an appropriate offer and did not violate the parents' procedural rights when the district subsequently modified its offer made at an IEP meeting because the district incorporated the parents' requests and attempted to schedule an IEP meeting to discuss the district's new offer. The ALJ's decision was affirmed on

¹⁴ Education Code section 56500.4 states: Pursuant to paragraphs (3) and (4) of subsection (b) and paragraph (1) of subsection (c) of Section 1415 of Title 20 of the United States Code, and in accordance with Section 300.503 of Title 34 of the Code of Federal Regulations, prior written notice shall be given by the public education agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and when the public education agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child.

appeal as the District Court adopted the ALJ's position regarding the District's modification of its offer. (*N.R. v. San Ramon Valley Unified School District* (N.D. Cal. 2006) 2007 U.S. Dist. LEXIS 9135, pp. 34-36.)

Remedies

14. IDEA empowers courts (and Administrative Law Judges) to grant request for compensatory services as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359.) On the theory that Congress did not intend the IDEA to entitle disabled children to a free education only where a child's parents are able to pay for private placement during a legal challenge to proposed services, *Burlington* has been extended to allow District Courts to grant compensatory educational services to remedy past deprivations caused by violations of the IDEA.

15. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 16; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Id.* at p. 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid.*) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

16. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*)

DETERMINATION OF ISSUES

Issue 1: Did the District's September 18, 2006 IEP, as modified on October 2, 2006, and October 27, 2006, fail to offer Student a Free and Appropriate Public Education (FAPE) because the District's IEP:

A. *does not contain sufficient goals?*

1. Pursuant to Factual Findings 25 through 37, the District's September 18, 2006 IEP did not underestimate Student's abilities as the District's assessment contained accurate information regarding Student's abilities. The District obtained correct information about Student's abilities through the assessment process, which included direct observation by District personnel, interviews with the Bay School staff and Parents, and review of records. Evidence from Bay School personnel and Bay School progress reports support the District's estimation of Student's abilities. District personnel conducting Student's assessment and developing his goals knew that Student was making significant progress at the Bay School

and believed, based on Student's past progress, that Student was capable of making significant progress in the District's program.

2. Pursuant to Factual Findings 35 through 38, the September 18, 2006 IEP contains sufficient goals to meet Student's needs, and was reasonably calculated to allow Student to make adequate educational progress. Although Student's IEP was the first IEP for a preschool student that Ms. Aldrich had drafted, she included sufficient goals in the areas of communication, social skills, pre-academic, behavior and self-help to meet Student's unique needs established by all the information that she reviewed. Student could have had, but did not, someone from the Bay School involved with Student's preschool program provide evidence that the District's goals and objectives in the September 18, 2006 were not adequate to meet Student's needs.

B. contains inaccurate present levels of performance regarding Student's goals?

1. As noted in Factual Findings 35 through 37, 57 and 58, the District's September 18, 2006 IEP did contain some somewhat outdated baseline information regarding Student's present levels of performance because the District conducted Student's assessment in June 2006 and did not have the Bay School's August 2006 progress at the time that Ms. Aldrich drafted the present levels of performance. However, the inaccuracies were not significant regarding Student's abilities and did not impair Parents' ability to meaningfully participate in the IEP process because Parents pointed out the inaccuracies, which were not significant, and the District subsequently updated Student's levels of performance. Additionally, Student did not establish that Student would not make adequate educational progress with the goals and objectives developed by the District with the incorrect baselines.

C. does not contain goals in area of receptive identification?

1. Pursuant to Factual Finding 52, Student did not establish a need for a goal regarding receptive identification, or what would be a proper receptive identification goal.

D. does not contain either group or individual parent training?

1. Pursuant to Legal Conclusion 3 and 4 and Factual Findings 48 through 50, the District's September 18, 2006 IEP did not contain adequate information regarding parent training as a designated instruction and services. Parents required this training for Student to benefit from his education program because of Student's need for consistency at home with the instruction Student received at Duncan Holbert. District did not dispute Parents' need for training, and stated that its program incorporated parent training. However, the District did not present to Parents any written information regarding parent training until the District provided on October 2, 2006, a copy of the District's draft program statement regarding the Duncan Holbert Program. The District's failure to provide Parents with a written description of the parent training at either the August 31, 2006, or September 18, 2006 IEP meeting, even though the program handbook existed, denied Parents an opportunity to meaningfully participate in the educational decision making process.

2. Pursuant to Factual Finding 59 and 60, the District corrected its error when it sent to Parents on October 2, 2006, a copy of the District's May 2006 Autism Intervention Program. The Autism Intervention Program contained a sufficient description of the parental training available to Parents. Student did not establish why the District needed to include a more specific statement regarding training in the Autism Intervention Program, or why the training available from a Program Consultant or the class teacher was not sufficient.

E. does not contain appropriate goals in the areas of joint attention and joint attention/initiating interaction, and group instruction because Student lacks the prerequisite skill?

1. Pursuant to Factual Findings 39, 41 and 43, the District's September 18, 2006 IEP contained adequate goals in the areas of joint attention and joint attention/initiating interaction to meet Student's needs in these areas and Student had the prerequisite skills for the goals developed by the District. The District had correct information regarding Student's abilities and needs in these areas from Ms. Takayama's assessment and developed appropriate goals to meet Student's needs. Student had met the goals in these areas at the Bay School by the time of the August 31, 2006, and September 18, 2006 IEP meetings, which establishes that Student had the prerequisite skills for the District's goals in these areas.

2. Pursuant to Factual Findings 39, 40, 42 and 43, the District appropriately developed a group instruction goal because Student had the prerequisite skills to participate in group instruction. At the Bay School, Student's ability to follow adult instruction and interest in other children was emerging. Student did not establish that he would not benefit from the District's group instruction. Rather, Student objects to this goal based on Parents' request for an ABA-only program, which would not include such a goal. In any event, the District remedied any potential problem regarding this goal when it removed the group instruction goal in the October 2, 2006 letter and October 27, 2006 email.

F. provides that Parents will be responsible for implementing Student's goals, but the IEP does not provide for a home program?

1. Pursuant to Factual Findings 46 and 47, the District never required Parents to be responsible for implementing Student's goals. The District listed Parents on the September 18, 2006 IEP on the "implemented by" line, but did not require Parents to be responsible for the particular goal. Instead, the District listed Parents to acknowledge their role in Student's education, especially generalization from school to home, and to include Parents in the education decision making process. The District acknowledged that it had the responsibility to have Student meet the proposed goals and never implied that Parents would be responsible to ensure that Student met the proposed goals.

G. *does not provide for a one-on-one teacher/aide ratio during the entire school day?*

1. Pursuant to Factual Findings 44 and 45, the District acknowledged at the August 31, 2006, and September 18, 2006 IEP meetings that Student required a one-on-one teacher/aide ratio during the entire school day, even though not explicitly stated on the September 18, 2006 IEP. The District did not adequately explain to Parents how it could provide Student with one-on-one instruction. The District did not make a clear, written offer to Parents that prevented Parents from meaningfully participating in the IEP process by not providing in the IEP for one-on-one instruction to meet Student's unique needs. However, the District corrected the mistake when it promised in the October 2, 2006 letter to provide for one-on-ratio instruction. While the possibility existed that the District might not have been able to provide one-on-one instruction, it is pure speculation to state that the District could not have provided Student with one-on-one instruction as stated in writing.

H. *does not provide for an accurate means of data collection to measure Student's goals and objectives?*

1. Pursuant to Factual Finding 51, Student did not establish that the District needed to include in the IEP a description of its data collection methodology to provide Student with FAPE. Additionally, Student's witnesses from the Bay School testified only to Bay School's data collection methodology, and not whether the District's data collection at Duncan Holbert did not meet Student's unique needs.

I. *does not provide for adequate development and implementation of social goals and objectives during the school day?*

1. Pursuant to Factual Findings 39, 40, 41 and 43, the District did provide for adequate social goals and objectives for Student during the school day. The District properly determined Student's social needs in its assessment and developed appropriate goals based on the information developed in the District's assessment.

J. *did not develop new goals for Student, but merely took goals drafted by the Bay School for Student's IFSP?*

1. Pursuant to Factual Finding 38, the District did not merely restate the goals developed by the Bay School for Student's IFSP. In developing the September 18, 2006 goals, Ms. Aldrich properly reviewed the goals developed by the Bay School and updated these goals based on the District's assessments, and added new goals, like group instruction. Student did not establish that the District needed to make wholesale changes to the IFSP goals to meet Student's needs.

Issue 2: Did the District fail to provide Student with FAPE because the District's Autism preschool program supported by peer-reviewed research?

1. Pursuant to Legal Conclusions 8 and 9 and Factual Findings 19 through 24, Student did not establish that the District's autism preschool program has been shown by peer-reviewed research not to be an effective program. The District appropriately developed its program based on the available information regarding the appropriate methodology for an autism program for preschool children. Pursuant to Factual Findings 13 through 18, the District established that its program has been successful in mainstreaming and educating students and that the District could meet the needs of Student in its program at Duncan Holbert.

Issue 3: Did the District fail to provide Student with FAPE in the September 18, 2006 IEP by not offering Student adequate speech and language and occupational therapy services to meet Student's unique needs?

1. Pursuant to Factual Findings 53 through 56, the District offered Student adequate speech and language and occupational therapy services to meet Student's needs.

Issue 4: Did the District fail to provide Student with FAPE in the September 18, 2006 IEP by not making a clear offer of speech and language and occupational therapy services to meet Student's unique needs?

1. Pursuant to Factual Findings 53 through 56, the District made a sufficiently clear offer of speech and language and occupational therapy services to meet Student's unique needs.

ORDER

Student's 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 Issues 1D and 1G regarding the District's September 18, 2006 IEP offer. District prevailed on Issues 1D and 1G regarding the modifications to the IEP contained in Ms. Saranto's October 2, 2006 letter and Ms. Aldrich's October 27, 2006 email.

2. District prevailed on Issues 1A, 1B, 1C, 1E, 1F, 1H, 1I, 1J, 2, 3 and 4.

RIGHT TO APPEAL THIS DECISION

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

DATED: May 11, 2007

A handwritten signature in black ink, appearing to read "P. P. Castillo", written over a horizontal line.

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings
Special Education Division