

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

In the Matter of:

STUDENT,

Petitioner,

v.

GARVEY ELEMENTARY SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080433

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 28 through February 1, 2008, in Rosemead, California.

Student was represented by Bruce Bothwell, Attorney at Law. Parents were present each day of the hearing.¹

Garvey Elementary School District (District) was represented by Bonificio "Bonny" Garcia and Benjamin D. Nieberg, Attorneys at Law, of Garcia, Calderon & Ruiz. Jerlene Hales, the District's Director of Special Education was present each day of the hearing.

Student's due process hearing request was filed on July 11, 2007. His first amended

¹ Student's parents shall be referred collectively as Parents, or separately, where appropriate, as Mother or Father.

request was filed on August 15, 2008. On September 14, 2007, District requested a continuance of the due process hearing and on September 28, 2007, OAH rescheduled the mediation, prehearing conference and hearing. On November 5, 2007, with the consent of the parties, OAH again rescheduled the prehearing conference and hearing, to accommodate OAH's annual education conference.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties stipulated on the record that closing briefs would be filed by March 14, 2008. The parties waived the 45-day period for issuance of a final decision and stipulated that the decision would be issued no later than April 15, 2008. On March 13, 2008, with Student's consent, District requested an extension of time to file closing briefs until March 19, 2008. The ALJ granted the extension. The parties timely filed their closing briefs on March 19, 2008, and the matter was submitted.

ISSUES²

Did District deny Student a free and appropriate public education (FAPE) for the 2007-2008 school year at the June 14, 2007 Individualized Educational Program (IEP) team meeting:

- (1) by denying Parents the right to meaningfully participate in the IEP team meeting;
- (2) by failing to offer Student a sufficient amount of speech and language therapy;
- (3) by failing to develop appropriate goals to address Student's compliance, attention and socialization deficits as recommended by his nonpublic agency

² The issues were derived from the Prehearing Conference Order as further clarified by the parties at the due process hearing and in their closing briefs. In his closing brief, Student combined two issues to form issue 6. The ALJ has revised the issues without changing their substance, for purposes of organizing this Decision.

- (NPA) behavior support provider;
- (4) by failing to offer appropriate classroom aide services and supervision;
- (5) by failing to offer Student individual home-based instructional services and supervision; and
- (6) by failing to provide an educational program that was scientifically-based and supported by peer-reviewed research to the extent practicable which would be implemented by staff with sufficient background and training in autism.

REQUESTED REMEDIES

Student requests orders requiring District to fund: (1) three hours a week of individual speech and language therapy outside Student's class and one-hour a month of consultation, and 30 minutes a week of group speech and language therapy, through the next annual IEP; (2) 100 hours of individual speech and language therapy through a nonpublic agency as compensatory educational services to remediate Student's severe speech and language deficits; and (3) 35 hours a week of individual therapy provided in a general education classroom and at home by Autism Behavior Consultants (ABC), 12 hours per month of ABA supervision, and two hours per month of ABA clinical director consultation.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student, born July 26, 2000, lives with his Parents and older sibling within District boundaries. The parties agree that Student is eligible for special education services under the category of autism. Student currently attends a second-grade general education class at a District elementary school.

2. Student was diagnosed with autism in April 2003. Student has received special education and related services from District since November 2003. He also receives

resource specialist services (RSP) where a certified special education teacher provides specialized instruction to Student during a portion of the school day outside his regular education class (also referred to as “pull-out” services). Student has also been provided school-based speech and language services (LAS), and occupational therapy (OT) services.

3. Beginning in April 2005, when Student was in kindergarten, District provided Student with a one-on-one school-based aide trained in applied behavioral analysis (ABA). The Eastern Los Angeles Regional Center (ELARC) also provided Student a one-on-one ABA-trained aide to work on behaviors at home. Both school-based and home-based ABA services were supplied by ABC. ABC prepared separate goals for Student’s home-based and his school-based ABA services and did not share the home-based goals with District. In total, Student received 28.5 hours a week of direct ABA services, 15 hours per week at school, and 13.5 hours a week at home.

4. Student was placed in a general education first grade class during the 2006 – 2007 school year. As part of Student’s 2006-2007 IEP, Student also attended RSP for 90 minutes a day, four days per week, individual LAS services for thirty minutes, twice a week, and group LAS services for thirty minutes, twice a week.³ In addition, District provided ABA supervision of five hours per month and two hours per month of consultation with the ABA clinical director so that the ABA staff and parents could discuss monthly progress.

DISTRICT’S OFFER AT THE JUNE 14, 2007 IEP TEAM MEETING

5. For the 2007-2008 school year, District offered Student placement in a general education second grade class. In addition, District offered a one-on-one ABA-trained aide daily, fifteen hours a week for the first month of second grade only to assist in transitioning Student to second grade. In place of Student’s one-on-one ABA trained aide, District offered to place a classroom academic aide in Student’s class three hours a day to

³ Student also received individual OT, for fifty minutes, one time a week.

provide additional support to him. District also offered the following services: individual LAS, 30 minutes, once a week; group LAS, 30 minutes, once a week; RSP pull-out, one hour a day, four days a week; adapted physical education (APE), 20 minutes, once a week; and OT, 30 minutes, once a week.

6. As in the 2006-2007 IEP, for the 2007-2008 school year, Student was offered accommodations and modifications to his instruction so that he could access his general education curriculum and achieve his goals and objectives. To enhance his learning, Student would be seated close to the teacher and a peer role model. Under the guidance of his general education and RSP special education teacher, Student only had to complete 50-75 percent of questions, problems, and sections of assignments. To assist Student in accessing his education, his teachers would use visual aides and would repeat instructions. Testing would be given in the RSP room to reduce distractions. Grades would be based upon Student's progress with his IEP goals, not grade level standards.

7. Parents disagreed with District's termination of Student's one-on-one ABA trained aide, its offer to provide a classroom academic aide for three hours a day, and its reduction of LAS. During the pendency of this due process hearing, the parties agreed that Student would be promoted to a second grade general education class. They also agreed to a "stay put" of the following services based upon the last operative IEP for the 2006-2007 school year IEP: ABA services through ABC for three hours a day, five days a week (15 hours per week), five hours a month of ABC-aide supervision, and two hours per month of ABC clinical director services; one hour a week of individual LAS in two thirty minute sessions; and one hour a week of individual speech and language to be provided in two thirty minute sessions. As part of stay put, District continued to provide Student RSP services, 90 minutes a day, four days a week.

ISSUE ONE: MEANINGFUL PARTICIPATION IN IEP TEAM MEETING OF JUNE 14, 2007

8. On June 14, 2007, the IEP team convened to conduct its annual review of

Student's progress and to determine Student's placement during the 2007-2008 school year. Parents attended. All essential participants were present including: Jerlene Hales (Ms. Hales), District Director of Special Education; Anne Gutierrez (Ms. Guttierrez), Student's first grade (substitute) general education teacher⁴; Sandra D. O'Brien (Ms. O'Brien), Student's RSP special education teacher; Danielle Walker (Ms. Walker), Student's first grade speech and language pathologist (SLP); his ABA providers from ABC, Michelle Ly (Ms. Ly), his one-on-one aide, and Heidi M. Glesne (Ms. Glesne), Clinical Director; and his OT provider. District's outside counsel also attended. Parents' rights were provided to them in writing. District and Parents recorded the meeting.

9. The IEP team met for six hours. During the course of the IEP team meeting, all aspects of Student's existing and proposed educational plan were reviewed. Student's strengths, challenges, goals and objectives, placement and related services were extensively discussed. Ms. Gutierrez reported on Student's strengths in math and his acceptable progress in meeting grade level standards. Ms. Hales explained that Student was within District requirements for achievement. She reported on accommodations being made to Student in general education and RSP including precutting shapes and working in a small group. Progress reports were provided by Student's OT, SLP, RSP special education teacher and ABA provider. A report from Student's APE provider was also presented.

10. During the IEP team meeting, Parents had ample opportunity to express their concerns and did. Parents agreed with the OT and APE goals presented and did not challenge District about the sufficiency of these goals.

11. Parents expressed their concern about the amount of time Student was removed from his general education class. District representatives shared Parents'

⁴ Jasmine Tang (Ms. Tang), Student's assigned first-grade general education teacher went on maternity leave in April 2007 and did not attend the June 14, 2007 IEP team meeting.

concerns and discussed ways to increase Student's time in general education by reducing his time in RSP and SLP.

12. Results of District's June 2007 administration of the Woodcock-Johnson, Third Edition (WJ-III) and the Wechsler Individual Achievement Test, Second Edition (WIAT-II) standardized achievement tests were provided and discussed. Ms. O'Brien, administered the achievement tests. In discussing the results of academic testing, Ms. O'Brien reported Student's strengths and also noted his weaknesses. On the WJ-III, Student skills measured in the high average range of others in his grade level, while his ability to apply his skills to school work was in the average range.

13. Ms. O'Brien reported Student's progress in skills requiring language comprehension, including math reasoning and reading comprehension. On both tests Student exhibited strengths in math calculations, word reading, and spelling, and weaknesses in reading and listening comprehension, and mathematical reasoning. Ms. O'Brien informed Parents that on the WIAT-II Student scored lowest in the area of listening comprehension. Student's listening comprehension scores placed him at the pre-kindergarten skill level. She explained that listening comprehension involves both receptive and expressive vocabulary. Ms. O'Brien also informed Parents that a listening center was available to advance Student's listening comprehension skills.

14. Parents asked questions about the standardized achievement tests administered by District. Parents wanted to know if the tests were normed for special education pupils, or were normed for all pupils. Ms. Hales confirmed that the tests were normed for all pupils.

15. Parents had an opportunity to interact with Ms. O'Brien about goals she proposed for Student to work on in RSP and in the general education classroom. Ms. O'Brien proposed six new goals. Parents asked questions about the goals. Parents inquired whether the reading comprehension goal met grade level standards and the RSP teacher explained that the objective of the goal was to advance Student from his present level to

grade level. Parents did not consent to the proposed goals. They informed District that they wanted to take the goals home and discuss them further before making a decision.⁵

16. Parents expressed concern about Student's speech and language comprehension skills. Parents' concerns were addressed by appropriate members of the IEP team. Ms. Walker, Student's SLP, reported on Student's progress in achieving goals set for him at the previous IEP team meeting. She proposed seven new goals. Parents agreed to the proposed speech and language goals.

17. At the June 2007 IEP team meeting, District and Parents discussed whether Student required compliance, attention and socialization goals for the 2007-2008 school year. ABC representatives attended the meeting and offered five new compliance, attention and socialization goals to be administered by Student's ABA-trained one-on-one aide, from ABC, or the District RSP.

18. ABC representatives, Ms. Glesne and Ms. Ly, insisted that District listen to ABC's proposed goals. During the presentation of the goals and objectives developed by ABC, many District members of the IEP team left the room. They returned fifteen minutes later. However, ABC did complete their presentation of the proposed goals and objectives.

19. ABC reviewed Student's previous goals. ABC stated that Student continued to be challenged in socialization and articulation. ABC expressed concern with Student's ability to transition to a new grade at the beginning of the year. ABC presented five new goals for the 2007-2008 school year.

20. Each behavioral goal proposed by ABC was discussed. Ms. Hales, Ms. Walker and Ms. O'Brien, voiced objections to the goals proposed. District IEP team members provided specific feedback for each goal proposed by ABC. Parents actively participated in the discussion of the proposed goals. Parents offered that Student did not share things at

⁵ Parent's have not contested to the goals written by Ms. O'Brien as part of this due process complaint.

home with friends, cousins and siblings and that he needed practice in sharing as indicated in goal number two. Parents shared that they had to constantly remind Student about keeping appropriate space as required in proposed goal number three. They also remembered an aide reporting that Student kissed her so the goal about personal space was needed to prevent that from happening at school. Parents also indicated that the problem of keeping appropriate space surfaced when Student was in the park.

21. Although District members of the IEP team uniformly disagreed with the need for a one-on-one, ABA trained aide, District did agree to develop a new social emotional goal based upon ABC's proposed goals. The goal would be implemented by Student's second grade general education teacher, his RSP special education teacher, Ms. O'Brien, and his SLP.

22. At the time of the June 14, 2007 IEP team meeting, District personnel did not believe that Student required an ABA therapist to access his education. Student did not exhibit disruptive behaviors and did not require a behavior plan. At the IEP team meeting the Director expressed a concern shared by the RSP and SLP that ABC's one-on-one aide prevented Student from participating independently in the classroom or on the playground with his peers. Not one of the IEP team members from the District believed that Student required a one-on-one ABA trained aide. District proposed that the ABA aide be discontinued in the 2007-2008 school year after a twenty day transition period.

23. Parents left the IEP team meeting without signing the IEP. One week later District received their typewritten objection to the IEP and their request for stay put.

ISSUE TWO: FAILURE TO OFFER SUFFICIENT SPEECH AND LANGUAGE THERAPY

24. At the June 14, 2007 IEP team meeting, District reduced Student's one-on-one LAS services for the 2007-2008 school from one hour a week to thirty minutes a week.

25. At the time of the IEP team meeting, Student remained severely deficient in speech and language comprehension, despite many years of LAS therapy provided by

District. Parents also privately funded LAS therapy. Despite Students continuing deficits and uneven progress, District recommended a reduction in LAS services.⁶

26. District's offer to reduce Student's individual LAS services had little to do with Student's unique speech and language needs or progress. At the IEP team meeting Parents and District agreed that Student needed more time in general education. District reduced Student's LAS services to maximize Student's time in his general education class room. Student's LAS and other special education services were provided at the school site as "pull-out" services. As a result, Student's time in general education was reduced by the amount of time he spent in LAS, RSP, and OT. At the time of the June 14, 2007 IEP team meeting Student was receiving 90 minutes of RSP pull-out services, four days a week, one hour each of individual speech and one hour of group speech as pull-out services. Student's 2006-2007 IEP indicated that he spent forty-nine percent of his time outside of general education.⁷

27. District's decision to reduce LAS services at the June 14, 2007 IEP team meeting was not supported by District's most recent triennial assessments. In 2005, District administered a range of standardized and valid measures of receptive and expressive language skills. District did not apply a standard deviation but compared Student's performance to other pupils taking the test. District's assessor determined that Student was between one-and a half and two years delayed in receptive and expressive language skills, including auditory comprehension. Student performed better on single word

⁶ Student requires group speech to work on his communication skills. Parents concur with District's offer of 30 minutes of group speech each week and accordingly the appropriateness of District's offer of group speech is not addressed in this decision.

⁷ District inadvertently set forth in the proposed June 2007 IEP that Student would be pulled out 240 minutes a day, instead of 240 minutes a week, or 60 minutes a day.

vocabulary tests than he did on comprehensive language tests.

28. Student's independent LAS assessment of June 2005 demonstrated that Student was severely delayed in receptive and expressive language skills, including language structure, syntax and qualitative and quantitative concepts. Student performed two standard deviations below the mean on single word receptive vocabulary skills, and three standard deviations below the mean on single word expressive vocabulary skills. Student's auditory comprehension was three standard deviations below the mean.

29. Student's need for intensive one-on-one LAS was also demonstrated by his partial progress in meeting his language goals during the 2006-2007 school year. Student's LAS goals have been relatively static since 2003. Student's language comprehension goals were developed by the SLP and the RSP. In his LAS session, Student's language goal one provided that he would be able to use six pictures to correctly sequence a story he had just heard. Goal one also provided that Student would be able to verbalize the beginning, middle and end of the story using 4-5 utterances. Student partially met this goal by the June 2007 IEP. Instead of repeating this goal for 2007-2008, District attempted to make the goal easier by only requiring Student to use four pictures instead of six. Goal two required Student to answer what, when and where questions. Progress was made, but the goal wasn't met.

30. With goal three, Student worked on oral motor exercises to position his mouth and tongue correctly to make sounds. Student met this relatively simple goal. Student met goal four, but he had not progressed to three or four syllable words, or to the sentence level. Student's goal five was designed to work on the length of his utterances and to improve his articulation. However, there was no way to measure the extent to which Student was able to put words in sentences. Instead, the goal provided for Student to use his photo book to work on this area.

31. At the time of the June 14, 2007 IEP team meeting Student's articulation skills were impaired. Teachers and classmates had difficulty understanding him. It was

especially difficult understanding Student at the beginning of the school year. As the school year progressed his teachers and classmates become accustomed to his articulation and had an easier time understanding him. Earlier speech and language reports, including District assessments, indicated that Student had apraxia, or oral motor deficiencies that affected his production of sounds. The oral motor structure of pupils with oral apraxia are intact, but they still can not organize their motor functions effectively. As a result their speech may be impaired. Pupils with apraxia will rely on one sound as a substitute for another sound they can not form; e.g., the letter "D" might substitute for "Th."

32. Parents secured an independent LAS assessment in October and December 2007. Ms. Jane Haddid (Ms. Haddid), of More Than Words, was retained by Student to conduct the independent assessment. She administered a series of tests to assess Student's speech and language skills. Ms. Haddid is a well qualified licensed SLP. She has a Bachelor of Science and Masters degree in Speech Pathology. Ninety percent of her practice is devoted to autistic pupils. The tests she administered were appropriate and valid assessments. Ms. Haddid testified directly and without equivocation. Ms. Haddid's observations were generally consistent with her test results, previous test results conducted by District, and the observations of Student's ABA aide and District's representatives. Her testimony and report were given great weight in determining Student's LAS needs.

33. District attempted to challenge Ms. Haddid's administration of the assessments on the ground that she failed to account for Student's status as an English learner. On the IEP, District did check the box indicating that Student was an English learner. However, District did not present any evidence as to whether it actually determined Student met the criteria of an English learner before checking the box. Parents' native language is Cantonese. However, Student was born in the United States and has been in the school system for several years. Student was never heard to speak Cantonese at school. Mr. Frances David, Student's current on-site speech pathologist admitted that he

relied only on the checked IEP box in determining that Student was an English learner.

34. Ms. Haddid administered the Receptive One-Word Picture Vocabulary Test (ROWPVT) to assess Student's single word receptive vocabulary. Student was asked to point to a named picture from a field of four. Student achieved a score of 76 which is more than 1.5 standard deviations from the mean and below average for his age. Student's single word expressive vocabulary was assessed with the Expressive One-Word Picture Vocabulary Test (EOWPVT). Student was asked to name pictures or the category of a group of pictures. Student scored 55, which was below average, calculated as more than one standard deviation below the mean of 80. Student's single word receptive and expressive vocabulary skills are only mild to moderately impaired. When compared to his other language scores, these skills are considered an area of relative strength for Student.

35. Ms. Haddid administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4). This test is designed to assess Student's overall language ability. The core language score is considered the most representative measure of language skills. Student's core language score of 40 was four standard deviations below the mean.

36. Four subtests of the CELF-4 were administered from which Student's core language score was derived. The Concepts and Following Directions subtest assessed Student's ability to interpret, recall and execute oral commands of increasing length and complexity. Student received a score of one, or three standard deviations below the mean. Student could only process directions with simple concepts (e.g., underline, circle) but could not process directions which involved steps, such as all but one, neither/nor, farthest or closest.

37. Student's grammatical skills are significantly delayed. Student received a scaled score of one, three standard deviations below the mean, on the Word Structure subtest, which was administered to assess Student's knowledge of grammatical rules in a sentence-completion task.

38. Student's auditory memory skills are weak. The Recalling Sentences subtests

measures Student's ability to recall and orally reproduce sentences of varying length and syntactic complexity. Student listened attentively to Ms. Haddid, but nevertheless received a scaled score of one, or a score three standard deviations below the mean. Student's score on the Concepts and Following Directions subtest also demonstrated reduced auditory memory for following two-part directions.

39. Student is severely delayed in syntax and sentence formulation. Student's score on the Expressive Language Index of CELF-4 was three and a half standard deviations below the mean. His responses to the Formulated Sentences subtest were three standard deviations below the mean. This subtest tested Student's ability to formulate compound and complex sentences using target words and phrases, while using an illustration as a reference. Student could formulate simple sentences about a picture using certain words. For other target words, Student responded with incomplete sentences or failed to use the target word.

40. Ms. Haddid administered the CLEF-4 Pragmatics Profile subtest. Pragmatic skills include skills used for daily communication, conversation, social and school interaction. To complete this subtest, she used data collected from interviews with Mother regarding Student's social behaviors and interaction skills. Ms. Haddid concluded that Student was able to use language but had difficulty with conversation and nonverbal communication. Student does not possess age-level pragmatic skills.

41. Student's pragmatic language deficits impact his social and peer interactions. From the results of the CLEF-4 Pragmatics Profile subtest, Ms. Hadid concluded that Student has difficulty interacting with peers because of poor expressive communication skills and low awareness of appropriate social behavior and the emotions of others. In other words, Student's peers do not understand what he is saying and do not want to play with him because he interacts inappropriately.

42. Ms. Haddid further assessed Student's pragmatic skills through observation. Student did use language to converse but his skills were limited by his expressive language

deficits. Student's responses to questions were delayed a few seconds because he needed time to process the query. He typically only took one turn in a conversation on a preferred topic. He had difficulty telling about recent events or talking about objects not present.

43. Results of the Arizona Articulation Proficiency Scale – Third Revision, given by Ms. Haddid, were consistent with teacher reports of Student's articulation challenges. The results indicated that his articulation skills were severely deficient, approximately two and one-half standard deviations below the mean.

44. Student retained Robin L. Morris, Ph.D. (Dr. Morris) to conduct an independent psychoeducational assessment in September 2007. Dr. Morris is a clinical psychologist and is qualified to administer assessments.⁸ Her assessment data was considered in determining Student's cognitive skills and deficits. Student's performance on cognitive intelligence tests reflected his severe language comprehension impairment. Student's overall nonverbal intelligence is average, demonstrating that he is able to progress academically. The results of Dr. Morris' administration of the Stanford Binet intelligence scale indicated that there was a marked difference between Student's verbal and nonverbal intelligence quotient. The verbal component of the assessment required Student to understand spoken instructions and clearly respond to these instructions verbally.

45. Student's performance in school reflected his unique language comprehension challenges. Prior to the June 14, 2007, IEP team meeting, Ms. O'Brien administered the WIAT-II. Dr. Morris administered the WIAT-II in September 2007. Ms.

⁸ Dr. Morris' opinion that Student's attention difficulties were the primary source of his educational challenges was not given weight. Dr. Morris relied extensively and almost exclusively on Student's attention deficit. She concluded that his attention deficits are the source of his academic difficulties without any meaningful analysis of his language comprehension challenges.

O'Brien and Dr. Morris obtained similar results. Student performed in the 98th percentile for numerical operations. He scored near the mean on spelling, written expression, simple math problems and when writing orally presented words correctly. His listening comprehension skills were extremely low. He could not recall increasingly complex stories which relied upon oral comprehension and attention skills or solve timed math problems which utilized word passages. His untimed scores for solving math problems were 13 points higher than his timed scores.

46. For the 2007-2008 school year Frances David (Mr. David) was assigned to be Student's SLP. Mr. David did not attend the June 14, 2007, IEP team meeting. He first worked with Student in summer 2006, and presently is his 2007-2008 SLP. Mr. David testified at the hearing that he concurred with the recommendation that Student's needs could be adequately addressed with 30 minutes of one-on-one LAS.

47. Mr. David insisted that Student could progress with reduced services if there were sufficient follow-up at home. He considered pragmatic speech to be Student's primary deficit. Mr. David's recommendation that Student's IEP goals can be accomplished at home without expanding his therapy is contradicted by his opinion that the home environment has delayed Student's progress, especially in the area of articulation. Mr. David insisted that Student's articulation problems were the direct consequence of hearing his Parents' native language of Cantonese at home. Mr. David disputed District's earlier assessment which indicated that Student's speech was compromised by his oral motor apraxia. Mr. David was taught that apraxia did not exist.

48. In the 2006-2007 IEP, a goal was developed, which was used to further Student's unique speech as well as language comprehension needs. Student was required to respond to who, what, where and when questions. Student made progress, but did not meet his speech or language comprehension goal in this area. Progress on this goal is critical to Student's ability to comprehend increasingly complex educational instruction. Why questions are particularly challenging because they require a higher level of word

comprehension and language skills. Each step must be broken down and repeated again and again.

49. The reduction in LAS services offered for 2007-2008 school year is inconsistent with the number of goals the SLP was required to administer under that IEP. In 30 minutes of speech, the SLP was required to work on seven goals; therefore, at most Student worked on each goal for four minutes a session. Mr. David maintained that he could accomplish all the goals within a short time period by using a psycholinguistic approach, which applies various speech goals together in one activity.

50. Ms. Haddid conceded that progress on goals is hard to predict, but given Student's severely impaired articulation and expressive and receptive language comprehension deficits she insisted that Student requires a minimum of three hours a week of one-on-one individual speech and language therapy by a licensed SLP experienced with autism for the 2007-2008 school year and extended school year. Consistent with her assessment, and the June 14 2007 IEP, she indicated that LAS therapy should address the following areas: (1) receptive language, including concept understanding, following directions and story comprehension; (2) expressive language, including, syntax/sentence formulation, morphology and narrative skill); and (3) pragmatics and articulation.

51. Student also works on his language comprehension goals with Ms. O'Brien. Ms. O'Brien addresses Student's language comprehension deficits during his RSP sessions, four days a week. Ms. O'Brien has been Student's RSP special education teacher since first grade. She also taught him briefly during summer school at the end of kindergarten. She is familiar with Student's struggles with language comprehension.

52. At the June 14, 2007 IEP team meeting, four of the seven proposed goals involving RSP addressed Student's reading or listening comprehension. In a goal shared with the general education teacher, the RSP teacher, Ms. O'Brien, was required to work with Student on math reasoning, particularly solving math problems with whole numbers,

and using grids and graphs to make comparisons. In RSP, as well as in general education, Student was required to work on his core listening comprehension deficit. In a goal shared with the SLP, in RSP, Ms. O'Brien will work with Student on answering who, what, where, when, why questions, to further his reading comprehension skills. Ms. O'Brien and Student's general education teacher were both required to address reading comprehension skills by using pictures to retell a story.

ISSUE THREE: FAILURE TO DEVELOP APPROPRIATE GOALS TO ADDRESS STUDENT'S COMPLIANCE, ATTENTION AND SOCIALIZATION DEFICITS

53. Student does not present with compliance or maladaptive behaviors that interfere with his access to education. Student is polite and quiet. He is easily redirected.

54. Student does have unique attention needs. He has to be regularly redirected and prompted to focus on his instruction and to follow directions. Student will often lose focus, fidget and fail to follow instruction absent prompts. Student's first grade general education teacher, Ms. Tang, acknowledged that Student had trouble staying attentive and needed to be prompted. His current teacher, Claudia Espinoza (Ms. Espinoza) also noted that Student needed to be prompted and redirected.⁹

55. Student has unique communication and social needs. As previously examined, Student's deficient pragmatic language skill, make it difficult for him to

⁹ Ms. Espinoza has been teaching general education elementary school for approximately 14 years. As required for her teaching credential, she enrolled in several special education courses. Student is Ms. Espinoza's first child with autism. Student is one of 19 pupils that comprise Ms. Espinoza's second grade class. Ms. Espinoza was able to clearly communicate that she understood Student's strengths and challenges. She presented herself as a teacher interested in her work and engaged with her pupils. For these reasons, her testimony was persuasive.

communicate and be understood by his peers. Further, like other autistic pupils, Student's social skills are impaired. His teachers and SLP insist that he makes his choices known and can initiate conversations. They note that his social deficits are shared by pupils his age and can be addressed appropriately by his general education teacher, or in a small group environment of RSP and group LAS.

56. Student's unique social needs make it difficult for him to interact on the playground. Student needs prompting to interact with other Students on the playground. Student's social needs on the playground are not addressed in District's offer of June 14, 2007. Playground time is completely unstructured. Teachers are assigned playground duty on a rotating basis, but are only there as general guardians of the pupils, and are not there to orchestrate games. There was no indication that any effort was made to create activities that would provide opportunities for Student to interact with his peers. On the contrary, Ms. O'Brien and Mr. David maintained that it was important for pupils to have unstructured time. Mr. David assumed that Student would play with his peers if he did not have a playground aide. Ms. O'Brien shared Mr. David's opinion although she never observed Student on the play ground. She commented that "play was children's work" and objected to Student being pushed too hard by his ABA aides.

57. ABC developed eight compliance, attention and social goals for Student during the previous 2006-2007 school year. The goals were met. Goals included: (1) no whining; (2) engaging in eight verbal responses to a peer; (3) initiating play with a peer; (4) engaging in appropriate play; (5) to use and recognize eight common gestures with peers; (6) to raise hand and respond; (7) to sit and respond in an age appropriate manner; and (8) to eat 10 new foods.

58. At the June 14, 2007 IEP team meeting, District proposed one broad social emotional goal, in the place of ABC's proposals. District recommended a social/emotional goal that would be implemented by the RSP teacher, the SLP and/or the general education teacher. The new social/emotional goal provided that Student would positively interact

with peers by appropriately taking turns or sharing materials for 4/5 trials as measured by observation opportunities in the school environment. Benchmarks would begin in the classroom setting and expand to the overall school environment.

59. The goal as written does not describe with any specificity the activities that form the core of District's goal to further Student's interaction with his peers. The goal is measured by observation, but it is unclear what District is observing. District intends the goal to move from the classroom to the "school environment," however, no mention has been paid to the playground, the environment which is lightly monitored only by teachers on rotating assignments. District's goal goes one step further than the goals developed by ABC. The goals developed by ABC place the burden squarely on Student to initiate but do not measure the reciprocity of peers Student approaches. District's goal attempts to encourage interaction between Student and his peers.

60. At the June 14, 2007 IEP, ABC proposed new social goals. Proposed goal one requires Student to ask a peer to play an activity of choice three times a week. Ms. Hales questioned the need for this proposed goal. The RSP teacher and SLP noted that Student did not have trouble making his preferences known in small groups.

61. ABC's proposed goal two requires Student to independently share and ask for items to be shared. The general education teacher objected to proposed goal two which addressed Student's resistance to sharing items. She indicated that his resistance to sharing was not uncommon for first graders.

62. Proposed goal three was designed to condition Student to maintain socially acceptable behavior, particularly appropriate personal space from his peers and adults. ABC observed that Student did not maintain appropriate space in school lines. Parents indicated that the goal was required because Student had hugged his teacher in the past, and had particular trouble keeping appropriate distance from other children in the park. ABC also observed Student's inappropriate behavior on the playground. The SLP and RSP teacher did not believe it was necessary to have goal number three as they had never

observed this to be a problem between Student and his peers in their small classes. Ms. Tang, Ms. Espinoza, Ms. O'Brien and Mr. David do not regularly monitor the playground; only ABC is regularly tracking Student in all his school environments, including the playground. Accordingly, ABC's opinion that goal three was appropriate was persuasive.

63. ABC recommended goals to address Student's attention. Proposed goal four furthers Student's ability to independently ask for assistance during independent work activities when he does not understand material by raising his hand to ask the teacher or a peer. The RSP teacher and the general education teacher maintained that this goal was also not necessary because Student did ask for help. However, Ms. Espinoza admitted that Student did not ask for help on a regular basis.

64. ABC recommended goal number five to further Student's skills in requesting and using a tissue. ABC had to constantly remind Student to use a tissue in the general education class. The RSP teacher did not believe that goal number five was needed to assist Student in requesting and using a tissue, because he was doing well in that area in her class.

65. Ms. Hales generally objected to ABC's proposed goals on the ground that Student would be better served applying these goals in the home or the community. At home, ABC was working on mitigating Student's maladaptive behaviors and improving his communication, play and social skills in order for Student to successfully function at home and in the community. Student's behaviors at home do not always manifest in the school setting. At home, Student's aversion to loud noise is acute. He fears elevated surfaces and walkways and does not want to walk on them. More recently, he developed a fear of the toilet and won't go near it or sit on it. Parent indicated that Student does not keep an appropriate distance from other people in the park; they observed his inappropriate use of a tissue. Accordingly, Student's goals in school address different needs and serve different objectives than Student's goals at school

66. ABC's proposed goals one through four address Student's attention and

social deficits at school. ABC's proposed goal five addresses behaviors that should be mitigated in the home and community.

ISSUE FOUR: APPROPRIATENESS OF CLASSROOM AIDE SERVICES AND SUPERVISION

67. In its closing brief, District acknowledged that evidence offered at the hearing demonstrated that Student requires a "fair amount" of individualized instruction in breaking down assignments, modification of assignments (including, but not limited to, shortening the number of problems or questions answered), redirection and prompting to benefit certain academic areas, especially in the area of language arts and reading comprehension. District's concession is supported by the testimony of his general education teachers, RSP, SLP, and Student's ABA providers.

68. Ms. Haddid noted Student's attention difficulties in her clinic and classroom observations. District challenged the accuracy of her classroom observations on the ground that her presence disturbed Student's attention and routine. Ms. Haddid's observations were not compromised by her presence in the classroom. Her observations were consistent with the results of her administration of standardized tests and Student's present level of performance. Ms. Haddid's observations did not substantially differ from Student's teachers. Student has difficulty with attention. District witnesses acknowledge that Student has attention problems; whether he had more attention difficulties the day Ms. Haddid visited does not undermine the basis of Ms. Haddid's opinion.

69. District contends that most of these functions can be performed by a trained academic aide, not a behavioral aide as recommended by Student. Student maintains that an ABA trained aide is singularly qualified to provide appropriate intervention in the classroom and on the playground.

70. The IEP narrative memorializes District's offer for Student to be in a general education classroom with RSP, Speech, OT, APE services, "and a three hour academic aide will be provided for the classroom." The Principal of Student's elementary school

represented that an academic aide would be provided for the classroom three hours a day and would assist Student. Ms. Hales testified that the offer for an academic aide was not firm. Parents had not agreed to the IEP at the team meeting and she was awaiting Parents' response to the total offer. She intended to further discuss the classroom aide with Parent after she knew they were interested in moving forward with the offer. Ms. Hales explained that the aide was not part of the special education budget, and the Principal of the elementary school where Student attended had to provide the aide from his staff. Ms. Hales testimony was contradicted by the IEP narrative.

71. Ms. Heidi Glesne testified that an ABA aide could accomplish more than Student's RSP by using a behavioral approach to better focus Student's attention on his lessons in class and breaking the lessons down so that he can complete them. Ms. Glesne assumes that Student's academic challenges are the result of his attention problems. ABC has been assisting Student in class since April 2005; he remains challenged academically.

72. Student does have significant attention difficulties. ABA is a methodology for addressing behavior and attention issues common to children with autism spectrum disorder. Student needs to be redirected and refocused. He requires close attention. Student's expert psychologist, Dr. Morris, concluded that Student required a certified ABA aide from an NPA like ABC to access his academic instruction. She suggested that his comprehension difficulties flowed primarily from his attention problems. She relied upon reports from his ABA aide, her observations during one-on-one testing, and classroom observations. Her opinion is not supported by Ms. Haddid's assessment of Student's language comprehension deficits and historical assessment data. Ms. Haddid also notes Student's attention difficulties, and supports the use of ABA to mitigate his attention challenges. However, Ms. Haddid acknowledged that Student's severe speech and language deficits are the root cause of his academic difficulties.

73. ABC acknowledged that Student does not require the constant prompting he did at the outset of its work with him and that it intended to "fade" its assistance to

Student. Student's teachers are trained to provide direction to Student and keep him focused. Student's general education teachers, Ms. Tang, and Ms. Espinoza, admit that they can't always focus on his needs and directly and immediately respond to him. They do need assistance.

74. Student's academic progress was severely challenged by his language comprehension deficits. However, there is no evidence that ABC aides have the necessary credentials to provide Student academic instruction. They do not have any general or special education training or credentials. Ms. Ly, Student's one-on-one aide, has an undergraduate degree in psychology and is completing her Masters in psychology with an emphasis on ABA. She has been working with autistic children for eight years and has been Student's school and home aide since 2005. Like her supervisor Ms. Glesne, her education and experience qualify her to speak about Student's social, behavioral needs and progress, not his academic needs and progress. They are not qualified to testify about Student's academic needs or progress. Accordingly, their opinion that a certified ABA trained aide is necessary for Student to understand and complete his academic instruction was not persuasive.

75. District offered an academic aide for the classroom. The student-teacher ratio in first and second grade is 20 to 1. Student can be overlooked in a general education classroom. Student's general education first grade teacher, Ms. Tang and his current second grade teacher, Ms. Espinoza, were aware that they could not always attend to Student given their competing classroom responsibilities. Student received attention when needed from his one-on-one aide. As part of a small group, Student also received attention when needed. Student's ABA aides on occasion have offered to assist Ms. Espinoza so that she can break down in small groups and work with pupils and Student. Student was able to participate without one-on-one attention.

76. At the start of first grade, Ms. O'Brien taught Student one-on-one in his RSP sessions. She expanded his RSP sessions to include other pupils so that Student could also

work on social skills. She found it easy to redirect and focus Student in a small group. She discovered that circle time was more productive in the RSP room where she sat eye-to-eye with Student on the floor. She could easily keep him focused and redirect him. Ms. O'Brien's RSP class never exceeded four pupils.

77. Student required guidance and direction on the playground. His current classroom ABA aide does accompany Student on the playground. There is minimal supervision on the playground. Given Student's unique communication and social deficits, Student can not participate with his peers and further his IEP goals without assistance.

78. Based upon the information known to District at the time of the June 14, 2007 IEP offer, District should have offered a classroom academic aide assigned to no more than four pupils, including Student. Under the guidance of the general education teacher, the aide would apply standard techniques for focusing and redirecting Student.

79. Student also contends that a one-on-one ABA trained aide is required so that he can attend the general education class without any pull out for RSP. At the June 14, 2007 IEP team meeting, District and Parents agreed that Student needed more time in his general education classroom. District offered to reduce Student's time in RSP by one-half hour to one hour a day, four days a week. District also reduced Student's time in LAS and ensured that the combined time of APE and OT did not exceed one hour a week. District's general education school day is approximately six hours.¹⁰

80. Student's one-on-one ABA aides successfully addressed Student's attention and social deficits to keep Student focused on his instruction in the general education class. At the time of the June 14, 2007 IEP, Student also had severe language comprehension deficits, requiring specialized instruction.

81. Student was not a behavior problem in Ms. Tang's first grade class. She was

¹⁰ Under stay put, Student is still receiving 90 minutes of RSP daily, four days a week.

conflicted about his removal from class, but she recognized that additional specialized instruction was necessary for Student to progress. As a general education teacher she was qualified to keep Student on task and reinforce the class lessons.

82. Ms. O'Brien, the RSP teacher, provided Student with specialized instruction to enhance his language comprehension in exercises involving reading, math and listening comprehension. Ms. O'Brien applied a variety of teaching methods to enhance Student's comprehension. She used sequencing and flow maps, visual supports and other "manipulatives" to enhance his comprehension and math reasoning skills. Ms. O'Brien worked with him one-on-one, and also utilized an aide to support her instruction. Ms. O'Brien sat on the floor at eye level with Student. Ms. O'Brien discovered what motivated Student. She found that he loved literature, especially rhyming books, songs, and stories on cassettes. She knew he enjoyed movies so she used movies to work on his listening comprehension skills embedded in the who, what, why, when and where questions. She knew he enjoyed the computer so she used computer-time as a reward.

83. Ms. O'Brien maintained that Student required a "pull-out" program to progress. Progress has been slow, but Ms. O'Brien is working on Student's core and severe language comprehension deficits. The RSP room is a secure and welcoming environment. General education can be pressured and rushed. During first grade Ms. O'Brien initially taught Student alone and then added other Students to further his goals, including his social skills. During his current second grade school year, Student attends RSP with the same two pupils that participated with him in RSP during his first grade school year. Student was excited to have company in the RSP room and the pupils enjoy working together with Student. Like Student, the other pupils are kind and cooperative. Ms. O'Brien has the support of an aide that works under her supervision.

ISSUE FIVE: FAILURE TO OFFER STUDENT INDIVIDUAL HOME-BASED INSTRUCTIONAL SERVICES AND SUPERVISION

84. Student maintains that he can not access his education without individual home-based instruction to assist him in completing his homework assignments. Mother claimed that it took four hours to complete his homework assignments. Student had to make up school work he missed due to the amount of time he was removed from his regular education class. Ms. O'Brien does not generally work directly on student's classroom or homework assignments and Student requires assistance to complete these assignments.

85. Student completed his assignments with assistance from his ABA aides. ABC assisted Student in breaking down the assignments and staying on task. At the June 14, 2007 IEP team meeting, ABC did not propose home-based goals to assist Student with homework. ABC focused on Student's classroom behavioral goals and insisted that it would be fading its assistance during the course of the 2007-2008 school year.

86. Student's ABA providers maintained that ABA can be applied to academic instruction as it provides a methodology for breaking down Student's assignments. They claim that Student was able to complete his assignments without them providing him with the answers. ABC elected to provide Student homework assistance. However, there is no evidence that ABA methods are required to assist Student with academic assignments.

87. At the June 14, 2007 IEP team meeting, District increased Student's time in his general education class and offered accommodations to pupil so that he could participate in general education. As part of his accommodations, Student was only required to complete 50 to 75 percent of his classroom assignments, tests, and problem sets. Given the offer of increased time in general education, and Student's accommodations, District was not required to offer Student homework assistance after school. It was also not required to provide home-based ABA services so that he can complete his homework.

ISSUE 6: FAILURE TO OFFER AN EDUCATIONAL PROGRAM WHICH WAS SCIENTIFICALLY-BASED AND SUPPORTED BY PEER REVIEWED RESEARCH AND WHICH WOULD BE IMPLEMENTED BY STAFF WITH SUFFICIENT BACKGROUND AND TRAINING IN AUTISM¹¹

88. In his closing brief, Student acknowledged that he was not contending that a particular methodology was required to provide Student a meaningful educational benefit.

89. The report of the National Resource Council, which Student offered as evidence, expressly provides that while interventions lead to improvements, it has not found a clear direct relationship between any particular intervention and children's progress. Student has provided persuasive evidence that ABA had assisted him with his behaviors, social skills and attention. However, the record also indicated that Student progressed to the point that the interventions required for him to access his education were similar to interventions generally utilized by classroom instructors to focus and redirect pupils. That Student requires more frequent prompts and redirections means that he requires assistance, but it does not mean that he also requires the services of an aide exclusively trained in ABA or a one-on-one aide.

90. District recognizes that ABA has its place in treating the attention, communication and social challenges facing pupils with autism. District provides ABA training to District staff and classroom aides through a certified nonpublic agency. Ms. Hales testified that the transition aide contemplated for Student was experienced with autistic children and had also received ABA training.

91. Student challenges the qualification of District personnel. District staff are not experts in autism, but as educators they have significant experience addressing compliance, attention and social issues. They know how to prompt, redirect and focus pupils. Similarly, given their years in the classroom or in providing services to elementary

¹¹ Student combined Issues 6 and 7 in his closing brief. Accordingly, the issues were combined as one.

school children, they know how to facilitate sharing and social interaction in their classrooms.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*))

ISSUE ONE: DID DISTRICT DENY STUDENT A FAPE BY IMPEDING PARENTS ' RIGHT TO MEANINGFULLY PARTICIPATE IN THE IEP TEAM MEETING?

2. Student contends that District committed a procedural violation of state and federal education law by denying parents the right to meaningfully participate in the IEP process. Specifically, Student contends that the IEP process was adversarial, and Parents were not allowed to participate in the IEP or the conferences which he alleges took place outside of Parents' presence during the course of the IEP team meeting.

3. Parents play a "significant role" in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) __ U.S. __ [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904].) ; 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485(*Target Range*); *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

4. Here, Parents were active participants in the June 14, 2007 IEP team meeting. The IEP team members met for six hours. All essential participants were present. All aspects of Student's proposed educational plan were reviewed including, Student's unique needs, progress, goals and objectives, placement and services.

5. Parents claim that they did not have an opportunity to meaningfully participate as IEP team members because District did not want to hear the recommendations of ABC and tried to prevent them from speaking. District personnel uniformly disapproved of the presence of ABC in the classroom. District IEP team members were resistant to ABC's proposed goals and objectives. However, the candid opinions of District personnel regarding Student's ABA services, including his one-on-one aide, do not establish that Parents did not have an opportunity to meaningfully participate as IEP team members. On the contrary, there was overwhelming evidence that Parents were provided opportunities to voice their concerns about District's proposal. Parents had time to consider District's recommendations and were not pressured to accept the proposed goals or services during the IEP team meeting.

6. Parents elected to approve certain goals and services during the IEP team meeting, and chose to reflect further on other proposals. They left the IEP team meeting without signing the agreement and delivered their objections to the IEP one week later. Parents expressly objected to the reduction in ABA services provided by ABC and its failure to offer extended school services. Parents agreed to placement in a general education second grade class. Parents further requested that all services under the last executed IEP continue under "stay put."

7. Parents claim that they were denied their right to participate as IEP team members because District's refusal to continue ABA services was determined outside their presence by District IEP team members. Some District staff left the room during ABC's presentation only to return 15 minutes later. ABC completed its presentation. District wrote its own social emotional goals to replace ABC's goals and objectives. There is insufficient

evidence from these facts that the IEP team predetermined its recommendation to eliminate ABA services from ABC.

8. Parents meaningfully participated in the IEP team meeting of June 14, 2007. Accordingly, Parents failed to meet their burden of proof that they were denied an opportunity to meaningfully participate in the IEP process. (Legal Conclusions 1 and 3; Factual Findings 1-23.)

ISSUE TWO: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE SUFFICIENT SPEECH AND LANGUAGE THERAPY?

9. Student contends that District failed to provide a sufficient amount of speech and language therapy. District proposed a reduction of individual LAS from one hour per week to 30 minutes a week.

10. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs.” *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley’s* “some educational benefit” simply as “educational benefit” (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645.)

11. To determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the 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 the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

12. "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) The term "unique educational needs" is to be broadly construed to include the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No.1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

13. Related services include speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664].) In California, related services are called designated instructional services. (Ed. Code, § 56363.)

14. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot be "judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

15. Here, the results of District's academic performance assessments of Student demonstrated that he struggles in all academic areas which rely on reading and auditory comprehension skills. Student's significantly delayed language comprehension skills impede his ability to understand oral and written instructions, and school work involving written narratives, including math problems and stories. Further, Student has severe pragmatic speech challenges, including his articulation, which impaired his ability to communicate clearly. His pragmatic skills deficits also impact his peer relations.

16. District's attempt to increase Student's time in his regular education class was laudable in view of the concern it shared with Parent that Student needed more time in his general education class. Student's 2006-2007 IEP indicated that he spent forty-nine percent of his time outside of general education. Student was pulled-out for various special education services throughout the day. However, District did not have to reduce Student's related LAS service to provide FAPE for the 2007-2008 school year. It could have and should have offered Student LAS services that did not interfere with his school day. District did not even consider offering Student after school services through a nonpublic agency (NPA) even after Parents mentioned that they had been providing Student with private LAS therapy through the years.

17. Student remained severely deficient in speech and language comprehension despite many years of speech and language therapy provided by District or privately funded by Parents. District's offer of a reduction in services, instead of an increase in service, was contraindicated by Student's assessment history and his failure to meet his previous IEP goals. Moreover, the limited time provided required Mr. David to work on seven goals within one-half hour, or one goal every 4 minutes. Mr. David thought it was possible if Student also practiced at home. Finally, Mr. David compromised his view of home practice, when he suggested that Student's language delays were due in part to Parents' lack of English language fluency. Although Mr. David's education and experience qualifies him to deliver LAS services, his opinion regarding Student's unique needs was not supported by Student's assessments, educational history, or progress in achieving his LAS goals.

18. Undoubtedly, the severity of Student's speech and language deficits requires intensive treatment by a licensed SLP experienced treating autistic pupils. Given the depth of Student's speech and language deficits, Student requires intensive one-on-one services to master skills he can then generalize to the school environment. Parents should remain knowledgeable of his therapy so that they can support him at home to the extent of their

abilities, but they are not responsible for implementing Student's IEP goals.

19. In sum, the weight of the evidence supports Student's claim that District's offer of LAS was not reasonably calculated to provide Student an educational benefit and denied him a FAPE. Student met his burden of proving that he was denied sufficient speech and language therapy. (Legal Conclusion 1, 3, 10-14; Factual Findings 1-7, 24-52.)

ISSUE THREE: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO DEVELOP APPROPRIATE GOALS TO ADDRESS STUDENT'S COMPLIANCE, ATTENTION AND SOCIALIZATION DEFICITS AS RECOMMENDED BY HIS BEHAVIOR SUPPORT PROVIDER?

20. Student avers that District should have adopted the compliance, attention and social goals drafted by Student's ABA provider, ABC, and that its failure to do so denied Student a FAPE.

21. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

22. Student has unique attention, communication and social needs. Student needs prompting and redirecting to stay on task. He has difficulty being understood due to his pragmatic skills deficits. His social skills are impaired and he needs prompting to interact with other pupils, especially on the playground.

23. District developed and offered a social goal to replace the goals offered by ABC. District intended that Student's social skills would be incorporated into group activities. It required peer interaction, beginning in the classroom and expanding to the

“school environment.” District’s social emotional goal was vague and not measurable. Further, at the outset, District must consider fostering social skills on the playground, not just in the classroom. Playground time was not monitored or structured and Student was not generally incorporated into peer activities without prompting from an aide.

24. District objected to the five new behavior goals developed by Student’s NPA ABA provider, ABC. Student had met his previous goals with ABC. Goal one focused on asking a peer to play, goal two addressed sharing items; goal three focused on Student’s maintaining appropriate social space; and goal four was designed to further Student’s independence in asking for assistance when he didn’t understand the materials. ABC’s fifth goal regarding the appropriate use of a tissue, was more appropriate to the home or community settings where the challenges appeared.

25. Based upon the observations of Student’s general education teacher, ABC’s proposed goals, with the exception of goal five, address Student’s compliance, attention and social needs, are measurable, and can be accomplished within one school year.

26. Student met his burden of proof that District’s proposed goal did not provide Student a FAPE and that four of Student’s five proposed goals did provide Student a FAPE. District shall implement these goals immediately with the appropriate teachers, service providers, and aides. As compensatory relief, the goals shall also be included in the IEP for the 2008-2009 school year. (Legal Conclusions 1, 20-11, and 21; Factual Findings 1-7, and 53-66.)

ISSUE FOUR: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER APPROPRIATE CLASSROOM AIDE SERVICES AND SUPERVISION?

27. Student contends that District failed to offer Student appropriate one-on-one support for him to access his instruction in a general education class. Student alleged that he needs a properly supervised full-time aide trained in ABA throughout the school year to access his educational curriculum, participate in class activities and to socialize with

his peers. Further, Student maintains that with an ABA trained aide he could successfully access his general education class without being removed to attend RSP. Related to his claim for a one-on-one aide in the general education class, Student contends that removal to RSP is not appropriate because Student hasn't progressed in RSP and it is not the LRE.

28. One-on-one assistance is considered a supportive or designated instructional service that may be necessary for a pupil to access his education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a).)

29. Here, District offered Student one month of his ABC aide at the beginning of the 2007-2008 school year to assist Student in transitioning to second grade. Thereafter, District offered an academic classroom aide. This aide would be available to assist the whole class, not just Student. At the time of the June 14, 2007, IEP team meeting Student had been accompanied to class by a one-on-one certified ABA-trained aide since April 2005. Under stay-put Student continued with his one-on-one certified ABA-trained aide during the 2007-2008 school year. Accordingly, at the time of this Decision, ABC had been providing one-on-one services to Student at school for three years.

30. Student no longer requires assistance from a one-on-one certified ABA-trained aide. It is true that Student has attention problems and needs to be prompted and redirected. At the time of the June 14, 2007 IEP it was ABC's stated intent to fade out its classroom support during the 2007-2008 school year. ABC had accomplished its previous attention and social goals and proposed new goals to increase Student's attention and encourage social skills. Student's challenges with attention and social interaction could be addressed by the classroom general education teacher with the assistance of the academic aide. Student's general education and special education teachers were adequately trained to prompt and, redirect Student. Student needed prompting and redirection more so than his elementary school peers, but he wasn't a behavior problem and, like his peers, he could easily be redirected.

31. Given his severe language comprehension deficits, the evidence

demonstrates that Student requires an academic aide in the general education classroom to access his curriculum. In the general education classroom, the academic aide would be able to work with Student to make sure he understands the teacher's instructions and lessons. The academic aide could also prompt and redirect Student. District will require the aide to follow the IEP.

32. District did offer an academic aide for three hours daily; however, District's offer was not appropriate because its classroom aide would have to serve up to twenty pupils. The evidence established that Student could be adequately monitored, and effectively prompted and redirected within a group that did not exceed four pupils. Given Student's language comprehension challenges, at the time of the June 14, 2007 IEP, it should have been anticipated that Student would require more attention than a general classroom aide could provide. Moreover, Student required assistance on the playground to interact with his peers and to further his IEP goals.

33. District shall select an appropriate academic aide. At a minimum, the academic aide, under the direction of the general education teacher, must be able to reinforce the teacher's instruction, assist Student in completing his assignments, monitor Student's attention and be ready to keep him on task. Further, arrangements must be made to fade Student's ABC aide over a two week period, and afford ABC an opportunity to discuss Student's present levels of performance and services. Although Student did not receive his preferred aide, Student met his burden of proof that District's offer did not satisfy FAPE. (Legal Conclusions 1, 10-11, and 28; Factual Findings 1-7, and 67-85.)

34. Student also claims that he had not made progress in RSP and that it did not constitute the least restrictive environment.

35. Federal and state law requires school districts to provide a program in the least restrictive environment to each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) A special education pupil must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education

environment only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) One-on-one assistance may be required to fulfill the federal and state mandate for school districts to provide a program in the least restrictive environment to each special education student. (See 34 C.F.R. §§ 300.114, et. seq.) RSP services are provided by a credentialed special education instructor to assist pupils with specialized instructional needs who are assigned regular education classroom teachers for the majority of a school day. (Ed. Code, § 56362.)

36. Both District and Student agree that he needs to be in his regular education class as much as practicable. However, Student's teachers admit that their classroom aides can only mirror and reinforce their instruction; whereas the special education teacher is trained to use different techniques to assist Student in understanding his instruction.

37. Student maintains that since ABC met its goals and the RSP teacher did not Student doesn't require RSP. Instead, Student requires the one-on-one assistance in his general education class. ABC did accomplish its attention and socialization goals. Student's progress in meeting his RSP goals has been slow. Given Student's severe language and comprehension difficulties his RSP goals are more difficult to accomplish. Student's severe language comprehension deficits impede his ability to progress faster.

38. The RSP room provides a welcome and less pressured environment for Student to work on his math reasoning, and language comprehension goals. Ms. O'Brien works with him one-on-one and also in a small group where he can practice circle time. Ms. O'Brien can not provide the same type of small group services in Student's classroom. With only one hour a day in RSP, Student still has ample opportunities to participate in his regular education class and on the playground with his peers.

39. Student does not need a one-on-one certified ABA-trained aide to access his general education. Student failed to provide sufficient evidence that District's offer of RSP was not reasonably calculated to provide him an educational benefit. RSP is provided one hour a day, four days a week. Given Student's academic challenges, his participation in general education with one-hour pull-out RSP constitutes the least restrictive environment. (Legal Conclusions 1, 10, 12 and 28; Factual Findings 1-7, 67-85.)

ISSUE FIVE: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER STUDENT INDIVIDUAL HOME-BASED INSTRUCTIONAL SERVICES AND SUPERVISION?

40. Student maintains that he requires home-based instructional services with his ABA provider to complete his homework and therefore access his education. Home-based instructional services may be authorized to meet a pupil's unique needs. (Legal Conclusions 12 and 28.)

41. Student has severe language comprehension deficits that have impacted his access to education and his ability to understand his lessons. He requires an RSP program and intensive LAS services. During the 2006-2007 school year, Student was pulled out for 90 minutes a day for RSP and other services. He lost time in class and missed instruction. ABC did help Student with his homework during first grade. However, at the June 14, 2007 IEP team meeting ABC did not recommend these services and prepare an applicable goal. At that IEP team meeting, District offered Student reduced time in RSP and more time in the general education class. Student was provided with accommodations. Student was never required to complete more than half his assignments. At the time of District's offer, it was not anticipated that Student would continue to be burdened with excessive homework.

42. Student failed to meet his burden of proof on this issue. (Legal Conclusions 1, 10, 11-12, 14, 21 and 28; Factual Findings 1-7, 84-91.)

ISSUE 6: DID DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE AN EDUCATIONAL PROGRAM THAT WAS SCIENTIFICALLY-BASED AND SUPPORTED BY PEER-REVIEWED RESEARCH TO THE EXTENT PRACTICABLE WHICH WOULD BE IMPLEMENTED BY STAFF WITH SUFFICIENT BACKGROUND AND TRAINING IN AUTISM?

43. Student contends that he wasn't provided a FAPE because his educational program was not scientifically-based or peer-reviewed, and his teacher's and service providers were not acquainted with autism.

44. Effective July 1, 2005, the IDEA provided that the related services provided to a student under an IEP "should be based on peer-reviewed research to the extent practicable." (20 U.S.C. § 1414(d)(1)(A)(4); 34 C.F.R. § 300.320.) However, prior to the implementation of this change in the IDEA, case law held that the choice regarding the methodology to be used to implement an IEP, even IEPs for children with autism, is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *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.) California administrative decisions that have applied the IDEA requirement that related services "should be based on peer-reviewed research to the extent practicable" have determined, based on the language used in the statute and regulation and the comments to the regulations, that the lack of peer review for a particular methodology, or the fact that one methodology may have had more peer-review than others, is not determinative. (*Fremont Unified School District* (SEA Cal. 2007) 49 IDELR 114 [eclectic program including some ABA methods determined to have provided FAPE]; *Rocklin Unified School Dist* (SEA Cal. 2007) 48 IDELR 234 [same].) Instead, the ultimate test remains whether a particular methodology was reasonably calculated to meet the child's unique needs. (*Ibid.*)

45. 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, supra*, 458 U.S. at p. 208.) The most important issue is whether the proposed instructional method meets the pupil's needs and whether the pupil may make adequate educational progress. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57; see also § 1414(d)(1)(IV); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(4).) Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal, supra*, 2006 U.S. Dist. LEXIS 27570 at pp. 51-57 [comprehensive summary of decisions discussing this issue].)

46. Student is being taught by competent and experienced professionals well aware of his speech and language deficits, and his communicative and social needs. ABA is not the singular methodology available to address the range of Student's needs. (Legal Conclusions 1, 10-11, 44 and 45; Factual Findings 1-7, 88-91.)

AS A RESULT OF THE DENIAL OF FAPE, IS STUDENT ENTITLED TO COMPENSATORY EDUCATION?

47. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Student W.*)) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) 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 ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) 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.*)

48. Pursuant to the stay put Student has advanced to a second grade general education class and receives 90 minutes of RSP, one hour of one-on-one individual LAS, one hour of group LAS, and 15 hours of weekly ABA services, three hours daily, with consultation.

49. At the time of the June 14, 2007, IEP team meeting, Student required intensive speech and language instruction for him to access his general education curriculum. District should have offered two hours per week of one-on-one LAS twice weekly after school through an NPA. Ms. Haddid recommended three hours of one-on-one LAS per week. With effective collaboration between Student's general education teacher, RSP and school-based SLP in the development of goals and objectives and the provision of services, Student could have appropriately been served with two hours of one-on-one LAS after school through an NPA experienced treating autistic pupils.

50. Ms. Haddid recommended one additional hour per month of consultation. This hour should be used to consult with District's RSP, group LAS provider, general education teacher and Parents. Additional hours of consultation should also be provided for the SLP to review and prepare IEP goals and to attend the IEP team meetings.

51. As a consequence of District's failure to offer and to provide an appropriate level of LAS, District shall provide Student 85 hours of compensatory LAS after school through an NPA LAS provider experienced providing services to autistic pupils. Student shall be entitled to utilize the NPA LAS services two times a week, whether or not school is in session. District shall make arrangements to pay for LAS NPA services directly instead of by reimbursement to Parents. District shall also provide one hour of consultation time per month so that the NPA LAS can consult with Student's teachers, RSP teacher, school-based SLP, and Parents. This consultation time shall not include time spent at the IEP team meetings. District shall invite the NPA LAS to the IEP team meetings and pay the NPA LAS separately and directly for IEP team attendance.

52. As a remedy for District's failure to develop appropriate compliance,

attention and social skills goals, District shall immediately implement ABC's goals one through four as proposed at the June 14, 2007 IEP team meeting. As compensatory relief, these goals shall also be implemented during the Student's 2008-2009 school year.

53. As a remedy for District's failure to offer an appropriate aide services, District shall provide Student an academic classroom aide, three hours a day, serving no more than four pupils, including Student. The aide will also accompany Student to the playground. ABC shall overlap with District's academic aide for ten days to consult with District, teacher and the aide, and to fade its services.

ORDER

1. Within fifteen days of this decision District shall contract with an NPA LAS experienced in treating autistic children, to provide a total of 85, one hour sessions of one-on-one LAS to Student after school. District shall arrange to pay the NPA LAS directly for services it provides to Student. Student shall be entitled to two, one-hour sessions weekly, whether or not school is in session. Parents shall be responsible for arranging the time and place for the NPA services. As part of its contract with an NPA LAS, District shall fund no less than one hour of consultation services per month. The NPA LAS shall consult with Parents, Student's RSP, Student's school-based SLP, and general education teacher, about Student's progress, and provide input on appropriate goals and objectives for individual and group LAS. In addition to the one hour consultation per month, District shall invite the LAS NPA to IEP team meetings and shall pay separately and directly for the LAS NPA's time at IEP team meetings. LAS NPA services and consultation shall expire at the end of the 2008 – 2009 extended school year, whether or not all the hours have been used.

2. District shall immediately implement ABC's goals one, two, three and four, for the 2007-2008 school year and extended school year, and the 2008-2009 school year.

3. Within fifteen days of this decision District shall secure a classroom academic aide three hours a day to assist Student in class and on the playground. The academic

classroom aide shall be assigned to no more than four pupils, including Student. ABC shall not be terminated until ten days after the new classroom aide begins and shall overlap with the new academic classroom aide so that ABC can consult with District and the new aide and fade its services.

4. Student's other requests for relief are denied.

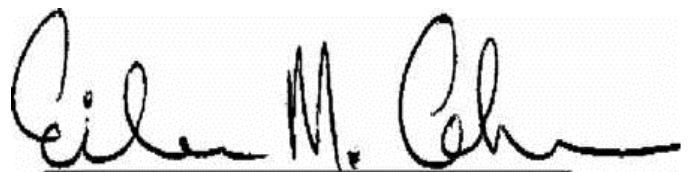
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that Student prevailed on Issues 2, 3 and 4. District prevailed on Issues 1, 5 and 6.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: April 15, 2008



EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division