

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

In the Matter of the Due Process Hearing of:

STUDENT.

OAH Case No. N2005070481

Petitioner,

v.

DOWNEY UNIFIED  
SCHOOL DISTRICT,

Respondent.

DECISION

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter at the offices of the Downey Unified School District in Downey, California, on September 6 - 9, 2005.

Bruce Bothwell, Attorney at Law, represented Student (petitioner). Father, petitioner's father, and Mother, petitioner's mother, were also present during the hearing.<sup>1</sup>

Eric Bathen, Attorney at Law, represented Downey Unified School District (DUSD or respondent). Kent Halbmeier, DUSD Director of Special Education, was also present during the hearing.

Petitioner and respondent offered documents, sworn testimony, and argued the case.

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<sup>1</sup> Petitioner and petitioner's parents are referred to by their first names and the first initial of their last name to protect their privacy.

The parties' trial briefs, which the parties elected to use in lieu of oral opening statements, and their closing arguments were marked for identification as part of the record as follows:

<u>Document</u>	<u>Marked for Identification as</u>
Petitioner's Hearing Brief	E4
Petitioner's Final Argument and Brief	F4
Petitioner's Rebuttal to Downey Unified	
School District's Post Hearing Brief	G4
Downey Unified School District's Trial Brief	45
Downey Unified School District's Post Hearing Brief	46
Downey Unified School District's Rebuttal To Petitioner's Final Argument and Brief	47

The record was left open for each party to submit written closing argument no later than September 19, 2005 and written rebuttal argument no later than September 26, 2005. The record was closed. The Administrative Law Judge completed his review of all briefs on October 31, 2005 and the matter was deemed submitted on that date.

The Administrative Law Judge makes the following factual findings, legal conclusions and order:

## ISSUES

The following issues are to be resolved:

1. What is petitioner's primary disabling condition and, consistent with that condition, has DUSD provided petitioner a free appropriate public education in the least restrictive environment?
2. Should DUSD reimburse petitioner's parents for the cost of petitioner's applied behavior analysis program during the period March 30, 2005 through June 30, 2005, in the amount of \$11,400.00, and/or until petitioner's next annual Individualized Education Program meeting, at the rate of 35 hours per week direct

therapy, 12 hours per month case supervision, and four (4) hours per month clinical supervision?

3. Does petitioner require speech and language therapy in order to obtain a free appropriate public education?

4. Is petitioner entitled to compensatory education services?

5. Should DUSD reimburse petitioner's parents for the cost of the independent psychological assessment of petitioner done by Robin Morris, Psy.D?

## SUMMARY

Petitioner contends that DUSD denied petitioner a free appropriate public education in the least restrictive environment. The gravamen of petitioner's complaint is that DUSD failed to appropriately assess petitioner or heed repeated requests by the parents that petitioner be considered eligible for special education and related services based on a diagnosis of autism. The parents contend that the condition upon which their son's eligibility is based determines the services needed for him to receive a free appropriate public education in the least restrictive environment.

The Administrative Law Judge determined that that DUSD completed an initial assessment and Individualized Education Program team meetings that complied with federal and state law. Although petitioner was not previously classified by DUSD as autistic, DUSD offered and provided an Individualized Education Program designed to meet petitioner's educational needs and reasonably calculated to provide petitioner with some educational benefit.

The Administrative Law Judge further determined that, based on corroborating independent assessments, petitioner is autistic and has benefited from applied behavior analysis therapy. Accordingly, the Administrative Law Judge directs DUSD to reimburse petitioner for an independent education evaluation, fund a portion of petitioner's ongoing applied behavior analysis therapy, and convene an individualized education program team meeting to reconsider petitioner's special

education and related services needs, taking into consideration all assessments and his eligibility based on autism and speech/language impairment. Petitioner's request for compensatory education was denied.

## FACTUAL FINDINGS

The following facts were determined by a preponderance of the evidence:

1. Petitioner is a four-year eight-month old male, born on January 21, 2001. He resides with his parents and two year-old brother within the jurisdictional boundaries of DUSD. Commencing on April 8, 2005, petitioner no longer attended a public school or received special education and related services from DUSD.<sup>2</sup>

2. On June 7, 2005, petitioner's parents requested this due process hearing.

3. An issue in this matter is the determination of petitioner's primary disabling condition, i.e., the disability that makes petitioner eligible for special education services under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.). Petitioner contends that the condition upon which eligibility is based determines the services needed for petitioner to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) (collectively, FAPE/LRE).

Based on DUSD's assessment, petitioner's Individualized Education Program (IEP) identifies petitioner's primary disabling condition as "speech/language impairment."

Petitioner's parents contend that petitioner's primary disabling condition is "autism," based on the criteria of "autistic-like behaviors." They further contend that

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<sup>2</sup> Although petitioner continues to reside within the boundaries of DUSD, his parents removed him from the public school. His education now consists of participation in an at-home applied behavior analysis program, a portion of which was funded by the South Central Los Angeles Regional Center.

based on the school district's failure to properly classify petitioner's primary disability, he was denied FAPE/LRE and should, therefore, be (1) compensated for lost educational benefits, (2) reimbursed for an independent assessment that confirmed his diagnosis of autism, and (3) entitled to funding of his applied behavior analysis therapy program.

## CHRONOLOGY

### November 2003: Kaiser Permanente Medical Group Assessment

4. Due to parental concern regarding petitioner's development, on November 24, 2003, when petitioner was two years and 10 months old, his mother and father had him evaluated by a multidisciplinary developmental team at Kaiser Permanente Medical Group. The evaluation team included a developmental pediatrician, psychologist, occupational therapist, licensed clinical social worker, and speech pathologist. The parents were concerned about petitioner's development because at age one he could not hear well and when he was two years old he did not speak as well as other children. Petitioner had already established a history of language delay and communicated by using only single words.

During the evaluation petitioner exhibited poor eye contact and tended to be erratic in his ability to stay focused on one activity. At that time, petitioner's primary language was Spanish. The Kaiser Permanente team evaluated petitioner's speech and language and pursuant to its report dated November 24, 2003, determined that:

1. Language skills are severely delayed for age and similar to a child who is about 12 months of age with emergence of some higher level skills at 12-18 months. For example, [petitioner] can now combine words in some contexts.
2. Atypical features of language development are seen, including use of echolalia or repeating words without a communicative intent and in reciting

movie scripts. [Petitioner] was more responsive when the topic related to his own interests of animals or his Buzz Light year toy.

3. [Petitioner] is aloof to information spoken to him or by auditory means. He also needs intense prompting by his family to engage or participate in following directions with gestures. [Petitioner] did not consistently follow others' pointing to objects or share their visual regard.
4. Strengths are seen in imitating and seeking out interaction at a peer level. [Petitioner] also shows ability to memorize and learn by rote or repetition.
5. [Petitioner] demonstrated early symbolic play when it related to his own level of interest in animals.

The Kaiser Permanente team also administered tests using standardized instruments. On the Pervasive Development Disorder Screening Test,<sup>3</sup> petitioner achieved a score of 10, indicating a need for further evaluation to rule out autism. On the Childhood Autism Rating Scale (CARS), petitioner achieved a score of 39, which is consistent with autism (a score of 30 or more indicates autism).<sup>4</sup> Petitioner's "Vineland" scores indicate that his then current adaptive functioning was at the lower

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<sup>3</sup> The Pervasive Development Disorder Screening Test is a tool used to screen for several autistic spectrum disorders in children as young as 18 months, including autistic disorder, pervasive developmental delay, and Asperger's disorder. It is designed to be a parent-report screening measure.

<sup>4</sup> Developed over a 15 year period, CARS includes items drawn from five systems for diagnosing autism. Each item covers a particular characteristic, ability, or behavior. After observing the child and examining relevant information from parent reports and other records, the examiner rates the child on each item. Using a seven-point scale, the examiner indicates the degree to which the child's behavior deviates from that of a normal child of the same age.

end of the average range in the area of motor skills.<sup>5</sup> In all other areas, his adaptive behaviors were in the lower portion of the borderline range, with development lags of at least one year. Vineland results were as follows:

<u>Domain</u>	<u>Standard Score</u> <sup>6</sup>	<u>Age Equivalent</u> <u>(Years - Months)</u>	<u>Adaptive Level</u>
Communication	70	1 - 6	Moderately Low
Daily Living Skills	70	1 - 8	Moderately Low
Socialization	77	1 - 9	Moderately Low
Motor Skills	86	2-5	Adequate
Composite Score	70	1 - 10	Moderately Low

5. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), published by the American Psychiatric Association, is the standard diagnostic tool used by mental health professionals to promote reliable research, accurate diagnosis, and thus appropriate treatment and patient care. In the manual, each psychiatric disorder with its corresponding diagnostic code is accompanied by a set of diagnostic criteria and descriptive details including associated features, prevalence, familial patterns, age, culture, gender-specific features, and differential diagnoses.

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<sup>5</sup> The Vineland Adaptive Behavior Scales is a standard instrument for measuring personal and social skills used for everyday living. Its format is a semi-structured interview and questionnaire. The Vineland assessment provides critical data for the diagnosis or evaluation of a wide range of disabilities, including mental retardation, developmental delays, functional skills impairment, and speech/language impairment. Vineland is a resource for predicting autism and Asperger's syndrome, among other differential diagnoses.

<sup>6</sup> The Vineland Adaptive Behavior Scales standard scores are based on arithmetic mean scores of 100 and a standard deviation of 15.

6. As a point of reference, DSM-IV-TR contains an in-depth description of the characteristics or behaviors seen in autistic individuals. Commencing at page 70, DSM-IV- TR describes autism, in pertinent part, as follows:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests.

Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism, childhood autism, or Kanner's autism.*

The impairment in reciprocal social interaction is gross and sustained. There may be marked impairment in the use of multiple nonverbal behaviors (e.g., eye-to-eye gaze, facial expression, body postures and gestures) to regulate social interaction and communication. There may be failure to develop peer relationships appropriate to developmental level that may take different forms at different ages. Younger individuals may have little or no interest in establishing friendships. Older individuals may have an interest in friendship but lack understanding of the conventions of social interaction. There may be a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., not showing, bringing, or pointing out objects they find interesting). Lack of social or emotional reciprocity may be present



(e.g., not actively participating in simple social play or games, preferring solitary activities, or involving others in activities only as tools or "mechanical" aids). Often an individual's awareness of others is markedly impaired. Individuals with this disorder may be oblivious to other children (including siblings), may have no concept of the needs of others, or may not notice another person's distress.

The impairment in communication *is* also marked and sustained and affects both verbal and nonverbal skills. There may be delay in, or total lack of, the development of spoken language. In individuals who do speak, there may be marked impairment in the ability to initiate or sustain a conversation with others, or a stereotyped and repetitive use of language or idiosyncratic language. There may also be a lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level. When speech does develop, the pitch, intonation, rate, rhythm, or stress may be abnormal (e.g., tone of voice may be monotonous or contain question like rises at ends of statements). Grammatical structures are often immature and include stereotyped and repetitive use of language (e.g., repetition of words or phrases regardless of meaning; repeating jingles or commercials) or metaphorical language (i.e., language that can only be understood clearly by those familiar with the individual's communication style). Language comprehension is often very delayed, and the individual

may be unable to understand simple questions or directions. A disturbance in the pragmatic (social use) of language is often evidenced by an inability to integrate words with gestures or understand humor or nonliteral aspect of speech such as irony or implied meaning. Imaginative play is often absent or markedly impaired. These individuals also tend not to engage in the simple imitation games or routines of infancy or early childhood or do so only out of context or in a mechanical way.

Individuals with Autistic Disorder have restricted, repetitive, and stereotyped patterns of behavior, interests, and activities. There may be an encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus; an apparently inflexible adherence to specific, nonfunctional routines or rituals; stereotyped and repetitive motor mannerisms; or a persistent preoccupation with parts of objects. Individuals with Autistic Disorder display a markedly restricted range of interests and are often preoccupied with one narrow interest (e.g., dates, phone numbers, radio station call letters). They may line up an exact number of play things in the same manner over and over again or repetitively mimic the actions of a television actor. They may insist on sameness and show resistance to or distress over trivial changes (e.g., a younger child may have a catastrophic reaction to a minor change in the environment such as a rearrangement of the furniture or use of a new set of

utensils at the dinner table). There is often an interest in nonfunctional routines or rituals or an unreasonable insistence on following routines (e.g., taking exactly the same route to school every day). Stereotyped body movements include the hands (clapping, finger flicking) or whole body (rocking, dipping, and swaying). Abnormalities of posture (e.g., walking on tiptoe, odd hand movements and body postures) may be present. These individuals show a persistent preoccupation with parts of objects (buttons, parts of the body). There may also be a fascination with movement (e.g., the spinning wheels of toys, the opening and closing of doors, an electric fan or other rapidly revolving object). The person may be highly attached to some inanimate object (e.g., a piece of string or a rubber band).

The disturbance must be manifest by delays or abnormal functioning in at least one (and often several) of the following areas prior to age 3 years: social interaction, language as used in social communication, or symbolic or imaginative play. In most cases, there is no period of unequivocally normal development, although in perhaps 20% of cases parents report relatively normal development for 1 or 2 years. In such cases, parents may report that the child acquired a few words and lost these or seemed to stagnate developmentally.

By definition, if there is a period of normal development, it cannot extend past age 3 years. The disturbance must

not be better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

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In most cases, there is an associated diagnosis of Mental Retardation, which can range from mild to profound.

There may be abnormalities in the development of cognitive skills. The profile of cognitive skills is usually uneven, regardless of the general level of intelligence, with verbal skills typically weaker than nonverbal skills.

Sometimes special skills are present (e.g., a 4½ -year-old girl with Autistic Disorder may be able to "decode" written materials with minimal understanding of the meaning of what is read [hyperlexia] or a 10-year-old boy may have prodigious abilities to calculate dates [calendar calculation]). Estimates of single-word (repetitive or expressive) vocabulary are not always good estimates of language level (e.g., actual language skills may be at much lower levels).

Individuals with Autistic Disorder may have a range of behavioral symptoms, including hyperactivity, short attention span, impulsivity, aggressiveness, self-injurious behaviors, and, particularly in young children, temper tantrums. There may be odd responses to sensory stimuli (e.g., a high threshold for pain, oversensitivity to sounds or being touched, exaggerated reactions to light or odors, fascination with certain stimuli). There may be abnormalities in eating (e.g., limiting diet to a few foods,

Pica) or sleeping (e.g., recurrent awakening at night with rocking). Abnormalities of mood or affect (e.g., giggling or weeping for no apparent reason, an apparent absence of emotional reaction) may be present. There may be a lack of fear in response to real dangers, and excessive fearfulness in response to harmless objects. A variety of self-injurious behaviors may be present (e.g., head banging or finger, hand, or wrist biting).... [Italics in original.]

7. The California Department of Developmental Services has published guidelines entitled *Autistic Spectrum Disorders: Best Practice Guidelines for Screening, Diagnosis and Assessment* (2002). The purpose of the guidelines is to "provide a consistent and comprehensive base of information for screening, evaluation and assessment of persons with autistic spectrum disorders [ASD]" based on then current research and professional consensus. Pertinent "best practice" guidelines include the following:

The detection of young children with developmental and behavioral problems can be difficult due to the variety of disorders and their manifestations at different ages. This is particularly apparent in young children with ASD whose communicative and social difficulties are often poorly understood and are therefore frequently attributed to normal variations in typical development. Many studies have demonstrated, however, that early detection and early therapeutic intervention are associated with the best developmental, behavioral and adaptive outcomes. (*Id.* at p. 14.)

The diagnostic evaluation for ASD necessarily includes six specific components:

- Review of relevant background information;
- Parent / caregiver interview (parents are experts on their particular child and, especially with very young children, are the primary source of information about their child);
- Comprehensive medical evaluation;
- Direct behavior observation (including the domains of reciprocal turn-taking, shared attention, social reciprocity, pretend play, sustained interaction, gaze aversion, spontaneous giving/showing, imitation of novel acts, ability to have attention directed, and use of toys and objects);
- Cognitive assessment; and
- Measures of adaptive functioning (including the domains of communication, socialization, fine and gross motor development, self-help/ daily living skills, and social- emotional functioning). (*Id.* at pp.27-52.)

8. Based on petitioner's history, primarily as reported by petitioner's parents, and his then current patterns of behavior, the Kaiser Permanente team's Axis I diagnostic impression, based on DSM-IV-TR criteria, was that petitioner had "Autistic Disorder." That determination was based on the following criteria:

- Poor eye contact;
  - Playing alone rather than with peers;
  - Only infrequently showing items of personal interest to his parents;
  - General social aloofness and difficulty interacting socially;
  - Severe delay in receptive and expressive language;
  - Echoing what others say and reciting dialog from videos;
  - Preoccupation with sand, water, certain video characters and animals;
  - Becoming upset if not allowed access to certain activities and/or items;
- and

- Toe-walking and fingernail biting.

9. The Kaiser Permanente team recommended that petitioner be referred to the South Central Los Angeles Regional Center (SCLARC) for determination of eligibility and case management services, and that petitioner's public school do a complete assessment "with consideration for a more intensive program to address petitioner's special needs for communication development." The team also suggested that a smaller class size might assist petitioner in engaging in a preschool curriculum. Other recommendations included receiving language support services to support a preschool curriculum by improving petitioner's vocabulary, phrase expansion, and simple verbal exchanges, and incorporating visual prompting. The team also thought it was important to provide for petitioner's social interaction with typically developing peers and opportunities to participate in activities that provide movement and "touch input."

10. No member of the Kaiser Permanente assessment team testified at the hearing of this matter. Their Multidisciplinary Developmental Team Report was admitted into evidence solely as administrative hearsay and considered for the purpose of supplementing, corroborating, or explaining other evidence.<sup>7</sup>

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<sup>7</sup> California Code of Regulations, title 5, section 3082, subdivision (b) states, in pertinent part:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. All testimony shall be under oath or affirmation which the hearing officer is empowered to administer.

December 2003: SCLARC I Ann Walker Assessment

11. As suggested by the Kaiser Permanente team, petitioner's parents contacted SCLARC to have petitioner assessed for eligibility and case management services. SCLARC referred petitioner to be evaluated by Ann L. Walker, Ph.D., a clinical psychologist. As part of her December 3, 2003 assessment of petitioner, Ann Walker used several standardized testing instruments. One such instrument was the Gilliam Autism Rating Scale (GARS).<sup>8</sup> GARS helps identify and diagnose autism in individuals and, if diagnosed, estimate its severity. Items on the GARS are based on definitions of autism adopted by the Autism Society of America and DSM-IV-TR. Dr. Walker interpreted petitioner's GARS score of 75 as representing a low probability of autism.

Petitioner's Vineland (Interview Edition) scores were as follows:

<u>Domain</u>	<u>Standard Score</u>
Communication	77
Daily Living Skills	73
Socialization	83
Motor Skills	78
Composite Score	72

Dr. Walker concluded that petitioner's nonverbal and overall cognitive intellectual functioning was within the normal range and his verbal cognitive, intellectual, self-help, social, and gross and fine motor skills fell in the borderline range. Notably, Dr. Walker found that petitioner showed significant delays in expressive and receptive language skills. His expressive language skills yielded an age

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<sup>8</sup> The GARS has three core subtests (stereotyped behavior, communication, and social interaction) that describe specific and measurable behaviors. There is also an optional subtest (developmental disturbances) that allows parents to contribute data about their child's development during the first 3 years of life. Behaviors are assessed using objective, frequency-based ratings by those who know the child best.



equivalent of one year, one month, and his expressive and receptive language skills fell in the moderate range.

As documented in her psychological evaluation report, Dr. Walker determined that petitioner did not meet the diagnostic criteria for a diagnosis of either autism or pervasive developmental disorder. She stated that petitioner displayed certain autistic criteria, including a lack of social or emotional reciprocity, and qualitative impairment in communication, as manifested by a "delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)" and "stereotyped and repetitive use of language, or idiosyncratic language." Dr. Walker opined that although petitioner displayed these criteria, they were insufficient to establish a diagnosis of either autism or pervasive developmental disorder. Her diagnostic impression of petitioner was that he had "Mixed Expressive Receptive Language Disorder."

Dr. Walker recommended petitioner continue to receive speech therapy and a referral for a speech therapy evaluation through the public school "at the earliest convenient time." She further recommended that petitioner be referred for "placement in a regular preschool to stimulate his language and social skills development" and that he would be a candidate for "a language intensive special education preschool placement through the public schools."

12. Based on Dr. Walker's evaluation of petitioner, SCLARC denied his eligibility for services. However, petitioner's parents appealed that denial. On March 26, 2004, petitioner's parents were notified that as a result of an informal conference they had with the regional center staff, consideration of the earlier assessment done by Kaiser Permanente Medical Group, and "additional new information" provided by the parents, the regional center reconsidered their earlier decision and agreed to find petitioner eligible for services based on a diagnosis of autism.

13. Neither Dr. Walker nor any representative from SCLARC testified during the due process hearing regarding the regional center's evaluation, the specific reason for changing petitioner's eligibility status of petitioner, or the services he received or is receiving from the regional center.

March 2004: DUSD Assessment

14. On January 6, 2004, petitioner's parents enrolled petitioner in DUSO.

15. As suggested by the Kaiser Permanente team, petitioner's parents contacted DUSO for an assessment of petitioner's special needs for communication development. The assessment was done on March 3, 2004. Petitioner was three years one month old at the time. The evaluators included Graceann Frederick (DUSO psychologist), Christine Alcan- Leal (speech/language pathologist), Barbara J. Lai (speech/language pathologist), and Na (ThucUyen) Q. Nguyen (occupational therapist).

16. Graceann Frederick has been credentialed as a school psychologist since 1983 and more recently had been involved in assessing preschoolers for special education services. Since 1987, she has also been state-licensed as a Marriage and Family Therapist. Ms. Frederick has a Master of Science degree in counseling (1981) and earned a post- graduate certificate in school-neuropsychology (2003). She has completed significant hours of continuing education focusing on autistic spectrum disorders and has been employed by .DUSD as a school psychologist since 1985.

Ms. Frederick testified during the due process hearing as an advocate for the school district, supporting and defending DUSD's position regarding the assessment of and special education services provided to petitioner.

17. Christine Alcan-Leal is a state-licensed speech-language pathologist, holds an American Speech-Language-Hearing Association Certificate of Clinical Competence, and is certified in the management of assaultive behavior. She has a Master or Arts degree in communications disorders (1985). Ms. Alcan-Leal has been employed by DUSD as a bilingual speech-language pathologist since 1999. She

evaluates and provides therapy services to children with a variety of disorders including pervasive developmental delays, autism, cerebral palsy, various genetic syndromes, and speech-language disorders.

Ms. Alcan-Leal did not testify during the due process hearing.

18. Barbara Lai is a state-licensed speech-language pathologist, holds an American Speech-Language-Hearing Association Certificate of Clinical Competence, and is credentialed in clinical rehabilitation services, teaching the severely handicapped and mentally retarded. She received Master of Arts degrees in two fields: Special Education (1982) and Communicative Disorders (1993). Ms. Lai has been employed by DUSD as a speech-language pathologist since 1997 and has completed significant continuing education pertaining to autistic spectrum disorders, including a two-year autism training series (1999 - 2001).

Ms. Lai did not testify during the due process hearing.

19. Na (ThucUyen) Q. Nguyen is a state-licensed (2001) and board-certified (2002) occupational therapist. She holds a baccalaureate degree in biology (1995) and a Master of Science degree in occupational therapy (2001). During the period 1996-1998, Ms. Nguyen gained experience at the Stein Education Center where she first worked as a teacher's assistant and then as an occupational therapy aide. While there, she worked with children who had various pervasive developmental delays, including autistic spectrum disorders and severe communication and behavioral disorders.

Ms. Nguyen testified during the due process hearing regarding her assessment and observations of petitioner.

20. As part of its assessment, the DUSD team reviewed and considered the Kaiser Permanente assessment of petitioner. Petitioner's parents did not provide the assessment team with a copy of Ann Walker's report. Instead, the parents advised that Ann Walker's examination was brief, "but confirmed that speech therapy was needed." The DUSD team was aware that Kaiser Permanente's assessment included a

diagnostic impression of "autistic disorder." DUSD's assessment predated SCLARC's reconsideration of petitioner's condition and agreement to find him eligible for services based on a diagnosis of autism.

Assessment information collected by the DUSD team was based on clinical and play-based observations, parent interviews, administration of CARS and portions of the Preschool Language Scale - 4 (PLS-4)<sup>9</sup> standardized testing instruments, and review of the Kaiser Permanente assessment report.

Based on her observations and parent reporting, Ms. Frederick adduced a CARS score of 24 for petitioner, which is not consistent with a diagnosis of autism. However, she noted the following in her report:

Verbal communication was the area in which [petitioner's] behaviors were rated the most extreme. He appears to have moderately-severely abnormal verbal communication skills. Meaningful speech is limited and peculiar speech patterns include jargon and echolalia.<sup>10</sup> Eye contact is poor and negatively impacts socialization.

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<sup>9</sup> The PLS-4 is a standardized test of auditory comprehension and expressive communication used for infants and toddlers. An auditory comprehension subscale assesses basic vocabulary, concepts and grammatical markers in preschool, and higher-level abilities such as complex sentences, making comparisons and inferences in older children. An expressive communication subscale, for example, asks preschoolers to name objects, use concepts that describe objects, express quantity, and use grammatical markers.

<sup>10</sup> With reference to speech-language impairment, "jargon" refers to unintelligible, meaningless, or incoherent speech, and "echolalia" is the pathological repetition of what is said by other people as if echoing them.

Transition objects aid in adapting to change. Petitioner is known to stare blankly and ignore the speaker when asked to do something he does not want to do. He overreacts to certain sounds, such as the vacuum cleaner. He frequently bites his toys and reportedly likes to eat crayons. He has a high tolerance for pain.

Petitioner could not consistently follow the formal testing procedures for administration of the full PLS-4 test. Therefore, only raw data obtained during play and structured activities could be used for an informal assessment. Ms. Alcan-Leal found that:

Overall, receptive language skills appear to be moderate-severely delayed. Decreased joint attention is a contributing factor in [petitioner's] performance on receptive language tasks. Use of visual aids (objects, pictures) was noted to enhance [petitioner's] ability to perform receptive language tasks. [¶] . . . [¶] Overall, expressive communication appears severely delayed.

The DUSD team concluded, in pertinent part, that

[Petitioner] demonstrates significant delays in speech and language development. . . . Play skills are suggestive of average nonverbal cognitive abilities. Weaknesses were apparent in the areas of joint attention, social interaction, and expressive and receptive language skills. Kaiser Permanente's multi disciplinary developmental assessment report lists "autistic disorder" as a diagnostic impression. Although autism is a spectrum disorder, much

of [petitioner's] non-language related behavior during the DUSD assessment did not appear autistic-like.

Based on the occupational therapy assessment, [petitioner] presents with adequate fine motor manipulation skills and emerging bilateral and visual motor skills. Gross motor skills were appropriate for preschool-related activities. He is showing improvement with his tactile processing and will continue to do so with more exposure. Vestibular and proprioceptive processing are appropriate.<sup>11</sup> Overall, it appears that he is functioning within an adequate range for preschool participation and does not need the services of occupational therapy at this time.

Pertinent recommendations made by the DUSD team included reviewing the assessment results at petitioner's IEP team meeting; determining eligibility for special education services, as appropriate, in the least restrictive environment; considering ongoing assessments and therapy to facilitate receptive and expressive language skills; and, considering the regional center's assessment information, when available.

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<sup>11</sup> The vestibular system (ear labyrinth and semi-circular canals) is critical to one's innate sense of balance. The proprioceptive system allows one to perceive where one's body parts are and what they are doing -- even when not looking at such parts. It also helps one to know how much pressure to use (e.g., to hold a pencil) and when to quickly make an appropriate body shift (e.g., while bending down to pick up a piece of paper) in order to retain balance. Children who have poor vestibular and proprioceptive processing often have difficulty with reading, writing, attention, and coordination .

Ultimately, petitioner became eligible for special education and related services based on a finding of "speech/language impairment."

21. When asked whether she considered the Kaiser Permanente assessment as part of the DUSD evaluation of petitioner, Ms. Frederick testified that she disagreed with that assessment. She based her conclusion on the belief that the Kaiser Permanente assessment was the result of "parent reports," as opposed to independent observations. Ms. Frederick elected not to use standardized instruments such as the Vineland Adaptive Behavior Scales for the same reason. The data used in the Vineland instrument is based on parent reporting. She stated that repetition of such tests is not required to determine a child's special education needs.

Ms. Frederick stated that "students respond differently to different people in different settings" and she did not see petitioner exhibit behaviors reported by his parents. For example, Ms. Frederick stated that although petitioner did not respond to prompts from his parents, he did respond to members of the school staff. Ms. Frederick also stated that some characteristics of autistic children, such as toe-walking, are characteristic of children that develop normally. Normally developing children will "grow out" of such behavior. That is not the case with autistic children. She also alluded to the masking and coincidental characteristics that are evident in children with other disabilities such as speech-language impairment and attention deficit - hyperactivity disorder (ADHD).

22. When asked what, if anything, would change if petitioner's primary disabling condition was based on "autistic-like behaviors" instead of speech-language impairment, Ms. Frederick testified that she would change "nothing" because petitioner's education needs were being met at the time he attended classes in the school district. Student needs are the principle determinative factor in deciding a student's placement and FAPE / LRE, as opposed to the classification of the student's "primary disabling condition."

23. In general, Ms. Frederick's position was that she was justified in disagreeing with an outside or independent diagnosis of a student if she did not personally observe or receive teacher reports that confirm the diagnosis. The rationale for her position is that DUSD spends considerably more time with a student than an independent examiner who may only spend a few hours testing and observing the child. Additionally, independent examiners obtain much of their information from the student's parents and parents' inputs generally result in "low" student scores on testing instruments such as Vineland and CARS. Such reliance may be misplaced because "students respond differently to different people in different settings." Hence, a child's behavior observed by a parent at home may be significantly different from what a teacher observes in the classroom. Ms. Frederick also believes that some signs or symptoms, which support one or more criteria for eligibility under IDEA, may merely be characteristics or phases that a child grows out of and does not become a problem unless it persists and affects the child's ability to receive a free appropriate public education. As an example, Ms. Frederick attributes "tantrumming over toys" as a preoccupation with many preschoolers. She views reports such as the Kaiser Permanente assessment as nothing more than "a part of the picture" to be considered. Ultimately, it is the educational need, rather than the eligibility category, that determines which special education services are appropriate for a student.

24. The Administrative Law Judge finds that, given the training, education, and experience of the DUSD employees who assessed petitioner, DUSD established that the school district's assessment of petitioner was conducted by qualified and competent persons who properly determined petitioner's eligibility for services and identified his then current needs for special education and related services.



## April 2004: Initial Individualized Education Program

25. Pursuant to section 1401(14) of title 20 of the United States Code, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with Title 20 United States Code section 1414(d). Title 20 United States Code section 1414(d)(1), and California Education Code section 56345 prescribe the minimum documentary requirements for an IEP, which shall include the following information:

- A statement of the child's present levels of academic achievement and functional performance;
- A statement of measurable annual goals;
- A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided;
- A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child;
- A statement of the program modifications or supports for school personnel that will be provided for the child;
- An explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class;
- A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments; and
- The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

26. Six IEP team meetings were held between April 19, 2004 and April 19, 2005, to address petitioner's individualized education needs.

27. Petitioner's "initial" IEP team meeting was held on April 19, 2004. The IEP team consisted of petitioner's parents; program specialist Barbara Tucker; Graceann Frederick; speech-language pathologists Christine Akan-Leal, Barbara Lai, and Marcia Curran; occupational therapist Na Nguyen; and special education teacher Maria Garcia. Barbara Tucker chaired the IEP meeting. Ms. Tucker and two of the three speech-language pathologists hold Certificates in Clinical Competence issued by the American Speech and Hearing Association. Ms. Tucker also has experience and training in autistic spectrum disorders.

28. At the IEP meeting, Ms. Frederick commented that petitioner demonstrated some characteristics on the autism spectrum, but not a sufficient number of characteristics for eligibility based on autism. Based on DUSD's assessment and Ms. Frederick's comments, the IEP team members collectively determined that speech-language impairment was then petitioner's most appropriate eligibility classification. The IEP also stated that the primary concern of petitioner's parents, relevant to petitioner's educational progress, was "improved language skills to facilitate his communication development."

29. The IEP team indicated petitioner should be placed with "peers who have similar learning needs/ styles" and that his "instructional/ academic/ behavioral needs necessitate a low pupil / adult ratio." Enrollment in the special day class (SDC) at Rancho Los Amigos Hospital School (Rancho School) was deemed the "most appropriate and least restrictive" environment to meet petitioner's educational needs. Petitioner's IEP instructional goals and objectives related solely to speech - language impairment.

30. The IEP team determined that petitioner would receive the following special education services:

SDC attendance; 330 minutes per week at Rancho School; and

Speech and Language Therapy; 20 minutes, twice per week in his classroom or the school Speech Room.

Special support also included 30 minutes of English Language Development with other SDC students and Head start class at the rate of 60 minutes per week.

31. Having signed the IEP, petitioner's parents agreed with the goals and objectives contained therein. Initial placement commenced on May 3, 2004.

June 2004: Cedar-Sinai Medical Center Assessment

32. As described below, in the course of communications between petitioner's parents and DUSD staff, petitioner's parents became dissatisfied because the school district did not change petitioner's primary disabling condition to "autism."

33. On June 7, 2004, petitioner's parents had petitioner evaluated at the Cedar- Sinai Medical Center outpatient psychiatric clinic. The evaluation included a review of the Kaiser Permanente assessment report and an assessment by "two specialists in PDD [pervasive developmental disorder] spectrum disorders." In an unsigned letter, Jeremy Revell, M.D., noted that the medical staff agreed with the Kaiser Permanente diagnosis of autistic disorder and supported petitioner's placement in SDC at school.<sup>12</sup> The letter also states:

However, [petitioner] requires an individual program in order to benefit from his provided education. The group

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<sup>12</sup> It is not known if Dr. Revell ever signed a copy of the letter.

concluded [petitioner] would greatly benefit with the addition of individualized services targeted at current global deficits related to his diagnosis. The clinicians here feel that due to [petitioner's] overall good prognosis (he lies at the higher level of the PDD spectrum), he would dramatically benefit from a more comprehensive individualized program. We are recommending Applied Behavioral Analysis (ABA) <sup>13</sup> at 15-20 hours a, week. We

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<sup>13</sup> ABA, as an intervention for the treatment of autism, is often associated with specific behavioral methods, such as: discrete trial training (DTT), which is sometimes also called "Lovaas" therapy or the Lovaas method; intensive behavioral intervention; incidental teaching; pivotal response training; and verbal behavior analysis. A discrete trial is a single cycle of a behaviorally-based instruction routine. A particular trial may be repeated several times in succession, several times a day, over several days (or even longer) until the skill is mastered.

Simply put, the method and technique of ABA therapy requires that targeted behaviors be reduced to their most basic elements, and that the subject then be trained by repetitious drilling in the redirected behaviors desired. Contextual factors, established operations, antecedent stimuli, positive reinforcers, and other consequences are used, based on identified functional relationships with the environment, in order to produce practical behavior change. Negative behaviors are generally ignored; if aversive treatment is called for, it is minimal, consisting of repetitious utterances of the word "no" and possibly physical contact between the instructor and the subject. Prompts or other assistance are timed and provided to assure correct responses, and then gradually "faded" to establish independence. The subject is then urged to repeat each task until it has been learned. Overall, the treatment focuses primarily on developing language, increasing social behavior, and

feel that these intensive services will facilitate [petitioner's] progress into a less restrictive educational setting. The targeted goal would be to integrate into a regular Kindergarten classroom. [Emphasis in original.]

The letter from Cedar-Sinai Medical Center was admitted into evidence solely as administrative hearsay, pursuant to California Code of Regulations, title 5, section 3082, subdivision (b). The administrative law judge gives little weight to this letter because its contents lack any details indicating that the medical staff at Cedar-Sinai Medical Center completed an independent objective assessment of petitioner or administered standardized testing instruments to make a differential diagnosis of petitioner's condition. No one from Cedar-Sinai Medical Center provided testimony regarding its assessment of petitioner. According to Graceann Frederick's notes of her telephone conversation with Dr. Revell, Dr. Revell told her that the Cedar-Sinai staff evaluation was "largely a records review."

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promoting cooperative play with peers along with independent and appropriate toy play. Concurrently, substantial efforts are directed at decreasing excessive rituals, tantrums and aggressive behavior.

Research has established that less-than-intensive training has generally been unsuccessful. For example, one study discloses that a control group which received only ten hours of one-to-one therapy reported no change from its position at the beginning of the therapy, while the experimental group made substantial progress. Generally, successful efforts have followed the Lovaas approach of administering this intensive therapy for an average of 40 hours per week for two or more years.

The Surgeon General has recognized ABA and the work of Dr. Lovaas and others as being effective.

#### June - July 2004: Reports of Regression

34. On June 18, 2004, Graceann Frederick spoke with Marissa Chutan, petitioner's case worker at SCLARC, who related that petitioner's parents were concerned that petitioner's behavior was regressing.

35. On June 23, 2004, Barbara Tucker spoke with petitioner's father. Petitioner's father told her that he was concerned about petitioner's behavior and eating. He stated that petitioner became aggressive, hitting and biting; the father wanted petitioner's eligibility changed to autism. Ms. Tucker told him that she would have to observe petitioner and consult with Graceann Frederick, but nothing would occur until the Fall. She referred petitioner's father to SCLARC for assistance with petitioner's behavior at home.

36. On July 8, 2004, Ms. Frederick spoke with petitioner's father. He told her that petitioner was biting, hitting, kicking, and throwing things at home and in school and was becoming aggressive toward his younger brother. Petitioner's father also told her that he and petitioner's mother started attending behavior management classes to address petitioner's problem.

37. On July 21, 2004, Ms. Frederick made a brief, informal observation of petitioner in both his classroom and the playground. She noted that she neither observed aggressive behavior, nor was any aggressive behavior reported by petitioner's teacher.

#### July 2004: IEP Meeting

38. On July 27, 2004, an "addendum" IEP team meeting was held to discuss petitioner's educational needs because the Rancho School was being closed and petitioner would be changing his SDC setting to Williams Elementary School, which is a "regular" DUSD site. All services, goals, and objectives from petitioner's initial IEP were to continue at the new school. It is not known who participated in the IEP meeting or whether petitioner's parents agreed with continuing with the goals, objectives, and services as referenced in this IEP.

### Placement at Williams School

39. After closure of Rancho School, petitioner was enrolled in Williams Elementary School. His teacher there, Maria Garcia, has been credentialed in special education since 2002<sup>14</sup> and is eligible to teach autistic children, even though her experience is considered limited. Petitioner's placement was in a classroom for students with speech/language impairment.

40. Ms. Garcia testified at the due process hearing. She stated that the biggest concerns regarding petitioner were his speech/language deficits and his short attention span. She stated that when petitioner first started classes he did not speak English. However, he demonstrated vast improvements over time. Although he had problems paying attention in class, Ms. Garcia opined that most three year olds have a short attention span.

### October 2004: IEP Meeting

41. On October 19, 2004, an addendum IEP team meeting was held to discuss the concerns of petitioner's parents related to petitioner's diagnosis, his class size, his limited progress within the classroom, the delivery of ABA services, increased speech-language services, and motor skill development. The IEP team included petitioner's parents; program specialist Nancy Matthews; speech - language pathologist Marcia Chutan; Maria Garcia; Graceann Frederick; and SCLARC representative Pamela Colvin-Lee.

Regarding petitioner's diagnosis, Ms. Frederick acknowledged that although a Kaiser Permanente team and SCLARC diagnosed petitioner with autism, she observed petitioner seeking help from the teacher, following directions, interacting with peers, and making eye contact with peers and adults. Therefore, she felt that there was not sufficient support for changing petitioner's diagnosis. Ms. Colvin-Lee stated that the

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<sup>14</sup> In 2001 Ms. Garcia received an "emergency credential" to compensate for the shortage in special education teachers. She received her final credential in 2004.

disability label is not as important as the services provided to petitioner and suggested that since this is petitioner's first school experience, he be given time to adjust to the classroom, new school, and the teacher before seeking alternative placement. Ms. Garcia reported that petitioner did not demonstrate aggressive or noncompliant behavior at school. Ms. Frederick stated that the DUSD assessment was appropriate to meet petitioner's educational needs.

In response, petitioner's parents informed DUSD they would seek an outside assessment to determine if petitioner was autistic. The IEP team elected not to change petitioner's eligibility designation.

Regarding petitioner's motor skill development, Ms. Frederick stated that although an earlier assessment of petitioner indicated that he had appropriate motor planning and gross motor skills, she would ask the occupational therapist to observe him in the classroom.

Regarding ABA, the IEP team indicated that DUSD had teachers trained in the implementation of ABA techniques. Although the IEP team was aware of the recommendation from Cedar-Sinai Medical Center that petitioner receive 15-20 hours of ABA services per week, the team was also aware of SCLARC plans for completing a behavior assessment of petitioner and providing behavior support services within petitioner's home.

No changes were made to petitioner's placement or special education services. IEP notes indicate that "the parents agree with the current placement but want to restate that if [petitioner] is not making progress at the next IEP they would like to review the goals and objectives and discuss alternative placements." However, on the last page of the IEP, petitioner's parents did not initial the statement indicating agreement with the IEP goals and objectives.

#### December 2004: "Familias First" Behavioral Assessment

42. On December 10, 2004, based on a referral from SCLARC, Familias First, an organization that provides behavioral services to children with exceptional needs,



completed a behavioral assessment of petitioner that focused on non-compliant and aggressive behavior. Petitioner's parents had reported that in addition to the problems of non-compliance and aggression, petitioner was tantruming and had a short attention span, safety awareness deficits, self-help skill deficits, and peer / sibling interaction deficits. These were additional challenging behaviors for the family. Petitioner's mother felt overwhelmed by petitioner's tantruming whenever she tried to address his self-care needs. Petitioner's father was concerned with petitioner's propensity to aggress against his younger brother (then age 17 months). As a result of its evaluation, Familias First identified seven behavioral goals for petitioner and prepared a behavioral support plan that addressed each of the parents' areas of concern. Familias First recommended that due to the severity of the behaviors exhibited, behavior modification services were recommended at the rate of 12 hours per month for three months. Familias First provided such services during the period March - April 2005, after which petitioner commenced an intensive ABA program with Autism Behavior Consultants.

#### January 2005: Request/or Temporary Classroom Support Staff

43. At the request of petitioner's parents, on January 4, 2005, Ms. Garcia prepared a "Request for Temporary Classroom Support Staff." The Request contained a host of references to the many difficulties petitioner was experiencing in class in terms of his attention, language deficits, and self-help skills. For example, she stated that petitioner "has problems focusing on a task in a large or small group" and "needs assistance transitioning to and from tasks, diapering, dressing and eating." Ms. Garcia also noted that petitioner was making some progress on his IEP goals "as most are on a 1:1 basis." She stated that "1:1 training working with petitioner for Instructional Aids would also be beneficial."

Ms. Garcia's request was to be addressed at the next IEP team meeting.

## February 2005: IEP Meeting

44. On February 14, 2005, the IEP team held an "addendum" meeting to further discuss parental concerns from the October 2004 meeting. The team consisted of petitioner's parents, Nancy Matthews, Maria Garcia, and speech - language pathologist Blair Bolles. Petitioner's parents were concerned that the entire IEP team was not present for this meeting. They were particularly concerned that Graceann Frederick was not present, even though the meeting was held to address petitioner's problems and the need for additional classroom support, and they wanted to again request changing petitioner's eligibility classification.

Although Ms. Garcia had requested temporary classroom support staff to assist with petitioner, when the IEP team considered her request, including the "Temporary Classroom Support Rubric" responses that were converted into a score, the IEP team decided that petitioner did not require a one-to-one assistant to benefit from his educational program. Ms. Garcia was to work with the parents in developing goals and objectives for petitioner's annual IEP review.

Although petitioner's parents believed the structured classroom environment allowed petitioner to benefit and be successful in his educational program, they still wanted DUSD to consider changing petitioner's eligibility status based on the prior diagnosis of autism and intended to address this again at petitioner's annual IEP review.

At this IEP team meeting no changes were made to petitioner's placement, special education services, or his eligibility category. By signing the IEP addendum, petitioner's parents again agreed with the goals and objectives as established at the April 2004 initial IEP meeting.

## January - February 2005: Occupational Therapist Observations

45. Occupational therapist Na Nguyen observed petitioner in his classroom on January 12 and February 24, 2005. During the January observation, Ms. Nguyen observed petitioner while he was involved in group activities. During the February

observation, she observed him in a one-to-one setting completing various fine motor and tactile activities.

Based on her observations, Ms. Nguyen determined that petitioner had difficulty with attending, and that this difficulty seemed more related to visual distractions rather than sensory-based deficits. However, after an unsuccessful attempt to use a weighted vest to increase his attending,<sup>15</sup> she concluded that using a sensory approach to assist petitioner within the classroom would not be an appropriate or effective approach. Ms. Nguyen recommended that petitioner did not need occupational therapy as a designated instructional service to assist him in his education.

#### March 2005: DUSD Home Visit

46. On February 15, 2005, Graceann Frederick, had a telephone conversation with petitioner's father, who expressed continuing concern that petitioner's eligibility condition had not been changed to autism. He related new behaviors by petitioner but reported some progress at school. Petitioner's father also indicated that he had been reading books by and about "Lovaas."<sup>16</sup> In response to the parent's concern, Graceann Frederick suggested a home visit to observe petitioner.

47. Ms. Frederick visited petitioner's home on March 8, 2005 to observe the behaviors reported by the parents. According to Ms. Frederick's notes, during the home visit petitioner played with various toys and moved from room to room. Petitioner's mother stated that she was concerned that petitioner covered his ears and walked around in circles. She also stated that her highest priority for petitioner

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<sup>15</sup> Weighted vests have been shown to have a calming effect that promotes attentiveness in some developmentally disabled children .

<sup>16</sup> Dr. Ivar Lovaas formulated the comprehensive therapeutic and educational plan that is now known as ABA.

was to have him make his own bed after waking up in the morning, and independently pick up his toys. Petitioner's mother indicated that because petitioner's eligibility condition had not been changed from speech/language impairment to autism, DUSO was "withholding services." Ms. Frederick indicated that she assured petitioner's mother that the home visit was to observe the reported autistic behaviors and that she would also do a classroom observation. Ms. Frederick noted that during the visit she observed petitioner's inattention, distractibility, joint attention, quiet personality, and language impairment. However, Ms. Frederick did not observe the numerous daily tantrums reported by petitioner's father. Based on her observations of petitioner in both home and classroom settings, Ms. Frederick stated that she did not see the problematic behaviors reported by petitioner's parents.

Ms. Frederick's notes also indicate that she discussed with petitioner's mother "a possible parent and child visit with the DUSD teacher who specializes in DTT [discrete trial training][1] <sup>17</sup>, so that DUSD might gain further information as to usefulness of DTT in reducing inattention and distractibility."

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<sup>17</sup> DTT is one of the instructional methodologies frequently used in ABA-based programs. DTT and ABA are not synonymous. While DTT is based upon principles of learning theory and has been demonstrated to be an effective intervention methodology, it represents only one of dozens of teaching strategies within the field of ABA. DTT learning opportunities are presented in a "training trial" format. Each training trial, regardless of the skill objective, consists of four major components:

1. The teacher or therapist presents a brief, distinctive instruction or question (stimulus). The instruction is followed by a prompt, if the child needs one, to elicit the correct response.
2. The child responds correctly or incorrectly (response).

March 2005: DUSD Proposed Assessment Plan

48. On March 11, 2005, petitioner's parents' transmitted a notice to DUSD that they were having an independent psychological evaluation of petitioner completed. Whether as a result of Ms. Frederick's visit to petitioner's home on March 8, or in response to notice of an independent evaluation, the school district sent petitioner's parents a plan for a further assessment of petitioner. The assessment plan included classroom observations and administration of both the Behavior Assessment System for Children, Second Edition (BASC-2)<sup>18</sup> and the Differential Assessment of Autism and Other Disorders.

The assessment plan indicated that the school psychologist would primarily perform the assessment.

Petitioner's parents refused to consent to the assessment plan because they had already decided to seek an independent assessment.

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3. The teacher or therapist provides an appropriate "consequence." Correct responses receive a reward, which may be an edible treat, a toy, hugs or praise; incorrect responses are ignored and/or corrected.
  4. Data are recorded.

<sup>18</sup> BASC-2 applies a triangulation method for gathering information through a comprehensive set of rating scales to get a more complete and balanced picture of a student's status. In addition to a Self-Report of Personality, the instrument uses Teacher Rating Scales to measure adaptive and problem behaviors in the preschool and school setting, and Parent Rating Scales to measure both adaptive and problem behaviors in the community and home setting. These scales measure areas important for both IDEA and DSM-IV classifications.

#### March 2005: SCLARC Classroom Observation I DUSD Contacts

49. On March 15, 2005, Pamela Colvin-Lee, a SCLARC representative, observed petitioner in the classroom. Following her visit, she had a telephone conversation with Ms. Frederick. According to Ms. Frederick's notes, Ms. Colvin-Lee opined that she did not believe that petitioner was autistic.

50 On March 15, 2005, Ms. Frederick spoke with Ms. Garcia regarding plans to observe petitioner in his classroom setting. Ms. Garcia reportedly advised Ms. Frederick that petitioner had made much progress since entering the Early Intervention program.

51. On March 16, 2005, Ms. Frederick spoke with petitioner's father and offered to arrange an opportunity for him to visit the DUSO ABA/DTT classroom and meet with the DTT teacher, preferably soon, so that provision of DTT could be discussed before the next IEP team meeting. Petitioner's father stated that he would have to discuss it with his wife and call back. On March 23, 2005, DUSO made the same offer to petitioner's mother.

Attempts by DUSO to set up a meeting between petitioner's parents and the DTT- trained teacher were unsuccessful because the parents did not respond to DUSD's offers.

#### March 2005: Robin Morris I Graceann Frederick Classroom Observation

52. Robin Morris, PsyD., is a clinical psychologist and marriage and family therapist identified by petitioner's counsel as someone who could do an independent psychological assessment of petitioner. She has worked with children with pervasive development disorders for approximately 13 years in hospital and school settings and currently works with teachers in formulating programs. Dr. Morris has been in private practice since 2001 and focuses on the assessment and treatment of children suspected of developmental delays and works with groups of autistic children.

53. On March 21, 2005, Ms. Frederick and Dr. Morris observed petitioner in his classroom. The observation period was approximately 45 minutes to one hour. As is evident by their notes and testimony, what each observer saw and interpreted was significantly different, and correlated to their respective positions in this matter.

54. According to her notes, Ms. Frederick observed the following:

Classroom aide was instructed by teacher [Mary Garcia] to sit behind [petitioner] to help him focus and remain in cube chair. [Petitioner] was inattentive much of the time, but followed teacher's direction regarding pocket chart activity. As he approach *[sic]* pocket chart, [petitioner] was distracted by something on a nearby shelf and teacher utilized picture to direct him back to sit quietly in [his] chair. [Petitioner] was observed to attend to boy sitting next to him. [Petitioner] transitioned with verbal and physical prompts to other location in classroom. He worked 1:1 with team teacher. He toileted with class and returned to group work. He did not seem to understand verbal directions to next workstation. Pointing and additional physical direction was required as [petitioner] started to follow students to house area of classroom. Inattention and distractibility interfere, as well as language deficits.

55. As part of her independent assessment, Dr. Morris documented her March 21, 2005 classroom observations of petitioner. She noted that during clean-up activities, as petitioner put blocks back into a container, "he threw them, smashing them together." After transitioning to calendar work, when the teacher posed a question to the class, petitioner "jumped out of his seat and ran to the front of the

room toward the teacher." Dr. Morris noted that the teacher asked petitioner to return to his seat five times, after which she instructed an aide to sit directly in back of petitioner's seat. She also noted that petitioner was inattentive, non-responsive, hit another student, refused to stay in his seat or consistently follow instructions, hummed loudly, sang and babbled to himself, fixated on his own hand, bit his own palm and fingers, imitated the teacher, and appeared to be in a daze. Dr. Morris concluded her comments regarding the classroom observation by noting: "During the hour the examiner spent observing Petitioner she noted he was out of his seat 16 times, placed his hands on others 4 times and exhibited one episode of hitting."

56. Following the classroom observation, Dr. Morris did not discuss her specific observations or findings with Ms. Frederick. Instead, they discussed the general structure of SDC and shared general observations of petitioner's inattention. Dr. Morris did not meet with Ms. Garcia or any of the classroom aides. She stated that she did not speak with petitioner's teacher because it was her protocol not to interrupt class instruction.

57. As noted above, Ms. Frederick and Dr. Morris saw things differently during the observation period. Ms. Frederick testified that she saw an aide sit behind petitioner to remind him to stay in his seat, but did not see any aggression by petitioner against another student. Dr. Morris testified that she observed an aide sitting behind petitioner in a manner that physically prevented petitioner from getting out of his seat. She also stated that petitioner hit another child in a manner that she described as a "fist slap" (i.e., more than mere poking).

#### March 2005: Dr. Morris' Psychological Evaluation

58. On March 21, 2005, Dr. Morris completed her psychological evaluation of petitioner. Her assessment of petitioner consisted of interviews with petitioner and his parents, the previously referenced classroom observation, and a series of tests that she administered on March 16, 2005. The battery of tests included the Mullen



Scales for Early Learning<sup>19</sup> Psychoeducational Profile Revised (PEP-R)<sup>20</sup>, Autism Behavior Checklist<sup>21</sup>, GARS, CARS, Vineland Adaptive Behavior Scales, and Conners' Parent Rating Scale (CPRS)<sup>22</sup>. At the time of the assessment, petitioner's age was 4 years, 2 months.

Petitioner's test scores were as follows:

*Mullen Scales of Early Development*

<u>Scale Component</u>	<u>Age Equivalent (years - months)</u>
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<sup>19</sup> The Mullen Scales for Early Learning is a developmentally integrated system that assesses language, motor, and perceptual abilities. It uses five scales to provide a picture of a child's cognitive and motor ability, and allows the examiner to identify strengths and weaknesses and assess the child's early intellectual development and readiness for school.

<sup>20</sup> The PEP-R is an inventory of behaviors and skills designed to identify uneven and idiosyncratic learning patterns and assess skills and behaviors of autistic and communication-handicapped children. The test is most appropriately used with children functioning at or below the preschool range and within the chronological age range of six months to seven years. The resulting profile reflects individual learning and behavior characteristics. This profile can be translated into appropriate individualized educational and home teaching programs.

<sup>21</sup> The Autism Behavior Checklist is a 57-item screening checklist for autism that is based on characteristics or behaviors commonly seen in autistic children. The form of the assessment instrument used by Dr. Morris provides for a qualitative scale and no formal score is given.

<sup>22</sup> The Conners' Parent Rating Scale is an instrument that uses observer ratings and self-report ratings to help assess attention deficit/ hyperactivity disorder and evaluate problem behavior in children and adolescents.

Gross Motor	2 - 1
Visual Reception	2-3
Fine Motor	3-0
Receptive Language	2-3
Expressive Language	2-8

PSYCHOEDUCATIONAL PROFILE REVISED

<u>Profile Component</u>	<u>Age Equivalent (years - months)</u>
Development (Composite)	2 - 9
- Imitation	3 - 5
- Perception	4 - 0
- Fine Motor	3 - 5
- Gross Motor	2 - 6
- Eye-Hand Coordination	3 - 4
- Cognitive Performance	2 - 5
- Cognitive Verbal	2 - 8

Behavior

- Attention Span	Severe
- Eye Contact	Severe
- Affect	Severe
- Seeking Help	Severe
- Movements and Mannerisms	Severe
- Reaction to Sound	Moderate
- Reward Motivation	Moderate

GILLIAM AUTISTIC RATING SCALE

<u>Component</u>	<u>Standard Score</u>	<u>Percentage</u>
Stereotyped Behavior	9	37
Communication	13	84
Social Interaction	10	50
Developmental	12	75

Autistic Quotient= 90 (average probability of autism)

CHILDHOOD AUTISM RATING SCALE

<u>Component</u>	<u>Range (1 -4)</u>	<u>Percentage</u>
Relating to People	3	Moderate
Imitation	3	Moderate
Emotional Response	3	Moderate
Body Use	3	Moderate
Object Use	3	Moderate
Adaptation to Change	3	Moderate
Visual Response	3	Moderate
Listening Response	3	Moderate
Taste, Smell, and Touch	3	Moderate
Fear of Nervousness	2	Moderate
Verbal Communication	3	Moderate
Nonverbal Communication	3	Moderate
Activity Level	3	Moderate
Intellectual Response Consistency	2	Mild
General Impressions	3	Moderate
Total Score	43	Severely Autistic

VINELAND ADAPTIVE BEHAVIOR SCALES

<u>Domain</u>	<u>Score</u>
Communication	47
Daily Living Skills	48
Socialization	52
Motor Skills	62

CONNERS' PARENT RATING SCALE

<u>Rating Scale</u>	<u>T- Score</u> <u>(&gt; 65 = Significant)</u>
Oppositionalism	67
Cognitive Probs / Int.	69
Hyperactivity	65
Anxious/ Shy	43
Perfectionism	41
Social Problems	81
Psychosomatic	44
Conners' ADHD Index	72

Global Index: Emotional Lability	67
Global Index: Total	69
DSM-IV: Inattentive	71
DSM-IV: Hyperactive/ Imp.	60
DSM-IV: Total	66

59. As a result of her assessment, Dr. Morris determined that petitioner met the DSM-IV-TR criteria for autistic disorder. She concluded:

Currently, [petitioner] lacks the basic skills needed to attend and participate in a program with peers. It is requested he participate in an individual program to gain the skills necessary to have success in a classroom setting. The classroom setting he currently participates in does not offer the 1:1 training he needs. He does not appear to understand verbal commands and questions made by staff. The aides that are in the classroom do not directly intervene with him and offer no skills or techniques to lessen his negative behavior.

Dr. Morris recommended:

Based on [petitioner's] delays in language, self-help skill and social skills it is recommended he participate in 1:1 discrete trial training in the home. It is the examiner's belief that this type of placement would be the least restrictive environment at the current time. The program should be 35 hours in total and should include a socialization and community based portion as well where he can apply his skills. Parent and caregiver training should also be offered on a regular basis to generalize the skills learned. The behavior therapy must be

conducted by someone who is Master level, trained in behavior analysis, with emphasis of positive behavior interventions as well as training in the use of treating children with autistic disorder.

Dr. Morris also recommended that petitioner receive speech therapy at the rate of two 90-minute sessions per week and occupational therapy to address fine and gross motor weaknesses and oral motor difficulties at the rate of two 45-minute individual sessions per week. She testified that petitioner can not benefit from speech-language therapy in a group setting. Dr. Morris suggested that petitioner receive a neurological examination, including an electroencephalogram "to rule out the possibility of seizure activity" and a re-evaluation in one year "for better estimates of his functioning."

60. Dr. Morris testified that although she thought it was important for the school district to receive a copy of her report, she neither discussed this with petitioner's parents nor sent a copy of the report to DUSD.

61. Petitioner's parents did not provide DUSD with a copy of Dr. Morris' evaluation report, which was dated March 21, 2005, until it was required to be disclosed under the statutory requirements for due process hearings. The parents stated that they did not receive Dr. Morris' report until after petitioner's April 19, 2005, IEP meeting.

62. Dr. Morris stated that the cost of her assessment of petitioner was \$1,200.00. The in-office testing of petitioner took approximately two and one-half to three hours to complete.

63. The Administrative Law Judge finds that the Kaiser Permanente Medical Group multidisciplinary team's assessment of petitioner, which was received as administrative hearsay, corroborates Dr. Morris' assessment and findings, particularly with respect to the diagnosis of autistic spectrum disorder.

64.

March -April 2005: Notices of Withdrawal from School

65. On March 24, 2005, petitioner's father sent a letter, via facsimile, to Kent Halbmaier, DUSD Director of Special Education. The letter stated:

I'm writing this letter on March 24, 2005 to inform you that I will be withdrawing [petitioner] from school, Williams Elementary. Do [*sic*] to the fact that [petitioner] is not making progress and is not receiving the adequate services. [Petitioner] will be enrolled in an ABA program with Autism Behavior Consultants and we'll be asking the Downey Unified School District for reimbursement for his therapy.

66. On April 4, 2005, Graceann Frederick had a telephone conversation with petitioner's father during which he advised her that petitioner would attend school until April 8 or 9, 2005, after which he would start a full-time ABA program that Dr. Morris was helping to set up with ABC.

67. Following her conversation with petitioner's father, Ms. Frederick notified SCLARC that petitioner's parents' intended to remove him from Early Intervention SDC at Williams School and that DUSD would schedule an IEP meeting as soon as possible.

68. Petitioner's parents withdrew petitioner from attendance at DUSD on April 7, 2005.

April 2005: IEP Meetings I DUSD Assessment Plan

69. On April 8, 2005, in response to the notice of and actual withdrawal of petitioner from Williams School, the IEP team held an "addendum" meeting to discuss parental concerns regarding petitioner's placement and eligibility. The IEP team consisted of petitioner's father, Director of Special Education Kent Halbmaier,

Nancy Matthews, Graceann Frederick, Maria Garcia, Blair Bolles, Na Nguyen, kindergarten teacher Diane Baccaro, and administrator Mary Weyers.

The IEP notes indicate an ongoing disagreement between the school district and petitioner's father regarding how petitioner was progressing in school and whether he was receiving appropriate services.

[Petitioner's father] explained that he has asked for additional assessment from the district in order to change [petitioner's] eligibility and he requested a 1:1 instructional assistant. ... [He] feels his son requires additional speech therapy. ... [Petitioner's father] stated [petitioner] misses a lot due to inattention. The teacher reported [petitioner] has increased his English vocabulary, access[es] the playground, participated in classroom activities and attends for longer periods when the activity is preferred. [Petitioner] is able to follow the classroom routine, requires his visual supports and is learning to assist with the toileting routine. [Ms. Garcia] stated he has made progress within her classroom but would continue to benefit from the classroom program to assist in developing his socialization, communication and pre-academic skills.

[Petitioner's father] stated he does not feel [petitioner] is [ ] making adequate progress in his program and he does not feel the services are appropriate. [He] stated he knows his son is autistic and has accepted the diagnosis. The Director of Special Education stated it is evident by statements made by school staff [petitioner] is making

progress. [Petitioner's father] stated that [petitioner] needs the 1:1 support to insure that [he] is able to attend. The classroom teacher indicated that there are specific times during the school day when [petitioner] receives 1:1 support or small group support. . . .

The school psychologist stated the district has offered several visits to observe the district ABA class. [Petitioner's father] stated they have not visited the district ABA program because they are waiting for the outside assessment to be completed by Dr. Robin Morris.

During the IEP meeting, Ms. Frederick did not discuss her observations or impressions from the joint-observation she made with Dr. Morris on March 21, 2005.

Kent Halbmaier stated that DUSD would like an opportunity to complete an assessment of petitioner, but the parents had not signed the assessment plan sent to them on March 11, 2005. DUSD also offered an independent outside assessment by Dr. Bruce Gail that would include visits in both the school and home settings.

70. Petitioner's parents, did not agree with the goals and objectives of the April 8, 2005 IEP and did not sign it.

71. During the April 8 IEP meeting, DUSD provided petitioner's parents with a second plan for a further assessment of petitioner. Although DUSD understood that SCLARC completed an assessment (Ann Walker's assessment) and petitioner's parents had an independent assessment completed (Dr. Morris' assessment), the school district had not been provided with the results of either evaluation. The new assessment plan was prepared because, from the DUSD perspective, the school district did not have enough information upon which to change petitioner's eligibility category or placement.



The April 8 assessment plan included classroom observations of play-based activities, a review of previous assessment results, an academic assessment of readiness skills, a social and emotional assessment, an evaluation of language-speech-communication development, and a review of two prior psychological reports (i.e., the report prepared by Anne Walker for SCLARC and the report prepared by Dr. Morris). The school psychologist and Dr. Gale, an independent behavior specialist/consultant, were to be the individuals leading the assessment. Although administration of BASC-2 was included in the March 11 assessment plan, it was not included in the new plan because, according to Ms. Frederick, petitioner's father indicated he would not complete any more questionnaires.

Petitioner's parents refused to consent to the April 8 assessment plan. Petitioner's father testified during the due process hearing that he did not sign the plan because he was waiting for receipt of Dr. Morris' evaluation.

72. The Administrative Law Judge finds that in refusing to agree, in writing, to DUSD's proposed assessment plans of March 11 and April 8, 2005, petitioner's parents prevented DUSD from re-evaluating petitioner. The only recourse available to DUSD would have been to prevail in a due process hearing seeking to compel a reassessment; an option DUSD elected not to pursue.

73. On April 19, 2005, the IEP team met for petitioner's annual review. The IEP team included petitioner's parents, administrator and vice principal of Williams Elementary School Karen Nadell, Maria Garcia, Blair Bolles, and a general education kindergarten teacher. Karen Nadell chaired the IEP meeting from its start at 8:00 a.m. until 8:55 a.m., at which time administrator Kimberly Cole replaced her. Blair Bolles attended the IEP meeting until 8:20 a.m., after she had explained and offered petitioner's speech-language goals. There is no indication that a representative from

the regional center attended the meeting or that the IEP team considered petitioner's Individualized Family Service Plan.<sup>23</sup>

The team reviewed progress made toward the previous year's goals and established goals and objectives for the 2005-2006 school year. Ms. Garcia reported that petitioner's prior goal regarding eye contact was still in progress. She also reported that petitioner had good play skills, was a kinesthetic learner, and adjusted well when changes in the classroom routine occur. He also appeared to have progressed in his academic / functional skills and, if interested, he named most basic colors and common shapes, sorted items by color, identified certain letters by pointing, and named and pointed to various body parts. If interested, he could attend a task for up to eight minutes. However, Ms. Garcia also noted that he was inconsistent in many tasks and was not able to identify himself by name. Petitioner also tried to play with other students, but did not want to share, and socialization with peers needed adult facilitation. He still had trouble following directions and the teacher reported: "Lately he shows aggressive behavior towards other peers." Petitioner's aggressive behavior was not further discussed at the IEP meeting and no objective or goal was established to address this concern.

At the time of the meeting, the IEP team had not received the results of the assessments performed by either SCLARC/Ann Walker or Dr. Morris.

IEP goals and objectives continued to focus on petitioner's communication disorder because it "affects all aspects of the preschool program." Ms.. Bolles recommended "continued speech and language intervention with goals continuing toward production of lengthening expressive language responses, increasing

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<sup>23</sup> An Individualized Family Service Plan (IFSP) is the document required by law to set forth the current status, desired outcomes, plans, and goals relating to certain clients of a regional center under the California Department of Developmental Services.

meaningful interactions with peers, and following directions." In addition to speech-language goals, other specific goals addressed toilet training, interaction with peers, and rate of compliance and ability to stay on task.

Placement included SDC for three hours 20 minutes per day with a resource specialist, and speech and language services at the rate of four 20-minute sessions per week. The rationale for petitioner's placement was that he "needs to be with peers who have similar learning needs/styles."

Instructional goals proposed for the 2005-2006 school year included use of functional vocabulary to make meaningful responses, use of social vocabulary to respond to peers, knowing and verbalizing new action words, manipulating clothes for toileting, listening to picture stories and identifying the main characters, matching numbers, tracing his name, interacting with peers during free time and recess, increasing his rate of compliance and ability to follow classroom routine based on verbal and visual instructions, and answering the questions "What is your name?" and "How old are you?"

Because petitioner was receiving in-home ABA training, the IEP team determined that placement back in the public school would begin when his ABA program is completed.

74. Petitioner's parents did not agree with the goals and objectives of the April 19, 2005 IEP and did not sign it.

#### April 2005: Jane Haddad Speech-Language Evaluation

75. On April 20, 2005, Jane Haddad, an independent speech-language pathologist completed a speech-language evaluation of petitioner. She received her Certificate of Clinical Competence in Speech-Language Pathology in 1996, the same year as her initial state licensure. Since 2004 she has been in private practice, doing business as More Than Words Speech & Language Services. One of her areas of expertise is "language disorders associated with autistic spectrum disorders."

Ms. Haddad interviewed petitioner's parents, made observations of petitioner during one 90-minute session when his parents were present, and used both standardized and non-standardized testing instruments to evaluate petitioner's speech and language skills.

Ms. Haddad's impressions were that petitioner presented as autistic with "a severe disorder of receptive and expressive language skills, and pragmatic skills." She also found that his interaction skills were impaired and he had difficulty maintaining social reciprocity during play. Ms. Haddad opined that "given his current language age-level group speech-language therapy is not appropriate at this time."

Ms. Haddad recommended that petitioner receive two 60-minute speech-language therapy sessions per week to address his deficits and that the therapy should be "provided by a speech therapist with expertise in working with autistic children." She also recommended implementation of an auditory re-education program to re-train petitioner's auditory system how to process sound. Ms. Haddad suggested that monthly collaboration occur between petitioner's speech pathologist and his behavior specialists. Additionally, petitioner's speech language skills should be routinely monitored and re-evaluated after one year to assess his progress and follow-on therapy needs.

76. Ms. Haddad testified during the due process hearing. She emphasized that the severe receptive and verbal language skill delays that she and the Kaiser Permanente team identified indicated that petitioner needed intensive one-to-one speech/language therapy. Another concern was that at the time of the DUSD assessment in March 2004, petitioner should not have exhibited jargon or echolalia. Neither of these characteristics should be present in a normally developing child after age three. In particular, echolalia is a characteristic of autistic children that is usually not seen in non-autistic children. Ms. Haddad opined that the rate and setting for DUSD's delivery of speech-language therapy was inadequate. She recommended that petitioner receive one-to-one speech language therapy at the

rate of two hours per week. Ms. Haddad also stated that petitioner's IEPs should have contained additional speech-language goals and objectives, including understanding and processing language, expressing wants and needs, and combining words in expressive language and syntax.

77. In completing her assessment, Ms. Haddad did not contact any of the DUSD speech-language pathologists that provided services to petitioner.

#### AUTISM BEHAVIOR CONSULTANTS

78. Autism Behavior Consultants (ABC) is a for-profit agency specializing in the treatment of autism and related developmental disorders using discrete trial training DTT, based upon the work of Dr. Ivar Lovaas. On April 24, 2005, Sandra Cazares, an ABC case supervisor, prepared an intake assessment and ABA plan for petitioner. Ms. Cazares recommended that petitioner receive the following:

. . . a home-based, one-to-one intensive behavioral intervention program. The most appropriate behavioral intervention plan would consist of 35 hours per week of in-home treatment with 10 hours of supervision per month and 2 hours per month of clinical consultation. In addition, parent training is recommended with [petitioner's] case supervisor. The success of this treatment is dependent upon consistency, therefore, these services are recommended on a year round basis.

79. Petitioner's parents paid for ABC services provided to petitioner during March -June 2005. The intensity of therapy, in hours, was as follows:

<u>Class of Service</u>	<u>March</u>	<u>April</u>	<u>May</u>	<u>June</u>
Direct Therapy	0.0	40.25	72.50	66.0

Case Supervision	2.0	7.75	7.75	6.0
Clinical Director	0.0	0.00	2.00	2.0

The total cost for the above services was \$11,400, broken down as follows:

March	\$	150.00
April		2,593.75
May		4,656.25
June		<u>4,000.00</u>
TOTAL		\$11,400.00

80. Pursuant to an agreement reached between SCLARC and petitioner's parents, the regional center agreed to pay for petitioner's ABA services provided by ABC during the period July - October 2005. No arrangements or agreements were made regarding funding of petitioner's ABA program after October 2005.

81. On September 1, 2005, Ms. Cazares completed a progress report covering the SCLARC-sponsored ABA services provided to petitioner by ABC during the period May 1 - July 31, 2005. The report states that, on average, petitioner received 20 hours per week of one-to-one, in-home "behavioral therapy" with eight hours of direct supervision (by Ms. Cazares) and two hours of clinical direction (by clinical directors Kelly Pieropan and/or Selena Rose Emond). However, in July 2005 the rate of services increased by 15 additional hours per week of behavior therapy and two additional hours of direct supervision.

Ms. Cazares reported that "trial-by-trial data has demonstrated [petitioner's] tremendous growth in the last quarter in all areas of core deficits: social skills, play skills, and language skills." Petitioner made significant progress in several areas, including expressive, receptive language, language acquisition, and self-help, almost eliminated perseverative behavior,<sup>24</sup> and a dramatically decreased spontaneous commenting and labeling. ABC prepared an updated plan as part of the report that

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<sup>24</sup> Peseverative behavior refers to uncontrollable repetition of a particular response in the absence or cessation of a stimulus.

recommended petitioner "continue to receive 35 hours of intensive one-to-one, behavior intervention with 12 hours of supervision and 4 hours of monthly clinical consultation."

82. Ms. Cazerres testified during the due process hearing. She has a baccalaureate in psychology and has been involved in providing ABA services since 1998. She first met petitioner's parents in March 2005, when she first observed petitioner. Her initial findings included echolalia, some imitative skills, interest in toys, not much stereotypical / self- stimulative behavior, a short attention span, general lack of eye contact, babbling, limited joint attention, and no desire to interact with others. Later, she observed tantrumming and aggression.

Although petitioner initially received 20 hours per week of direct therapy, in August 2005, after SCLARC assumed responsibility for funding the therapy, the intensity increased to 35 hours per week. The increased therapy conformed to research results regarding optimal delivery rates for maximum effectiveness and enabled ABC to address more goals for petitioner. Ms. Cazerres stated that petitioner has done "wonderfully" in his response to therapy and, as of early September, he had already met the November goals in his ABA plan.

83. Selena Rose Emond is a part-time ABC clinical director who oversees the provision of ABA services for petitioner. She testified during the due process hearing. During the past few months she observed petitioner and determined that he exhibited inattention, lack of responsiveness and inappropriate play with toys. She testified that petitioner's "learning trajectory" was good and his cooperative play and attention span was expanding. She opined that petitioner is now ready to begin mainstreaming in a typical preschool class (not SDC), starting with immediate introduction at the rate of two days per week for short periods and with an aide. The time petitioner spends in a preschool class would be increased over time. Her expectation is that petitioner would be prepared to enter a mainstream kindergarten

class for the 2006-2007 school year. An aide would assist petitioner in his kindergarten class, but be gradually phased out.

Ms. Emond's recommendation was that petitioner should continue to receive 35 hours of direct ABA therapy with a portion of those hours moved into regular preschool attendance. One-to-one therapy should continue at this time because petitioner needs age- appropriate mastering of certain skills. Additionally, 12 hours per month would be needed for clinical/director supervision. The increase in supervision was attributed to the need for teacher interface.

84. Although petitioner's parents obtained an independent psychological assessment by Dr. Morris, an independent speech-language assessment by Jane Haddad, and an intake assessment by Autism Behavior Consultants, the information obtained from those assessments was not made available to DUSO prior to petitioner's most recent IEP meeting (April 19, 2005). Therefore, the school district and IEP team could not have considered these assessments when determining petitioner's special education and related services needs for the 2005-2006 school year.

#### TESTIMONY OF BRYNA SIEGEL

85. Bryna Siegel is a professor of child and adolescent psychology at the University of California, San Francisco. She has a Ph.D. in child developmental psychology, has been associated with the university for 16 years, and is the director of its autism clinic. Her curriculum vitae highlights her involvement in developing diagnostic criteria for autism and its early identification. Most of Dr. Siegel's work involves dealing with preschoolers, under age five or six. She has authored three books: *Helping Children with Autism Learn: A Guide to Treatment Approaches for Parents and Professionals* (2003); *The World of the Autistic Child: Understanding and Treating Autistic Spectrum Disorders* (1996); and, *What About Me? Growing up with a Developmentally Disabled Sibling* (1994). She testified during the due process hearing.



86. Although requested by DUSD, petitioner's parents did not allow Dr. Siegel to assess petitioner. Therefore, she was only able to offer opinions based on her review of petitioner's IEPs and DUSD's "contact notes." Dr. Siegel did not have any contact with petitioner's SDC teacher or DUSO speech-language pathologists. She only had an opportunity to speak with Graceann Frederick the morning before she testified in the due process hearing.

87. Accepting DUSD's March 2004 assessment of petitioner as valid, Dr. Siegel opined that petitioner's placement and the goals and objectives in petitioner's initial IEP (April 2004) were appropriate. She stated that if petitioner's primary diagnosis was autism, she would expect to see overly narrow interests, returning to preferred topics, overly sensitive or narrow play, no comprehension of gestures, and no expression; not the reported set of characteristics exhibited by petitioner.

Based on her review of petitioner's IEPs and the contact notes maintained by DUSD, Dr. Siegel opined that although petitioner was making significant progress in his SDC placement, his parents did not appreciate the in-depth nature of his problem. She further opined that as they became more aware of autism, the parents realized they could obtain more services for petitioner if his diagnosis was changed.

88. Dr. Siegel questioned the Kaiser Permanente and Dr. Morris assessments. She viewed the Kaiser Permanente evaluation as a mere "screening" rather than a more in-depth diagnosis or true assessment. That is, Dr. Siegel understood Kaiser Permanente as only determining that there was a likely risk of a disorder, rather than doing an in-depth assessment to make a specific diagnosis.

Dr. Siegel also questioned Dr. Morris' qualifications and how she applied diagnostic measures of autism. Dr. Siegel believed that Dr. Morris relied too much on parent reporting. Instead, as a private examiner she should have used observations and other measures in addition to parent reports. She suggested that Dr. Morris started with her conclusion and then attempted to justify it.

89. Dr. Siegel testified that use of Spanish, as the primary language in petitioner's home, would be a source of significant speech/language delay because the child would have to "bridge" the language barrier. She emphasized the importance of viewing any observed autistic-like behaviors in conjunction with the child's overall development. For example, some characteristics or symptoms of autism may be the result of speech-language impairment.

90. Based on her review of the records provided by DUSD, Dr. Siegel opined that DUSD provided petitioner with FAPE / LRE. However, she agreed that implementation of a one-to-one ABA program at the intensity currently being provided to petitioner is beneficial and appropriate.

91. Dr. Siegel suggested that petitioner's ABA program should include parental goals that correlate with petitioner's progress and that petitioner should be inserted into an age-appropriate preschool such that a portion of his time (possibly 50 percent) is spent in a class where he can experience modeling from normal (i.e., non-autistic) children.

92. The Administrative Law Judge finds that petitioner is receiving an educational benefit through his participation in the at-home ABA program provided by ABC. However, the Administrative Law Judge does not find that the ABA program constitutes FAPE/LRE.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Except as otherwise provided by law, a party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. (Evid. Code, § 500.)

2. With respect to the issues involving special education and related services, the Supreme Court has held: "The burden of proof in an administrative

hearing challenging an IEP is properly placed upon the party seeking relief." (*Schaffer v. Weast* (November 14, 2005, No. 04-698) 546 U.S.\_\_\_\_.)

3. Based on the foregoing, as the party requesting a change from petitioner's last approved IEP (February 14, 2005) and seeking entitlement for services not previously funded by DUSD, petitioner bears the burden of proof with respect to all issues.

ISSUE: WHAT IS PETITIONER'S PRIMARY DISABLING CONDITION AND, CONSISTENT WITH THAT CONDITION, HAS DUSD PROVIDED PETITIONER A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT?

Legal Principles - Eligibility for Special Education and Related Services

4. California Education Code section 56411.11, subdivision (b) lists eligibility criteria for early childhood special education services applicable to preschool children between the ages of three and five years. Included are disabling conditions of "autism" and "speech or language impairment in one or more of voice, fluency, language, and articulation."

5. California Code of Regulations, title 5, section 3030, defines criteria for determining eligibility as an individual with exceptional needs. Subdivision (a) provides the framework for determining eligibility.

A pupil shall qualify as an individual with exceptional needs .... if the results of the assessment as required by Section 56320 demonstrate that the degree of the pupil's impairment as described in Section 3030 (a throughj) requires special education .... The decision as to the whether or not the assessment results demonstrate that the degree of the pupil's impairment requires special education shall be made by the individualized education program team ... The individualized education program

team shall take into account all the relevant material which is available on the pupil. No single score or product of scores shall be used as the sole criterion for the decision of the individualized education program team as to the pupil's eligibility for special education ... [Emphasis added.]

#### Legal Principles - Assessments

6. 34 Code of Federal Regulations part 300.532 (2004) sets forth the procedures for evaluating a child under IDEA. It states, in pertinent part:

Each public agency shall ensure, at a minimum, that the following requirements are met: [¶] . . . [¶]

(b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining --

(1) Whether the child is a child with a disability under § 300.7; and

(2) The content of the child's IEP.

[¶] . . . [¶]

(f) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.

[¶] . . . [¶]

(h) In evaluating each child with a disability ... , the evaluation is sufficiently comprehensive to identify all of the child's special education and related

services needs, whether or not commonly linked to the disability category in which the child has been classified.

[¶] . . . [¶]

- (J) The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. [Emphasis added.]

7. 34 Code of Federal Regulations part 300.532 (2004) and California Education Code sections 56320 and 56322 provide evaluation procedures and requirements for assessments of individuals with exceptional needs in special education instruction.

Education Code section 56320 provides, in pertinent part, that before any action is taken with respect to the initial placement of an individual with exceptional needs, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons. No single procedure is to be used as the sole criterion for determining whether a pupil is an individual with exceptional needs and for determining an appropriate educational program for the pupil, and the pupil is assessed in all areas related to the suspected disability by persons knowledgeable of that disability.

California Education Code section 56322 also provides that assessments of a pupil's educational needs shall be done by persons "competent to perform the assessment, as determined by the school district."

8. California Education Code sections 56321, 56329, and 56506, subdivision (e), pertain to written notice requirements before a school district can do an assessment of a pupil.

Section 56321, subdivision (a), provides, in pertinent part, that if an assessment for the development or revision of the individualized education program is to be conducted, the parent or guardian of the pupil shall be given, in writing, a

proposed assessment plan within 15 days of the referral for assessment, unless the parent or guardian agrees, in writing, to an extension.

California Education Code section 56329 provides requirements regarding the written notice that shall be provided to the pupil's parent or guardian. It states, in pertinent part that the written notice shall include the following information:

- (b) A parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from qualified specialists, as defined by regulations of the board, if the parent or guardian disagrees with an assessment obtained by the public education agency . . . .
- (c) . . . If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free, appropriate public education to the child, and may be presented as evidence at a due process hearing . . . .

Section 56506, subdivision (e), provides that written parental consent shall be obtained "before any assessment of the pupil is conducted, unless the public education agency prevails in a due process hearing relating to the assessment." "[I]nformed parental consent need not be obtained in the case of a reassessment of the pupil if the local educational agency can demonstrate that it has taken reasonable measures to obtain consent and the pupil's parent has failed to respond."

9. California Education Code section 56381 addresses the frequency of pupil reassessments and information to be considered by the IEP team. It states, in pertinent part:

- (a) A reassessment of the pupil ... shall be conducted at least once every three years or more frequently, if conditions warrant a reassessment, or if the pupil's parent or teacher requests a reassessment and a new individualized education program to be developed.

If the reassessment so indicates, a new individualized education program shall be developed.

(b) As part of any reassessment, the individualized education program team and other qualified professionals, as appropriate, shall do the following:

(1) Review existing assessment data on the pupil, including assessments and information provided by the parents of the pupil, ... current classroom-based assessments and observations, and teacher and related services providers' observations.

(2) On the basis of the review conducted pursuant to paragraph (1), and input from the pupil's parents, identify what additional data, if any, is needed to determine:

[¶] ... [¶]

(B) The present levels of performance and educational needs of the pupil.

[¶] ... [¶]

(D) Whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the measurable annual goals set out in the individualized education program of the pupil and to participate, as appropriate, in the general curriculum.

#### Legal Principles - Eligibility based on Autism

10. The DSM-IV-TR criteria for diagnosing autism are more stringent than the eligibility requirements set forth under IDEA. Thus, eligibility criteria for special education services based on autism are broader than that required by regional centers, which determine eligibility based on the DSM criteria

In this matter two competing special education eligibility criteria are at issue; speech/language impairment and autism (based on autistic-like behaviors).

California Code of Regulations, title 5, section 3030, defines criteria for determining eligibility as an individual with exceptional needs. The introduction to

section 3030 establishes the framework for determining eligibility. Subdivision (c) of section 3030 addresses eligibility based on speech/language impairment and subdivision (g) addresses eligibility based on "autistic-like behaviors."

11. 34 Code of Federal Regulations part 300.7 (2004)' provides that a child with autism is a "child with a disability." Subdivision (c)(l) defines autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance.

12. California Code of Regulations, title 5, section 3030, subdivision (g), also provides criteria for eligibility based on "autistic-like behaviors."

A pupil exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.

#### Legal Principles - Eligibility based on Speech/language Impairment

13. 34 Code of Federal Regulations part 300.7 (2004) provides that a child with a speech or language impairment is a "child with a disability" Subdivision (c)(11) defines speech or language impairment as a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.



14. With respect to Speech/Language Impairment, California Education Code section 56333 states, in pertinent part:

A pupil shall be assessed as having a language or speech disorder which makes him or her eligible for special education and related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. In order to be eligible for special education and related services, difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from any of the following disorders:

[¶] . . . [¶]

(d) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.

15. California Code of Regulations, title 5, section 3030, subdivision (c), further addresses the eligibility criteria for speech/language impairment. It provides that the pupil has an expressive or receptive language disorder when the pupil scores below certain levels for the pupil's chronological or developmental level in standardized tests in the areas of language morphology, syntax, semantics, or pragmatics and/or displays inappropriate or inadequate usage of expressive or receptive language.

## Legal Principles- FAPE

16. Title 20 United States Code section 1400(d)(l)(A) states that one of the purposes of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (See also, Cal. Ed. Code, § 56000.)

17. Title 20 United States Code section 1401(29) defines special education as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." (See also, Cal. Ed. Code, § 56031.)

18. Title 20 United States Code section 1401(26)(A) defines "related services" as "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology ... to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child ... ) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children."

19. California Education Code section 56363, subdivision (a) refers to related services as "designated instruction and services" (DIS) and, like federal law, provides that DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

20. Title 20 United States Code section 1401(9) and California Code of regulations, title 5, section 3001, subdivision (o), define FAPE. Subdivision (o) of the California regulation states:

"Free appropriate public education" means special education and related services that:

- (1) have been provided at public expense, under public supervision and direction and without charge;
- (2) meets any of the standards established by state or federal law;
- (3) include an appropriate preschool, elementary, or secondary school education in California; and
- (4) are provided in conformity with the individualized education program required under state and federal law.

#### Legal Principles - LRE

21. Title 20 United States Code section 1412(a)(5), 34 Code of Federal Regulations part 300.550(b) (2004), and California Education Code section 56031, define policies and procedures pertaining to "least restrictive environment" (LRE) requirements. Part 300.550(b) of the federal regulation states:

Each public agency shall ensure --

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

22. 34 Code of Federal Regulations part 300.551 (2004) establishes the requirement that public agencies provide a continuum of alternative placements to meet the needs of children with disabilities for special education and related services. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services.

23. California Code of Regulations, title 5, section 3042 defines "placement" and requires that the rationale for placement outside the pupil's classroom must be documented in the IEP.

24. The United States Department of Education's Office of Special Education Programs (OSEP) is the public agency entrusted by the legislature to administer IDEA. In responding to question 1 of Appendix A of 34 Code of Federal Regulations part 300, OSEP addressed the requirement that each child's IEP include "an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class and in [extracurricular and other non-academic] activities.

OSEP stated, in pertinent part:

. . . IDEA presumes that the first placement option considered for each disabled student by the student's placement team, which must include the parent, is the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered. . . . In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or

administrative convenience. Rather, each student's IEP forms the basis for the placement decision.

#### Legal Principles - IEP

25. Title 20 United States Code section 1414, subdivision (d)(2), provides, in pertinent part that at the beginning of each school year each local educational agency shall have an IEP in effect for each child with a disability. In the case of a child with a disability aged 3 through 5, the IEP team shall consider the child's individualized family service plan.

26. California Education Code section 56341, subdivision (a), states: "Each meeting to develop, review, or revise the individualized education program of an individual with exceptional needs shall be conducted by an individualized education program team."

27. Title 20 United States Code section 1414(d)(l)(B), 34 Code of Federal Regulations part 300.344, and California Education Code section 56341, subdivision (b), define requirements for the composition of an IEP team, which shall include the following participants:

- One or both of the pupil's parents, a representative selected by a parent, or both;
- At least one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment;
- At least one special education teacher of the pupil, or if appropriate, at least one special education provider of the pupil;
- A representative of the district, special education local plan area, or county office who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of individuals with exceptional needs, is knowledgeable about the general curriculum; and is knowledgeable about the availability of resources of the local educational agency;

- At the discretion of the parent, guardian, or the district, special education local plan area, or county office, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate;
- An individual who conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used to assess the pupil, is familiar with the assessment results or recommendations, and is qualified to interpret the instructional implications of the assessment results; and
- Whenever appropriate, the individual with exceptional needs.

28. Title 20 United States Code section 1414(d)(l)(C), provides that "a member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting." Additionally, "a member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services," provided that the parent and the local educational agency consent to the excusal, in writing, and the IEP team member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. Written agreement and consent is required.

29. Title 20 United States Code section 1414(d)(4) and California Education Code section 56343 provide that a pupil's IEP team shall meet whenever a pupil has received an initial or any subsequent formal assessment; the pupil demonstrates a lack of anticipated progress; the parent or teacher requests a meeting to develop, review, or revise the IEP; and at least annually, to review the pupil's progress.

30. Title 20 United States Code sections 1414(d)(3)(A) and 1414(d)(3)(B) address considerations when developing an IEP, which shall include, the strengths of

the child, the concerns of the parents for enhancing the education of their child, and the results of the initial evaluation or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team is to consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

31. California Education Code section 56329(d) states:

If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency shall have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian.

32. California Education Code section 56383 provides that when a nonpublic, nonsectarian school implements a child's individualized education program, responsibility for compliance with IDEA and implementing regulations remains with the school district, special education local plan area, or county office of education.

#### Legal Principles - Behavioral Intervention

33. Federal and state laws mandate that IEP teams consider the affects of behavior that impedes a students learning.

34. Title 20 United States Code section 1414(d)(3)(B(i) and California Education Code section 56341.1, subdivision (b)(1), provide that in the case of a pupil whose behavior impedes his or her learning or that of others, the IEP team shall consider, when appropriate, "positive behavioral interventions, strategies, and supports to address that behavior."

35. California Code of Regulations, title 5, section 3052, subdivision (a) provides, in pertinent part that behavioral intervention plans shall be based upon a functional analysis assessment and be specified in the IEP. The IEP team shall supervise all assessment, intervention, and evaluation activities related to an individual's behavioral intervention plan.

36. In responding to question 39 of Appendix A of title 34 Code of Federal Regulations part 300, OSEP addressed the issue of placement when a child's behavior in the regular classroom, even with appropriate interventions, significantly impairs the learning of the student or others. OSEP responded:

The IEP team, in developing the IEP, is required to consider, when appropriate, strategies, including positive behavioral interventions, strategies and supports to address the behavior of a child with a disability whose behavior impedes his or her learning or that of others. If the IEP team determines that such supports, strategies or interventions are necessary to address the behavior of the child, those services must be included in the child's IEP. These provisions are designed to foster increased participation of children with disabilities in regular education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings.

The determination of appropriate placement for a child whose behavior is interfering with the education of others requires careful consideration of whether the child can appropriately function in the regular classroom if provided appropriate behavioral supports, strategies and



interventions. If the child can appropriately function in the regular classroom with appropriate behavioral supports, strategies or interventions, placement in a more restrictive environment would be inconsistent with the least restrictive environment provisions of the IDEA. If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child.

#### Determinations - Primary Disabling Condition

37. Based on the information available to DUSD at the time of the petitioner's initial IEP (April 2004) and most recent IEP (April 19, 2005), the school district's selection of speech/language impairment as petitioner's primary disability was reasonable. (Factual Findings 8, 9, 12, 15, 20-24, 27-49, 53, 54, and 64-73; Legal Conclusions 4-15.)

38. Based on the entire record, including the assessment reports and observations of Kaiser Permanente Medical Group, Dr. Morris, and Jane Haddad, petitioner has established that he has autistic disorder.

39. Petitioner meets the eligibility criteria for special education and related services based on both speech/language impairment (based on expressive and receptive communication deficits) and autism (based on autistic-like behaviors). (Legal Conclusions 37-38.)

#### Determinations -FAPEILRE

40. There is a clear distinction between a student's eligibility classification and that student's needs for special education and related services. 34 Code of Federal Regulations part 300.125(d) (2004) states:

Nothing in [IDEA] requires that children be classified by their disability so long as each child who has a disability listed in § 300.7 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under [IDEA].

"The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child." (*Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.)

41. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that 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 198- 200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide an educational benefit to the student. (*Id.* at 201.)

42. To determine whether DUSD offered petitioner FAPE, the analysis must focus on the adequacy of DUSD's program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If DUSD's program is designed to address Petitioner's unique educational needs, is reasonably calculated to provide him some educational benefit, and comports with his IEP, DUSD provided FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would result in greater educational benefit. (*Rowley, supra*, 458 U.S. at pp. 207-208; *Gregory K., supra*, 811 F.2d at p. 1314.) DUSD is also required to offer

petitioner a program which educates him in the least restrictive environment. Therefore, under IDEA and *Rowley*, the program the school district offered petitioner for the 2004-2005 and 2005-2006 school years must meet the following four requirements to constitute an appropriate educational program for petitioner: (1) be designed to meet his educational needs, (2) be reasonably calculated to provide him some educational benefit, (3) comport with his IEP, and (4) provide him an education in the least restrictive environment.

43. Some courts in other jurisdictions have attempted to "clarify" *Rowley*. The Second Circuit has held that de minimis benefit or only trivial advancement is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) The Third Circuit has held that the education benefit "must be gauged in relation to the child's potential." (See *Ridgewood Board of Education v. NE*. (3d Cir. 1999) 172 F.3d 238, 247, citing *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 182-185.)

44. DUSO can only be held responsible for developing an IEP based on information has available at the time.

Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . An individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.

(*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

45. A child's "potential" for realizing an educational benefit is a function of many factors that can only be ascertained by an in-depth multi-disciplinary

assessment, including determining the child's adaptive and cognitive abilities. Additionally, a child's potential for realizing an educational benefit is related to the instructional methodology applied, abilities of the instructor, and learning environment. Given that maximization or optimization of educational benefit is not the standard by which provision of FAPE is established, a student's potential is a consideration, but not determinative, regarding the services that must be provided by a school. (Legal Conclusions 40-44.)

46. When considering whether an IEP complies with the provisions of IDEA, the IEP must be analyzed prospectively.

Rowley's requirement that a school district's program be "reasonably calculated" to enable a child to receive educational benefits is prospective; it is based on an evaluation done by a team of experts prior to the student's placement. At the time of the child's evaluation, the IEP must be reasonably calculated to enable the child to receive educational benefits. Thus [the court] would not view Rowley's test of "appropriateness" as whether the child actually receives educational benefit as a result of his school placement. Instead, the appropriateness of a student's placement must be assessed in terms of its appropriateness at the time it is created and not at some later date when one has the benefit of the child's actual experience.

*(Fuhrmann v. East Hanover Board of Education. (3d Cir. 1993) 993 F.2d 1031, 1041.)*

Actions of school systems cannot be judged exclusively in hindsight. . . . In striving for appropriateness, an individualized education program must take into account

what was, and was not, objectively reasonable when the snapshot was taken; that is, at the time the individualized education program was promulgated. [Citation omitted.] The alchemy of reasonable calculation necessarily involves choices among educational policies and theories -- choices which courts, relatively speaking, are poorly equipped to make. Academic standards are matters peculiarly within the expertise of the state department of education and of local educational authorities.

*(Roland M v. Concord School Committee (1st Cir. 1990) 910 F.2d 983.)*

47. The educational program that DUSD provided for the 2004-2005 school year must be evaluated to determine whether it offered petitioner FAPE/LRE. If DUSD's program was designed to meet petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, comported with his IEP, and provided him with an education in the least restrictive environment, then it provided petitioner with FAPE/LRE. (Legal Conclusions 20-24 and 41-46.)

48. Based on the information it had at petitioner's initial IEP (April 2004), the program DUSD offered to petitioner for the 2004-2005 school year was designed to meet petitioner's unique educational needs, in that it was reasonably calculated to provide him some educational benefit. After the initial IEP was approved by the parties, DUSD provided petitioner with services prescribed therein, including placement in a special day class, which was deemed to be the least restrictive environment for petitioner's needs. (Factual Findings 8, 9, 12, 15, and 20-31; Legal Conclusion 47.)

49. At the time of petitioner's April 2005 annual IEP review, it was clear that petitioner had made progress toward certain objectives but still exhibited deficiencies in a number of key areas. While DUSD may not have provided services that would have optimized or maximized petitioner's educational benefit, it did

provide for progress that was not merely trivial, de minimis, or negligible. Petitioner's continuing deficiencies were identified and addressed in a combination of continuing and new educational goals and objectives. Accordingly, DUSD established by a preponderance of the evidence that it provided petitioner with FAPE/LRE during the 2004-2005 school year. (Factual Finding 72; Legal Conclusions 20-24 and 41-46.)

50. When petitioner's parents refused to consent to the March 11 and April 8, 2005, assessment plans proposed by DUSD, the school district had the option of seeking authority to conduct an assessment without parental consent by filing a request for a due process hearing pursuant to Education Code section 56506, subdivision (e). However, DUSD elected not to follow such a course of action. The school district reasonably believed that it was providing petitioner with FAPE/LRE and proposed a reassessment in response to prompting from the parents to reclassify petitioner's primary disabling condition. (Factual Findings 48, 70, and 71; Legal Conclusions 8 and.)

51. Petitioner's parents refused further assessment by DUSD. Pursuant to Education Code section 56329, subdivision (b), they had the option of asking for an independent assessment at school district expense. They elected not to avail themselves of that opportunity and, instead, sought an independent assessment, at private expense, by Dr. Morris. (Legal Conclusions 50 and 82.)

52. The conduct of both parties is considered with respect to the reassessment of petitioner. The IEP team should have had the benefit of a reassessment of petitioner prior to convening the annual IEP review on April 19, 2005. DUSD failed to pursue a reassessment after petitioner's parents made several early requests regarding petitioner's eligibility classification. However, when DUSD presented plans for reassessment on March 11 and April 8, 2005, petitioner's parents neither consented to the implementation of either plan nor requested an independent evaluation at public expense. Instead, petitioner's parents sought independent assessments from Dr. Morris and Jane Haddad at private expense.

Although Dr. Morris had completed her report prior to the annual IEP review, petitioner's parents did not make it available to DUSD prior to the April 19 IEP team meeting. Given the totality of the circumstances, it was reasonable for the school district to continue classifying petitioner as speech/language impaired for the 2005-2006 school year. (Factual Findings 32, 41, 44, 46, 48, 58, 60, 61, 70, 71, and 74; Legal Conclusions 9 and 51.)

53. The DUSD IEP team that met on April 19, 2005, did not comply with the procedural provisions of IDEA in the following respects:

- a. The IEP team did not comply with title 20 United States Code section 1414(d)(2), in that the team did not consider petitioner's IFSP. (Factual Finding 72; Legal Conclusion 25.)
- b. The IEP team did not comply with title 20 United States Code section 1414(d)(3)(B)(i); California Education Code section 56341.1, subdivision (b)(1); and California Code of Regulations, title 5, section 3052, subdivision (a). Petitioner's parents had previously voiced a concern about petitioner's aggression, and at the IEP meeting petitioner's SDC teacher noted petitioner's recent "aggression towards other peers." However, the IEP team did not address the need for a functional analysis assessment and did not consider strategies, including positive behavioral interventions and supports, to address that behavior.

Although DUSD did not adequately address petitioner's aggression at the IEP meeting, petitioner's parents had unilaterally removed petitioner from his SDC class and were not inclined to allow him to be further assessed by the school district. Accordingly, DUSD could not conduct a functional or behavioral analysis assessment of petitioner until his parents agreed to make him available for such an assessment. (Factual Findings 35, 36 and 72; Legal Conclusions 33-36 and 51.)

- c. Karen Nadell and then Kimberly Cole attended the April 19, 2005 IEP meeting as the school district administrator. There is no evidence that Ms.

Nadell was qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, as required by title 20 United States Code section 1414(d)(1)(B)(iii)(I).

Although Ms. Cole's credential in special education may not have been in effect at the time of the meeting, it is found that she was qualified to act as the administrator for the IEP team meeting. (Factual Findings 72; Legal Conclusion 27.)

d. Blair Bolles is considered to be the attendee at the IEP meeting who could interpret the instructional implications of evaluation results, as required by title 20 United States Code section 1414(d)(1)(B)(v). However she left the meeting early and petitioner's parent neither deemed her attendance not necessary nor provided a written agreement and consent that she be excused from attending the meeting, in whole or in part, as required by title 20 United States Code section 1414, subdivision (d)(1)(C). (Factual Findings 72; Legal Conclusions 27 and 28.)

54. Not every procedural violation of IDEA results in a denial of FAPE.

Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, "will not render an IEP invalid." [Citation omitted.] On the other hand, "procedural inadequacies that result in the loss of educational opportunity," [citation omitted] or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations omitted] or that "caused a deprivation of educational benefits," [citation omitted] clearly result in the denial of a FAPE.

*(Amanda J v. Clark County School District (9th Cir. 2001) 267 F. 3d 877, 892.)*



55. At the time of petitioner's April 19, 2005 IEP team meeting, the school district understood that petitioner's parents would not allow DUSD to reassess petitioner and that petitioner was going to participate in a private at-home ABA program for an indeterminate period. DUSD had not been afforded an opportunity to observe petitioner in his home-based ABA training and had not received any reports regarding petitioner from Dr. Morris or ABC. Petitioner's parents also refused to follow up on the school district's offers with respect to familiarization with the DUSD ABA/DTT program. The only new information available to the IEP team came from the progress reports prepared by speech/language pathologist Blair Bolles and SDC teacher Maria Garcia. With the exception of their failure to address the issue of petitioner's emerging aggression, it was not reasonable for the IEP team to make significant substantive changes in petitioner's IEP. Given the limited new information available to the IEP team, the goals and objectives established by the IEP team were designed to meet petitioner's educational needs and reasonably calculated to provide him with some educational benefit. There was insufficient basis for changing petitioner's placement with respect to the least restrictive environment. (Factual Findings 51, 60, 61, 64, 64, 67, 71, 72; Legal Conclusions 51 and 52.)

56. Petitioner did not establish that DUSD denied petitioner FAPE/LRE at the April 19, 2005 IEP team meeting. (Legal Conclusions 53-55).

57. Respondent established that it did not deny petitioner FAPE/LRE at the April 19, 2005 IEP team meeting. (Legal Conclusions 53-55).

58. At the present time, DUSD has more information than was available during the April 19, 2005 IEP team meeting, including the assessments of petitioner completed by Dr. Walker, Dr. Morris, Jane Haddad, and ABC. DUSD is also aware of the progress demonstrated by petitioner in his intensive ABA program. At the next scheduled IEP, which should be convened as soon as reasonably possible, but not later than 30 days from the date of this Decision, the additional information and petitioner's IFSP must be considered by the IEP team in formulating a revised IEP.

59. Since petitioner's parents and ABC are not implementing petitioner's current IEP, DUSD is not responsible for ABC's compliance with IDEA. (Ed. Code, § 56383.) (Legal Conclusion 32.)

60. Based on the entire record the Administrative Law Judge concludes that petitioner did not establish by a preponderance of the evidence that DUSD denied petitioner FAPE/LRE or that petitioner's private at-home placement for ABA therapy constitutes FAPE/LRE.

ISSUE: SHOULD DUSO REIMBURSE PETITIONER'S PARENTS FOR THE COST OF PETITIONER'S APPLIED BEHAVIOR ANALYSIS PROGRAM DURING THE PERIOD MARCH 30, 2005 THROUGH JUNE 30, 2005, IN THE AMOUNT OF \$11,400.00, AND/OR UNTIL PETITIONER'S NEXT ANNUAL INDIVIDUALIZED EDUCATION PROGRAM MEETING, AT THE RATE OF 35 HOURS PER WEEK DIRECT THERAPY, 12 HOURS PER MONTH CASE SUPERVISION, AND FOUR (4) HOURS PER MONTH CLINICAL SUPERVISION?

#### Legal Principles - Reimbursement of Education Costs

61. Title 20 United States Code section 1412(a)(10)(C) and title 34 Code of Federal Regulations part 300.403 (2004) address payment for education of children enrolled in private schools without consent of or referral by a public agency. Section 1412(a)(10)(C) provides that a school district is not required to pay for the cost of education of a child with a disability at a private school or facility if the school district provided the child with FAPE but the parents elected to place the child in such private school or facility. However, if the parents enrolled the child in a private elementary school or secondary school without the consent of or referral by the school district, the Administrative Law Judge may require the school district to reimburse the parents for the cost of that enrollment if he or she finds that the school district did not make FAPE available to the child in a timely manner prior to that enrollment.

Section 1412(a)(10)(C) also provides, in pertinent part, that the cost of reimbursement may be reduced or denied if, prior to the parents' removal of the

child from the public school, the school district informed the parents of its intent to evaluate the child, but the parents did not make the child available for such evaluation, or upon a finding that the parents actions were unreasonable.

62. Title 20 United States Code section 1415, subdivision (j); title 34 Code of Federal Regulations part 300.514; and California Education Code section 56505, subdivision (d), provide that during the pendency of this proceeding, unless the State or school district and the parents otherwise agree, the child shall remain in the then-current educational placement of the child (i.e., the placement established by petitioner's last approved IEP). (See *Thomas v. Cincinnati Board of Education*, (6th Cir. 1990) 918 F.2d 218.)

63. California Education Code section 56505, subdivision (i) states: "In decisions relating to the placement of individuals with exceptional needs, the person conducting the state hearing shall consider cost, in addition to all other factors that are considered."

#### Determinations - Reimbursement for Education Costs

64. Petitioner's request for reimbursement is based on the premises that DUSD denied petitioner FAPE/LRE and that petitioner's unilateral placement in an at-home ABA program was required for FAPE/LRE.

65. In *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, parents unilaterally changed their child's educational placement during the pendency of judicial review proceedings. Ultimately, the parents placed their child in a private school. The underlying issue was who should pay for the child's private placement. The Court held:

While we doubt that [20 U.S.C. § 1415(j)] would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the

pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated [20 U.S.C. § 1415(j)]. [¶] . . . [¶] We do think that the court was correct in concluding that "such relief as the court determines is appropriate," within the meaning of [20 U.S.C. § 1415(j)], means that equitable considerations are relevant in fashioning relief. [Emphasis added.]

(*Id.* at pp. 397-398.)

66. Where a school district denies a student FAPE, reimbursement is an equitable remedy. However, the conduct of both parties is considered.

By nature, equitable relief is a fact-specific inquiry in which the Ninth Circuit had held that "the conduct of both parties must be reviewed to determine whether relief is appropriate." [¶] . . . [¶] In the Ninth Circuit, parents have an equitable right to reimbursement for the cost of compensatory education where a school district has failed to provide [FAPE]. However, procedural violations under [IDEA] do not necessarily result in the denial of a FAPE unless the violation results in the loss of an educational opportunity or seriously infringes upon the parent's opportunity to participate in the IEP process. And even if there is a denial of a FAPE, the remedy remains an equitable one.

(*Miller v. San Mateo-Foster City Unified School District* (2004) 318 F. Supp. 2d 851, 859- 860, 862; see also *Alamo Heights Independent School District* (5th Cir. 1986) 790 F.2d 1153, *WG. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F. 2d 1479, 1485-1486.)

67. DUSD made a free appropriate public education available to petitioner, but petitioner's parents elected to remove him from his SDC class and continue a private at-home ABA program. (Factual Findings 64-67; Legal Conclusion 60.)

68. Prior to this due process hearing, no expert opinion was made available to, or received by, DUSD to indicate that petitioner would benefit from ABA therapy (Factual Findings 60-61, and 83.)

69. Petitioner has not established that petitioner's private at-home placement and ABA therapy is needed for petitioner to obtain FAPE/LRE.

70. Petitioner's at-home ABA program does not constitute enrollment in a private elementary or secondary school.

71. In determining the appropriate setting for delivery of special education services, cost can be a legitimate consideration, i.e., when choosing between several options, all of which offer FAPE/LRE. (See *Clevenger v. Oak Ridge School Board* (6th Cir. 1984) 744 F.2d 514, 517.)

72. Petitioner's ABA program was funded by SCLARC during the period from July to October 2005. It was not established that SCLARC is precluded from continuing to fund all or part of petitioner's participation in an ABA program, regardless of whether such funding results from petitioner's IFSP, a settlement agreement with SCLARC, or a decision following a due process hearing. (Factual Finding 79.)

73. It has been established that for ABA therapy to be effective, a threshold level of intensity is 25 hours per week, 12 months per year, in which the child is engaged in systematically planned and developmentally appropriate educational activities with identified objectives. Dr. Morris and Dr. Siegel concur with this view.

(See National Research Council (2001) *Educating Children with Autism*, Division of Behavioral and Social Sciences Education, Washington, D.C., National Academy Press, p. 6.)

Dr. Morris recommended that petitioner receive therapy at the rate of 35 hours per week, including a socialization and community-based portion. (Factual Finding 59.)

Petitioner's parents refused to let Dr. Siegel assess or observe petitioner. However, Dr. Siegel opined that 35 hours per week of one-to-one ABA therapy would be appropriate for petitioner. (Factual Findings 85 and 89.)

74. Based on the entire record and prior determination that DUSD did not deny petitioner FAPE/LRE prior to this due process hearing, there is no basis for DUSD to reimburse petitioner for ABA services provided during any period prior to the date of this Decision. (Legal Conclusion 60.)

75. Accordingly, the Administrative Law Judge concludes that petitioner did not establish by a preponderance of the evidence that petitioner's parents are entitled to reimbursement of all or part petitioner's applied behavior analysis program for the period March 30, 2005 through June 30, 2005. (Legal Conclusion 74.)

76. However, petitioner has received and continues to receive an educational benefit through participation in his ABA program. ABA service providers indicated that gradual transition to a regular preschool class with an aide should commence in the near future, with the expectation that petitioner would be able to enter a mainstream kindergarten class for the 2006-2007 school year.

Given the educational benefits realized by petitioner through his ABA program, and the fact that DUSD now has additional assessment information to consider in formulating petitioner's IEP, equity dictates that DUSD should assume responsibility for a portion of the costs of petitioner's ABA program. (Factual Findings 80-82, 89 and 91; Legal Conclusion 66.)

77. With due consideration to equity and the conduct of the parties in this matter, the Administrative Law Judge concludes that it is just and proper that DUSD assume responsibility for funding 50 percent of the cost of petitioner's ABA program during the period between October 1, 2005 (the date SCLARC no longer funded petitioners ABA program) and the date of petitioner's next annual IEP review meeting, which should be held in April 2006. Reimbursement is based on actual delivery of services up to and including 35 hours per week direct therapy, 12 hours per month case supervision, and four (4) hours per month clinical supervision.

ISSUE: DOES PETITIONER REQUIRE SPEECH AND LANGUAGE THERAPY IN ORDER TO OBTAIN A FREE APPROPRIATE PUBLIC EDUCATION?

78. Petitioner established that he needs speech/language therapy to obtain an educational benefit. This deficit and need for services was recognized by DUSD at both petitioner's initial IEP meeting and the April 2005 annual IEP review. At the April 19, 2005 IEP meeting, the IEP team determined that petitioner should receive four 20-minute speech language sessions per week. Based on her independent assessment, Jane Haddad subsequently recommended that petitioner receive two 60-minute sessions per week.

Petitioner's IEP team should determine the setting and intensity for the provision of speech/language therapy services, after they consider petitioner's progress in his ABA program and Jane Haddad's speech-language report. That information was not available during petitioner's last IEP team meeting. (Factual Findings 28-30, 72, 74, 75, and 80-83; Legal Conclusion 30.)

79. Based on the entire record, the Administrative Law Judge concludes that petitioner requires speech and language therapy in order to obtain a free appropriate public education.

ISSUE: IS PETITIONER ENTITLED TO COMPENSATORY EDUCATION SERVICES?

80. Some federal courts have held that compensatory services are an appropriate form of relief where a school district fails to provide FAPE.

Congress's apparent goal . . . was to relieve the providers of education for handicapped children of such burdens in order to "make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped. [Citation omitted.] The relief [appellant] requests is entirely consistent with this goal, since she wishes to recover compensatory educational services to remedy denial of the benefits Congress sought to protect through denying a damages remedy, a free appropriate education. . . .

Accordingly, we hold that the plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of [IDEA].

*(Miener v. Missouri* (8 Cir. 1986) 800 F.2d 749, 753-754.)

81. Since DUSD provided petitioner with FAPE/LRE, the Administrative Law Judge concludes that petitioner did not establish by a preponderance of the evidence that he is entitled to recover compensatory education services. (Legal Conclusions 60 and 80.)



ISSUE: SHOULD DUSO REIMBURSE PETITIONER'S PARENTS FOR THE COST OF THE INDEPENDENT PSYCHOLOGICAL ASSESSMENT OF PETITIONER DONE BY ROBIN MORRIS, PSYD?

Legal Principles - Reimbursement for Independent Educational Evaluation

82. 34 Code of Federal Regulations part 300.502 and California Education Code section 56329 addresses the issue of reimbursement to parents for an independent educational assessment by qualified specialists who are not employed by the school district. Parents have the right to an independent educational evaluation at public expense if they disagree with an evaluation obtained by the school district. Upon request of the parents, the school district must either pay for the full cost of the evaluation or ensure that the evaluation is otherwise provided at no cost to the parents.

The parents would be entitled to reimbursement unless the school district initiates a due process hearing to show that its assessment was appropriate. If the Administrative Law Judge determines that the school district's assessment is appropriate, the parents maintain the right for an independent educational assessment, but not at public expense.

If the parents obtain an independent educational evaluation at private expense, the results of the evaluation must be considered by the school district, in any decision made with respect to the provision of FAPE to the child.

Determinations - Reimbursement for Independent Educational Evaluation

83. Petitioner's parents were entitled to obtain an independent assessment of petitioner based on their disagreement with DUSD's March 3, 2004 assessment. (Legal Conclusion 82.)

84. On March 11, 2005, petitioner's father advised DUSD of his intention to seek a private assessment of petitioner. DUSD elected not to initiate a due process

hearing to show that its assessment was appropriate. (Factual Finding 48; Legal Conclusion 82.)

85. Dr. Morris completed her examination of petitioner on March 16, 2005, and rendered her psychological evaluation report on March 21, 2005. Dr. Morris' fee for her assessment of petitioner was \$1,200.00. (Factual Findings 58 and 62.)

86. DUSD did not demonstrate in the due process hearing that the evaluation obtained by the parent did not meet DUSD criteria.

87. The Administrative Law Judge concludes that petitioner established by a preponderance of the evidence that he is entitled to reimbursement for the cost of Dr. Morris' assessment of petitioner. (Legal Conclusions 83-86.)

#### PREVAILING PARTIES

88. Pursuant to Education Code section 56507, subdivision (d), parties prevailed on the issues as follows:

- a. Respondent DUSD prevailed on the issue of whether DUSD provided petitioner a free appropriate public education in the least restrictive environment.
- b. Respondent DUSD and petitioner jointly prevailed on the issue of whether DUSD should reimburse petitioner's parents for the cost of petitioner's past and ongoing applied behavior analysis program. Respondent DUSD prevailed in that it provided petitioner with FAPE/LRE and, on that basis, would ordinarily not be required to reimburse petitioner for any portion of his ABA program. Petitioner prevailed in that it was established that he is receiving an educational benefit from his ABA program and, with due consideration to the conduct of both parties, equity dictates that DUSD should reimburse petitioner for a portion of his ABA program.
- c. Respondent DUSD and petitioner jointly prevailed on the issue of whether petitioner requires speech and language therapy in order to obtain an education benefit. Both parties established that petitioner needs these

services, but at different levels of intensity. Petitioner's IEP team should determine the level of intensity needed for FAPE.

- d. Respondent DUSD prevailed on the issue of whether petitioner is entitled to compensatory education services.
- e. Petitioner prevailed on the issue of whether DUSD should reimburse petitioner's parents for the cost of the independent education assessment of petitioner done by Dr. Morris.

## ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. DUSD shall, within 30 days from the date of this Order, reimburse petitioner's parents in the amount of \$1,200.00 for the cost of Dr. Robin Morris' independent assessment of petitioner.
2. DUSD shall assume responsibility for funding 50 percent of the cost of petitioner's ABA program, during the period between October 1, 2005 and the date of petitioner's next annual IEP review meeting, which should be held in April 2006. Reimbursement and prospective funding during the period is based on actual delivery of services up to and including 35 hours per week direct therapy, 12 hours per month case supervision, and four (4) hours per month clinical supervision.
3. DUSD shall, within 30 days from the date of this Order, convene a properly constituted addendum IEP meeting that includes, but is not limited to the following actions:
  - a. Recognizing that, in addition to or in lieu of speech/language impairment, petitioner satisfies the eligibility criteria for special education and related services under the disabling condition of "autism," based on autistic-like behaviors;
  - b. Considering petitioner's psychological evaluation report, prepared by Robin Morris;

- c. Considering petitioner's speech-language evaluation report, prepared by Jane Haddad, and planning for the delivery of continued speech-language services at a rate to be determined by petitioner's IEP team;
- d. Considering petitioner's Individualized Family Support Plan;
- e. Considering petitioner's ABA intake assessment and all progress reports, prepared by Autism Behavior Consultants;
- f. Planning for completion of a functional analysis assessment to support preparation of petitioner's behavior intervention plan; and
- g. Considering alternative placement options, including transition plans, and the continuum of special education and related services applicable to petitioner's disabilities.

4. Petitioner's request for reimbursement of past ABA services provided by ABC during the period March 30, 2005 through June 30, 2005, is denied.

5. Petitioner's request for compensatory education is denied.

**This is a final administrative decision. Each party shall be bound by this decision. Either party may appeal the decision to a court of competent jurisdiction within 90 days of receiving notice of this final decision. (Ed. Code, § 56505, subds. (h) and (k).)**

November 28, 2005.

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ROBERTS. EISMAN  
Administrative Law Judge  
Office of Administrative Hearings