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

STUDENT, Petitioner, V. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N2005070135

DECISION

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on February 7-10, 2006, in San Juan Capistrano, California.

Attorney Bruce Bothwell represented the Petitioner Student. Petitioner's parents, Mother and Father, attended the hearing on Petitioner's behalf.

Attorney Dan Harbottle represented Respondent Capistrano Unified School District (District). District Program Specialist Jennifer Fant attended the hearing on the District's behalf during most of the hearing. District Legal Assistant Kimberly Gaither attended the hearing on the District's behalf when Ms. Fant could not be present and when Ms. Fant was testifying as a witness in the hearing.

Petitioner called the following witnesses to testify: Catherine Minch, supervisor for the Center for Autism and Related Disorders (CARD); Cathy Johnson, speech-language pathologist; Tracy Kerins, speech-language pathologist; Dr. Ronald Leaf, licensed

psychologist; Jennifer Fant, autism program specialist; Luisa Martinez, school psychologist; Dr. Melanie Lenington, licensed psychologist; April Waldron, special day class (SDC) teacher; Dr. Doreen Granpeesheh, licensed psychologist and clinical director of CARD; Father, Student's father; and Mother, Student's mother.

The District examined all of the above witnesses, and also called Dr. Paul Dores, licensed psychologist, to testify.

On March 21, 2005, the California Special Education Hearing Office (SEHO) received Petitioner's request for due process hearing. On March 31, 2005, the parties agreed to take the case off-calendar. On June 29, 2005, the Petitioner requested that the matter be placed back on calendar; on June 30, SEHO notified the parties that the matter would proceed to hearing beginning on July 26, 2005. On July 1, the case transferred from SEHO to OAH, and OAH assigned the case number N2005070135. On July 25, 2005, OAH granted the parties' joint request to reschedule the hearing for September 14-16, 2005. On September 8, 2005, OAH received notice that the parties agreed to again take the case off- calendar. On October 26, 2005, the parties submitted to OAH a request to place the hearing back on calendar and schedule the hearing for January 24-27, 2006; thereafter OAH scheduled the hearing for those dates. On January 23, 2006, OAH granted a joint request from the parties for a brief continuance of the hearing, and thereafter the hearing dates were rescheduled for February 7-10, 2006.

The ALJ received sworn testimony and documentary evidence at the hearing on February 7-10, 2006. On February 28, 2006, the parties submitted written closing arguments by mail. Upon receipt of the written closing arguments on March 2, 2006, the record was closed and the matter was submitted.

ISSUES

1. Did the District offer Petitioner a free appropriate public education (FAPE) in the least restrictive environment (LRE) from January 22, 2005, through April 7, 2005?

2. Did the District offer Petitioner a FAPE in the LRE from April 7, 2005, to June 7, 2005?

3. Did the District offer Petitioner a FAPE in the LRE from June 7, 2005, to the present?

4. Is Petitioner entitled to reimbursement for privately funded services and prospective placement with his current providers, CARD and The Speech, Language and Learning Center?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Petitioner, born January 22, 2002, is a four-year-old student who resides within the boundaries of the District. He is eligible for special education services due to his autism. He currently attends a private program funded by his parents and does not attend any District school.

FACTUAL BACKGROUND

Initial Diagnosis And Early Intervention

2. In July 2004, when Petitioner was two and a half years old, pediatric neurologist Dr. Leslie Brody diagnosed him with autism. Shortly thereafter, Petitioner's parents sought services for him from the Regional Center of Orange County (Regional Center). In late August 2004, speech-language pathologist Tracy Kerins and school psychologist Sandra Garrison assessed Petitioner at the Interagency Assessment Center (IAC) on behalf of the Regional Center. They determined that Petitioner was eligible to receive early intervention services from the Regional Center due to his autism.

3. Pursuant to an individual family service plan (IFSP) dated August 31, 2004, the Regional Center provided Petitioner with early intervention services including

speech language therapy, occupational therapy (OT), and a one-to-one in-home behavioral program. Ms. Kerins provided Petitioner's speech-language therapy. Autism Comprehensive Educational Services (ACES), a non-public agency, provided Petitioner's one-to-one in-home behavioral program; Petitioner's ACES program primarily used an Applied Behavioral Analysis (ABA) methodology, although progress reports from ACES indicated some use of other methodologies such as Floortime. Initially, Petitioner's ACES program consisted of ten hours per week, but that increased to 15 hours per week in October or November 2004. Beginning in November or December 2004, Petitioner's parents began privately paying ACES for a few additional hours of one-to-one services per week, eventually increasing Petitioner's ACES program to 25 hours per week.

Individual Education Program (IEP) Process and Petitioner's Privately Funded Program

4. On November 9, 2004, Petitioner's parents and his then-current service providers met with District school psychologist Luisa Martinez to plan Petitioner's transition to the District once he reached his third birthday. In December 2004, Ms. Martinez and speech-language pathologist Melissa Echavez conducted the District's initial assessment of Petitioner, which included observation of Petitioner during his one-to-one ABA instruction in the home. In January 2005, occupational therapist Callie Antuna conducted the OT portion of the assessment.

5. On January 10, 2005, Petitioner's IEP team convened to discuss Petitioner's assessment results and initial placement in the District. District staff presented the results of the District's December 2004 assessment, and the team members discussed those results and reports from IAC and ACES. District staff recommended goals and objectives for Petitioner, discussed the continuum of placement options available, and made an offer consisting of 23 hours and 50 minutes of direct services per week. That offer consisted of: placement at the District's Palisades Elementary School (Palisades) in a

"structured autism" SDC; individual intensive behavioral instruction (IBI) for four hours per week before and after school; speech-language therapy for two 30-minute sessions per week; OT for 30 minutes per week; and extended school year (ESY) services. During the meeting, the parents asked some questions but did not state whether they agreed or disagreed with the offer; instead, they indicated that they needed time to consider the proposed program and observe the Palisades SDC. On January 20, 2005, the IEP team reconvened to consider the assessment report from the occupational therapist.

6. Petitioner turned three years old on January 22, 2005, but did not begin attending school within the District. Instead, he continued to receive one-to-one ABA services from ACES, funded by his parents. Petitioner's parents visited the proposed SDC on two occasions, once accompanied by the Palisades principal and once by Dr. Melanie Lenington, a licensed psychologist who was conducting an independent assessment of Petitioner. Although Dr. Lenington wanted to observe the SDC for 90 minutes, the observation was limited to 20 minutes pursuant to District-wide policy. Because Dr. Lenington's office is in west Los Angeles, she had to drive at least 90 minutes or more each way to participate in the observation in San Juan Capistrano, and she billed that travel time to Petitioner's parents. Although the District's policy did not limit the number of times an individual could observe a District classroom, Dr. Lenington did not return to conduct any further observations of the SDC.

7. Petitioner's parents did not inform District staff as to whether they accepted the January 2005 IEP offer. In the months of February and March 2005, District school psychologist Luisa Martinez sent letters and made phone calls to Petitioner's parents to follow up on the IEP offer and inquire whether Petitioner would enroll in the District. The District received no response until later in March 2005, when attorney Bruce Bothwell filed a request for hearing alleging that the January 2005 IEP offer denied Petitioner a FAPE.

8. In a letter dated April 7, 2005, District autism program specialist Jennifer Fant wrote to Petitioner's parents in response to the due process request. The April 7 letter reiterated what the District had offered at the January 2005 IEP meetings, and offered additional services in response to the parents' concerns raised in the due process request. The additional services consisted of a transition plan and additional IBI services. The additional IBI services included four hours per week of IBI tutoring in the home, which increased to 27 hours and 50 minutes the amount of direct services that Petitioner would receive per week.[1] The transition plan described in Ms. Fant's April 7 letter proposed to transition Petitioner from his in-home program to the school-based program over a period of four weeks, and provided for District funding of some in-home ABA services provided by ACES during that four-week period. Attached to Ms. Fant's April 7 letter was a copy of the District's notice of parent rights and an information sheet about the District's IBI program. Also attached to the letter was a brochure describing the components of the District-wide preschool and kindergarten structured autism program, called the Building Language, Academics and Social skills through Structured Teaching (BLASST-off) program.[2]

9. In May 2005, Petitioner's parents requested another IEP meeting to discuss the District's offer of placement and services, while Ms. Martinez wrote to ask the parents to attend an addendum IEP meeting to discuss ESY recommendations. On June 7, 2005, Father and the District members of the IEP team convened for an IEP meeting. During the discussion, Father asked several pointed questions about the methodology of the

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[1] The offer of additional IBI services also included one hour per week of supervision and ten hours of parent training and skills generalization in the home.

[2] The proposed SDC at Palisades is part of the BLASST-off program.

District's program, including what peer-reviewed research supported the program and whether the jigsaw drawing on the IBI information sheet indicated that the District's program was an "eclectic" program. After some discussion, District staff members objected that Father was interrogating them, while Father objected that the District employees were not answering all of his questions. Ms. Fant sought to change the topic to recommendations specific to Petitioner, including the specifics of the District's ESY offer; Father objected and stated that District staff could use the final two minutes of the meeting to talk about their topics. Finally, Ms. Fant ended the meeting and handed Father a copy of the District's "Civility Policy". District staff wrote the specific components of the ESY offer in the IEP notes, and reiterated both the regular school year and ESY offers in a follow-up letter dated June 13, 2005.

10. Petitioner continued to receive privately funded services from ACES and from speech-language pathologist Cathy Johnson.[3] By all accounts, Petitioner showed improvement over the course of receiving those services, including a decrease in problem behaviors and increase in language. In June 2005, Petitioner's parents enrolled him in a typical preschool, which he attended with a one-to-one shadow aide. After a couple of months, his parents withdrew him from the preschool because they felt that he was not learning anything.

11. In September 2005, when an opening with CARD became available, Petitioner switched providers and began receiving his program from CARD instead of ACES. Due to staffing availability and Petitioner's tolerance, initially Petitioner received only 14 hours of direct services per week in his CARD program. CARD increased that amount as staff became available and as Petitioner became more comfortable with his

[3] Ms. Johnson's non-public agency (NPA) was originally called South County Speech Pathology, but is now known as The Speech, Language and Leaning Center.

new ABA tutors; the number of hours gradually increased and, in early 2006, reached the total of 36 per week. Recent CARD progress reports and the testimony of Petitioner's CARD supervisor, Catherine Minch, established that Petitioner also made educational gains from his CARD program.

Petitioner's Areas of Deficit and Educational Needs

12. Over the course of the time period at issue, Petitioner's skills and behaviors improved from week to week, as he received educational services. Moreover, while the parties' witnesses gave markedly different recommendations regarding what type of program Petitioner required, overall the various assessments, progress reports, and witness testimony were fairly consistent in their descriptions of Petitioner's deficits and level of functioning. Petitioner's areas of need included self-help/adaptive skills, speech and language, communication, social skills, cognition, attention, and behavior. He had scattered skills, with particular strengths such as his knowledge of numbers and shapes, compared to greater difficulties with language and abstract concepts. He had severe delays in both expressive and receptive language. In December 2004, he tended to speak in single words rather than longer utterances, and had an expressive vocabulary of approximately 100 words. By July 2005, his expressive vocabulary had increased to 200 words, and he used some short phrases in addition to single words.

13. In late 2004 and early 2005, Petitioner demonstrated some self-stimulatory behaviors and frequent tantrums, although these behaviors decreased as he received educational services. In November 2004, his parents reported that he had previously demonstrated self-injurious behaviors, such as hitting his head, but that those behaviors had stopped recently. He continued to demonstrate noncompliant behaviors. Regarding social and emotional functioning, overall Petitioner was severely impaired. Nonetheless, he enjoyed social interaction and had emerging social behaviors, such as attempting to

please his mother by complying with her requests, pulling his mother's head closer and kissing her, and sometimes turning his head when his name was called.

14. Typical of many children with autism, Petitioner had a short attention span and had difficulty focusing on a task. As of November 2004, when using a picture schedule, he was able to sit for up to 45 minutes when working one-to-one with his ABA tutor on preferred activities. Additionally, he often had difficulty transitioning between tasks or locations. He exhibited little difficulty transitioning when he was in a familiar environment, such as his home, and he was guided by a familiar adult, such as his ABA tutor. In contrast, he often had ongoing tantrums when his parents brought him to new environments with unfamiliar people, unfamiliar activities, and an unfamiliar routine, such as when he went to a doctor's appointment, or to a health assessment followed by an OT assessment at a new school.

Speech-Language Therapy

15. Petitioner required speech-language therapy as a designated instruction and service (DIS). District speech-language pathologist Tracy Kerins attended Petitioner's January 10, 2005 IEP meeting, and would have been Petitioner's speech-language therapist at Palisades. Testimony from Ms. Kerins established that, in light of the totality of the District's proposed placement and services, 30 minutes of individual speech-language instruction and 30 minutes in small group per week would have addressed Petitioner's needs. Ms. Kerins' testimony was credible for several reasons, including her expertise in speech language and her prior experience working with Petitioner.

16. As noted in Factual Findings 2 and 3, Ms. Kerins conducted a speech-language assessment of Petitioner in late August 2004, and provided him with one hour per week of individual speech-language therapy from early November 2004 until mid-January 2005. Ms. Kerins' testimony that Petitioner made meaningful progress

over the course of those sessions is not in dispute and is supported by other evidence, such as Dr. Lenington's observations of Petitioner's language gains during that time period. Ms. Kerins explained that the SDC was structured to develop the students' language throughout the school day. In part because of the SDC placement, the mode of Petitioner's speech-language therapy could shift to a combination of individual and small group therapy. As also discussed during the testimony of speech-language pathologist Cathy Johnson, small group sessions offer opportunities to work on goals such as turntaking.

17. While Ms. Johnson was also knowledgeable about Petitioner's speech-language needs, her recommendation that Petitioner needed solely individual speech language instruction for more hours each week was not ultimately persuasive. There is little question that Petitioner could benefit from additional speech-language sessions, but that is not what is required for provision of a FAPE. Considering that the Petitioner has the burden of proving his claims, Ms. Johnson's testimony did not overcome the other credible evidence establishing that individual therapy for 30 minutes per week and small group therapy for 30 minutes per week was appropriate.

18. In the January 2005 IEP document, the mode identified for delivering the 60 minutes of speech-language services per week was "Individual and Group; Direct and Collaboration; Monitor and Consult." Petitioner's parents understood this to mean that Petitioner would receive his speech-language therapy in a small group setting, with the potential for individual instruction but no guarantee.

19. In the April 7, 2005 letter described in Factual Finding 8, Ms. Fant reiterated the January 2005 offer, but listed the speech-language therapy offer as "two times per week for 30 minutes, small group, on campus." In the June 7, 2005 IEP document, the mode of speech-language therapy offered is listed as "Individual and Group; Direct Instruction" for two 30-minute sessions per week. Similarly, in the District's June 13, 2005

follow-up letter wr_itten by Ms. Fant, the speech-language therapy component is described as "two times per week for 30 minutes, individual and small group, on campus."

District's Proposed SDC Placement and Individual IBI Tutoring

20. As noted above in Factual Finding 5, the District offered placement in a structured autism SDC taught by April Waldron at Palisades.[4] The SDC was designed for pre-kindergarten and kindergarten students, ages three to six, who were within the "moderate to severe" range of autism. The class consisted of seven students, three trained instructional aides, and the teacher. The SDC students had mainstreaming with general education kindergarten students on a regular basis. The SDC structure and curriculum emphasized behavior, social skills, language and communication. The SDC staff received support and assistance from a team of specialists including an occupational therapist, a speech-language pathologist, an autism program specialist, and a licensed clinical psychologist experienced in working with individuals with autism.

21. The District's January 2005 offer included individual IBI tutoring at school.[5] Ms. Waldron and trained IBI tutors would provide four hours per week before and after school in the SDC room. The Distriet's April 2005 offer added four hours of IBI tutoring in the home. The in-home IBI tutoring would similarly be provided by trained IBI tutors, but

[4] Ms. Waldron is an experienced special education teacher who has had considerable training related to autism and holds a master's degree in special education from the University of Kansas.

[5] While the District describes the entire BLASST-off program as an IBI program, the proposed "individual IBI tutoring" is essentially discrete trial training (DTT).

would be supervised by one of two District IBI supervisors. Both the proposed in-school IBI tutoring and the proposed in-home IBI tutoring included offers for supervision time and monthly student progress meetings; the offer of in-home IBI tutoring also provided for parent training and skills generalization.

22. The testimony of knowledgeable District witnesses, including Ms. Waldron, Ms. Fant, Ms. Kerins, and Dr. Paul Dores, established that the SDC placement and IBI tutoring would address Petitioner's needs and would allow him to make educational progress. The Palisades SDC utilized a small teacher-to-student ratio and ABA methods integrated into the daily instruction to provide the individual attention and intensive instruction that Petitioner required. The SDC used effective behavior intervention strategies, such as getting the child's attention, breaking down the new information into chunks, using modeling, prompting and reinforcement, and taking data to measure the effectiveness of the instruction. While the small teacher-to-student ratio and individual IBI tutoring would ensure that Petitioner received individual instruction, the group setting would offer opportunities for facilitated peer interactions; conversely, the setting would avoid the dependency on prompts and over-reliance on the one-to-one instructor that can occur when a child is in a one-to-one setting exclusively. Petitioner was at a level of functioning wherein he could transition to this type of structured, supportive SDC designed for students with moderate to severe autism. Although Petitioner's overall functioning would generally have been in the lower range among the students in the Palisades SDC, in some areas he was functioning at levels higher than many other students in the class.

23. Petitioner presented testimony from expert witnesses, in particular Dr. Ronald Leaf, that only programs using solely ABA methods are appropriate interventions for autistic preschoolers, while "eclectic" programs utilizing more than one type of instructional methodology, such as a combination of ABA and Floortime, are ineffective.

Dr. Leaf concurred with a research article's opinion that it is surprising how many prominent individuals and organizations in the autism community endorse an eclectic approach. Dr. Leaf also confirmed that he considered ACES to be an eclectic program. While Dr. Leaf is indisputably a well-recognized expert on autism, for several reasons his testimony did not establish that the District's proposed program was inappropriate for Petitioner. Dr. Leaf was not familiar with the District's program. In contrast, Dr. Dores, who designed and supervises the District's IBI program, persuasively testified that it was an ABA-based program that did not use methodologies such as Floortime.[6] Moreover, as discussed further under Legal Conclusion 5, so long as the District offers an appropriate program, methodology is a matter within the District's discretion. Furthermore, Petitioner's educational progress in his ACES program contradicts Petitioner's argument that any eclectic approach would, by definition, have been inappropriate for him.

24. Dr. Lenington and Dr. Granpeesheh each testified that the District's offer did not include enough individual instruction, that Petitioner's needs were so severe that

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[6] IBI is a methodology that utilizes ABA principles specific to autism. While Dr. Dores did not characterize the District's IBI program as eclectic, he noted that different professionals have different definitions of what constitutes an eclectic approach. For example, some professionals might consider a program to be eclectic if it included both ABA and sensory integration, while others would not. In any event, Petitioner's depiction of the program as "eclectic" rests principally upon a jigsaw drawing on the District's IBI information sheet. Testimony from Dr. Dores, Ms. Fant, and Ms. Waldron established that the BLASST-off program was designed to implement ABA methods, and that the jigsaw drawing did not represent that a variety of methodologies would be delivered in the District's program.

he could not learn in a group setting, and that a one-to-one, in-home ABA/DTT program for 35 to 40 hours per week was the only program that would have been appropriate. For several reasons, the ALJ did not ultimately find those opinions persuasive. Neither Dr. Lenington nor Dr. Granpeesheh was particularly familiar with the Palisades SDC or other components of the District's program, and thus their testimony regarding the District's program carried less weight than that of Dr. Dores, who helped design the program and continues to supervise it.[7] As noted in Factual Finding 25, the SDC's low teacher-to-student ratio ensured that Petitioner would receive significant adult attention throughout the school day, in addition to the one-to-one instruction he would receive during IBI, speech-language therapy, and OT.

25. Moreover, consistent with Factual Finding 12, while Dr. Lenington was more, familiar with Petitioner than Dr. Dores was, Dr. Lenington's reports of Petitioner's functioning were generally consistent with the District's understanding of Petitioner's functioning, as described in the District's assessment report, IEP present levels of performance, and testimony of District witnesses. For example, as noted in Factual Finding 13, Dr. Lenington's evaluation report described how, while Petitioner's social skills were severely impaired, he nevertheless enjoyed social interaction and had emerging social behaviors. Hence, the divergence in the witnesses' recommendations for Petitioner's placement appeared to hinge less upon differing understandings of

[7] As discussed further in Legal Conclusion 17, Dr. Lenington should have been permitted to observe the Palisades SDC for the full 90 minutes that she sought, instead of the 20 minute observation that was permitted. However, the additional 70 minutes of observation time likely would not have significantly affected the weight given to Dr. Lenington's testimony on this point, given Dr. Dores' far greater familiarity with the SDC.

Petitioner's needs, and more upon different philosophical beliefs about when students with autism should receive instruction in any type of group setting. The preference of Petitioner's witnesses to delay the entry of autistic children into a classroom did not establish that Petitioner needed to remain in a home program for all of his instructional hours. While the one-to-one, in-home program recommended by Drs. Lenington and Granpeesheh would have allowed Petitioner to make educational progress, such a placement was highly restrictive, contrary to the District's obligation to offer placement in the LRE that would address Petitioner's unique needs.

26. Regarding testimony that the District's offer of approximately 24, and later 28, hours per week was insufficient, those opinions were not ultimately persuasive in light of several factors, including the determinations in Factual Findings 10, 11, and 12 that Petitioner made progress in an in-home program which ranged from 15 to 25 hours per week. The additional in-home tutoring offered in April 2005 ensured greater individual instruction from which Petitioner would certainly benefit; however, consistent with Factual Findings 23 and 25, the January 2005 offer of approximately 24 hours per week was nevertheless sufficient to address Petitioner's needs.

27. Petitioner raised other arguments concerning the proposed SOC and IBI tutoring, but these claims did not succeed. For example, Petitioner contended that the IBI tutors were unqualified because the hiring qualifications were reportedly less stringent than the qualifications required for CARD tutors. Ms. Fant established in her testimony that the minimum qualifications for IBI tutors included a high school diploma or general equivalency diploma (GED) and 19 hours of training. However, many of the tutors have more extensive qualifications, including advanced degrees. Petitioner failed to support his contention with any evidence regarding the actual qualifications of the IBI tutors. In light of all circumstances, the evidence did not support Petitioner's position, and Petitioner did not meet his burden of proving his claim on this point.

Transition Plan

28. While the District's proposed program would have provided approximately the same number of direct service hours that Petitioner was receiving from ACES in January 2005, Petitioner's attendance in the SOC would have involved a new location, new people, new demands placed upon him, and a change from a one-to-one setting to a group setting. Given Petitioner's resistance to transitions, he would have had difficulty switching from his one-to-one in-home program to an SOC at a school. Accordingly, had Petitioner enrolled in the Palisades SOC, he would have needed a transition plan to facilitate the change to his new environment.[8]

29. The January 2005 IBP did not contain a formal transition plan. Instead, in the section of the January 2005 IBP entitled "Support for Transition," District staff wrote: "Team recommends family and [Petitioner] visit school and program." Ms. Fant and Ms. Martinez testified that this language meant that if the parents agreed to bring Petitioner to the SOC for a visit, the SOC staff would observe him in the classroom and determine to what extent he required transition services.[9]

30. After receiving the parents' due process filing and concluding that Petitioner would not be visiting the SDC as recommended, District staff instead

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[8] This type of transition plan should not be confused with an Individual Transition Plan (ITP), which concerns the transition of older students from school to postschool activities. (See Cal. Ed. Code § 56345.1.)

[9] Testimony from Ms. Fant and Ms. Martinez established that, while District staff believed that developing the transition plan this way was the best approach to address Petitioner's needs, the District would have developed the transition plan at the IEP meeting if the parents had so requested.

offered a formal transition plan. The transition plan described in Ms. Fant's April 7, 2005 letter proposed District funding of some ACES services for four weeks, beginning with 12 hours per week and tapering off to one hour per week in the fourth week of the plan. Similarly, the transition plan proposed gradually increasing Petitioner's attendance at Palisades, and also provided for collaboration between ACES and District staff. This transition plan offered the type of transition services, for an adequate time period, which Petitioner would have needed to facilitate the change to his new placement.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. The parties dispute whether the federal law applicable in this matter is the Individuals with Disabilities in Education Act of 1997 (IDEA), which was the applicable law until June 30, 2005, or the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), which became effective on July 1, 2005. The District's IEP offer was for the period from January 2005 to January 2006, and thus the program would have been in effect both before and after July 1, 2005.

2. Both case law and the rules of statutory construction dictate that the applicable law is the statute in place at the time the IEPs were developed. (See *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 n. 1 (citing *Adams v. State a/Oregon* (9th Cir. 1999) 195 F.3d 1141, 1148 n. 2).) There is no question that the IDEA remained effective until July 1, 2005. Petitioner does not cite any legal authority to support his contention that IEPs developed prior to the effective date of the new law nevertheless must comply with those requirements. Thus, under Petitioner's theory, from January to June 2005, a school district would be required to comply with both the law in place at the time of the IEP meeting (IDEA) and the law scheduled to go into effect on

July 1, 2005 (IDEIA). The alternative option would be that every school district nationwide would need to revise every student's IEP exactly on July 1, 2005, to comply with the new requirements effective on that date. Either result would be absurd, and there is no indication that Congress intended either result. (See 108 H.Rpt. 77 (2003); 108 S.Rpt.185 (2003).) Accordingly, the IDEA is the applicable law for the IEPs at issue in this case, and all citations to Title 20 United States Code are to sections in effect prior to July 1, 2005, unless otherwise noted.

3 Under the IDEA, children with disabilities have the right to a FAPE. (2 U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents, that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).) "Related services" or DIS means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education.(20 U.S.C. § 1401(22); Cal. Educ. Code§ 56363(a).)

4. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. *(Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley,* (1982) 458 U.S. 176, 200, 102 S.C. 3034.) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. *(Rowley,* 458 U.S. at 206-07.)

5. In the *Rowley* opinion, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural

violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. *(ML. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *WG. v. Board a/Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Cal. Ed. Code§§ 56304, 56342.5; 34 C.F.R. § 300.501(a), (c).) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting, and that does not constitute predetermination of the IEP. *(Roland M v. Concord Sch. Comm.,* 910 F.2d 983, 994 (1st Cir. 1990)); affd, 361 F.3d 80 (1st Cir. 2004).) However, when a school district predetermined the child's program and did not consider the parents' requests with an open mind, the school district denied the parents their right to participate in the IEP process. *(Deal v. Hamilton County Bd. of Education* (6th Cir.2005) 392 F.3d 840, 858.)

7. Another key aspect of the parents' right to participate in the IEP process is the school district's obligation to make a formal written offer which clearly identifies the proposed program. *(Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) Additionally, the parents' right to participate in the IEP process includes the right to have the parents' independent expert observe the proposed placement. *(Benjamin* G. *v. Special Education Hearing Office,* (2005) 131 Cal.App.4th 875, 32 Cal.Rptr.3d 366; see Cal. Ed. Code§ 56329, subd. (c).) California Education Code section 56329, subdivision (c), specifies that "If a public education agency observed the pupil in conducting its assessment ... an equivalent opportunity shall apply to... observation of an educational placement and setting, if any, proposed by the public education agency, regardless of

whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

8. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. *(Id.* at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. *(Id.* at 200.)

9. Moreover, the *Rowley* opinion established that, as long as a school district provides an appropriate education, methodology is left up to the district's discretion. *(Rowley,* 458 U.S. at 208.) Subsequent case law confirms that this holding is squarely on point in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon,* 195 F.3d at 1149; *Pitchford v. Salem-Keizer Sch. Dist.,* 155 F. Supp. 2d 1213, 1230-32 (D. Ore. 2001); *T.B. v. Warwick Sch. Comm.* (1st Cir.2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. *(T.B.,* 361 F.3d at 84 (citing *Roland M,* 910 F.2d at 992-93).) In *Adams,* 195 F.3d at 1149-1150, wherein the parents of a toddler with autism sought a one-to-one, 40-hour per week ABA/DTT program

modeled after the research of Dr. O. Ivar Lovaas, the Ninth Circuit Court of Appeal explained:

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

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

11. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. *(Gregory K.,* 811 F.2d at 1314.) If the school district's program was designed to address Petitioner's unique educational needs was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

12. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight. .. an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *(Adams,* 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Ed. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

13. In an administrative hearing, Petitioner has the burden of proving the essential elements of his claim. *(Schaffer v. Weast* (2005) 546 U.S. ____ 387].) [126 S.Ct. 528, 163 L.Ed 2d

14. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. For example, parents are not required to conform their unilateral

placement to the content of the child's IEP, need not provide a placement that is certified by the state, and need not provide a placement in the LRE. The placement still must have met the child's needs and provided educational benefit. *(Florence County Sch. Dist., Fourv. Carter(l993)* 114 S.Ct. *361;Alamo Heights independent Sch. Dist. v. State Ed. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161.)

DETERMINATION OF ISSUES

ISSUE 1: DID THE DISTRICT OFFER PETITIONER A FAPE IN THE LRE FROM JANUARY 22, 2005, THROUGH APRIL 7, 2005?

Predetermination of JEP

15. Petitioner contended that the District unlawfully predetermined the January 2005 IEP offer, and that this procedural violation denied him a FAPE. As determined in Factual Finding 5, the parents asked questions at the IEP meeting, but did not express disagreement with the offer or request any other services. Moreover, as determined in Factual Finding 8, when the District finally learned that the parents sought a different program in a one-to-one setting, staff attempted to address the parents' concerns by offering additional hours of one-to-one instruction. There was no evidence that the District staff had predetermined the IEP or were unwilling to consider input from theparents, and Petitioner's contentions to the contrary were unsupported. Thus, no procedural violation occurred.

Length of Observation by Parents' Independent Evaluator

16. Petitioner contended that the District's limitation of the length of Dr. Lenington's observation to 20 minutes was a procedural violation which significantly interfered with the parents' right to participate in the IEP process. As determined in Factual Finding 6, the District restricted Dr. Lenington's observation of the SDC to 20

minutes, pursuant to District-wide policy applied to all observations of District classrooms. In theory, Dr. Lenington could have returned for additional observations, but to do so would have required her to make additional round trips between west Los Angeles and San Juan Capistrano, with all travel time billed to Petitioner's parents.

17. While potentially an independent evaluator may seek to observe for an unreasonably long time, that was not the case here, where Dr. Lenington would otherwise have observed the Palisades SDC for only 90 minutes. California Education Code section 56329, subdivision (c), does not specify how long the independent evaluator may observe the proposed placement, only that it must be an "equivalent opportunity" to the public education agency's observation of the student when conducting the agency's assessment. The Distri-ct' s initial assessment included observation of Petitioner in his in-home program, and that observation was not limited to 20 minutes.[10] Hence, while the District gave Petitioner's evaluator an opportunity to observe the proposed placement, that opportunity was not equivalent to the District assessors' opportunity to observe Petitioner in his in-home program. In light of all circumstances, the limitation of Dr. Lenington's observation to 20 minutes violated section 56329, subdivision (c).

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[10] Subsequent to Dr. Lenington's observation of the SDC, the District filed a motion with OAH to order Petitioner's parents to permit the District's expert witness to observe Petitioner in his in-home placement. The District opposed Petitioner's request to limit the District's observation to 20 minutes, and argued that "Education Code [section] 56329(d) does not set any time limits on the District's ability to observe Student in his private placement." OAH concurred, and ordered Petitioner to permit an observation for three consecutive school hours.

18. The next question is whether this procedural violation constitutes a denial of FAPE. The purposes behind section 56329, subdivision (c), include allowing the parents to obtain expert opinion regarding the appropriateness of the proposed placement, and allowing the parents to participate in a due process hearing with an expert witness prepared to provide a knowledgeable opinion about the proposed placement. (See *Benjamin* G., 131 \Cal.App.4th at 881, 884.) Here, Dr. Lenington indicated in her testimony that, while she would have preferred to observe for the full 90 minutes, she was still able to develop opinions about the SDC, advise the parents regarding the SDC, and give informed testimony at the hearing regarding the SDC. Additionally, in the present case, given Dr. Dores' extensive knowledge about the SDC, an additional 70 minutes of Dr. Lenington's observation likely would not have significantly affected the weight given to her testimony regarding the appropriateness of the SDC. Hence, given the particular facts of this case, the procedural violation did not seriously interfere with the parents' right to participate in the IEP process, and thus did not rise to the level of a procedural denial of FAPE.

Speech-Language Therapy

19. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group per week. However, as determined in Factual Finding 18, the January 2005 IEP offered two 30 minutes sessions to be provided in "Individual and Group; Direct and Collaboration; Monitor and Consult." As also determined in Factual Finding 18, Petitioner's parents did not understand this as an offer of 30 minutes of individual speech-language therapy each week. The parents' interpretation of the January 2005 IEP was not unreasonable; given the District's obligati9n to make a clear written offer of placement and services, the January 2005 IEP did not clearly inform the parents that

the District was offering one of the weekly speech-language therapy sessions on an individual basis. To this extent, the failure to clearly offer 30 minutes of weekly individual speech-language therapy denied Petitioner a FAPE.

SDC Placement and Individual IBI Services

20. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably calculated to provide him with educational benefit. In light of these determinations, the January 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

Transition Plan

21. As determined in Factual Finding 28, Petitioner needed a transition plan to facilitate his switch from his in-home program to attendance at a school. As determined in Factual Finding 29, District staff did not offer a transition plan in January 2005, and instead intended to observe Petitioner in the SDC to determine to what extent he needed transition services. While developing a transition plan separately from a placement offer does not necessarily violate the District's obligation to make a clear written offer, one key problem in the present case is that the IEP document did not reflect the District staff's intention to develop a transition plan if needed. Moreover, it is dubious whether the District would have offered a transition plan after Petitioner's visit to the SDC occurred. Testimony from school psychologist Luisa Martinez that "one hundred percent" of the children she placed transitioned to an SDC without any difficulty, casts doubt on whether the District would have offered the transition services that Petitioner needed. Accordingly, the lack of a transition plan failed to offer Petitioner a program designed to address his unique needs, and thus constituted a substantive denial of FAPE for this time period.

ISSUE 2: DID THE DISTRICT OFFER PETITIONER A FAPE IN THE LRE FROM APRIL 7, 2005, TO JUNE 7, 2005

Speech-Language Therapy

22. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group per week. However, as determined in Factual Finding 19, the April 7, 2005 letter listed the speech-language therapy offer as "two times per week for 30 minutes, small group, on campus." Thus, because the offer did not include 30 minutes of weekly individual speech-language therapy, the offer was not designed to address Petitioner's unique needs and, therefore, denied him a FAPE to that extent.

SDC Placement and Individual IBI Services

23. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably calculated to provide him with educational benefit. In light of these determinations, the April 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

Transition Plan

24. Pursuant to the determinations in Factual Finding 30, the transition plan offered in the April 7, 2005 letter was appropriate and constituted a substantive offer of PAPE.

ISSUE 3: DID THE DISTRICT OFFER PETITIONER A FAPE IN THE LRE FROM JUNE 7, 2005, TO THE PRESENT

Parent Participation In The June 7, 2005 IEP Meeting

25. Petitioner contended that the District denied his parent's right to participate in the IEP process when, during the June 7, 2005 IEP meeting, District staff did not answer all of Father's questions about the methodology and research supporting the District's BLASST off program. Pursuant to the determinations in Factual Finding 9, District staff attempted to ensure that Father was an equal participant in the discussion at the meeting. It is disingenuous for Petitioner to claim that the District staffs failure to field all of Father's numerous questions on the complex topic of autism research denied the parent's right to participate. The breakdown in communication between the parent and District staff appears to have been due to various factors, including tension related to the due process filing. In any event, the District was not obligated to let Father decide the entire agenda of the IEP meeting, to the exclusion of other pertinent, noticed topics such the ESY placement. Considering all of the circumstances, the ALJ finds that no procedural violation occurred.

Speech-Language Therapy

26. As determined in Factual Finding 15, Petitioner needed 30 minutes of individual speech-language instruction and 30 minutes in small group per week. As determined in Factual Finding 19, the June 13, 2005 follow-up letter identified the mode of speech-language therapy as "two times per week for 30 minutes, individual and small group, on campus." While under other circumstances this language could convey an offer of 30 minutes of individual therapy and 30 minutes of group therapy, the meaning is less clear given the legitimate confusion regarding the January 2005 offer. Pursuant to Factual Finding 18, District staff at the January 2005 IEP conveyed to Petitioner's parents that the offer included the possibility of individual

speech-language therapy, but no guarantee. Given this history, had the District sought to offer 30 minutes of individual speech-language therapy, that offer needed to be conveyed more specifically, to distinguish from the similar language of the prior offer that did not necessarily promise a weekly individual session. As such, the June 2005 offer did not clearly offer 30 minutes of individual speech-language therapy, and denied Petitioner a FAPE to that extent.

SDC Placement and Individual IBI Services

27. Pursuant to Factual Findings 20-27, the SDC placement and IBI services were designed to address Petitioner's unique needs and were reasonably calculated to provide him with educational benefit. In light of these determinations, the June 2005 offer of SDC placement and IBI services constituted a substantive offer of FAPE.

ISSUE 4: IS PETITIONER ENTITLED TO REIMBURSEMENT FOR PRIVATELY FUNDED SERVICES AND PROSPECTIVE PLACEMENT WITH HIS CURRENT PROVIDERS, CARD AND THE SPEECH, LANGUAGE AND LEARNING CENTER?

28. As determined in Legal Conclusion 21, the District denied Petitioner a FAPE from January 22, 2005, through April 7, 2005, due to the District's failure to offer a transition plan. While the District had otherwise offered an appropriate placement for this period, Petitioner would not have been able to make meaningful educational benefit in the placement without first successfully transitioning into the placement. Therefore, reimbursement of Petitioner's in-home program during this period is warranted. Consistent with Factual Finding 10, the in-home ACES program was designed to meet Petitioner's unique needs and reasonably calculated to allow him to receive educational benefit, and the District did not dispute this. Accordingly, the District shall reimburse the parents in the amount of $12,306.25, which was the cost of the ACES program for that period.

29. As determined in Legal Conclusions 19, 22, and 26, the District denied Petitioner a FAPE for the entire period at issue by failing to offer at least 30 minutes of individual speech-language therapy per week. Pursuant to Factual Finding 10, Petitioner's private speech-language therapy was designed to meet his unique needs and reasonably calculated to allow him to receive educational benefit, and the District did not dispute this. Because Petitioner required a total of one hour of speech-language therapy per week, and given his difficulties with transitions and unfamiliar people, it would likely not have been feasible for the parents to enroll Petitioner in small group speech-language therapy at school, and then supplement this with 30 minutes of individual speech-language therapy from a private provider. Therefore, the District shall reimburse the parents for a total of one hour per week of individual speech-language therapy provided from January 22, 2005 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision. While Father testified regarding the total costs of the private speech-language therapy, the evidence does not establish the costs to the parents for one hour per week of the therapy. Therefore, the parents shall submit proof of such costs to the District.

ORDER

30. The District shall reimburse Petitioner's parents in the amount of $12,306.25, for the in-home ACES program provided from January 22, 2005, to April 7, 2005.

31. Upon receipt of proof, the District shall reimburse Petitioner's parents for one hour of speech-language therapy per week, provided during the period from January 22 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision.

32. All of Petitioner's other claims for relief are denied.

PREVAILING PARTY

33. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

Issue 1: Petitioner prevailed only regarding the transition plan and the District's failure to clearly offer 30 minutes of weekly individual speech-language therapy. The District prevailed all of the remaining components of this issue.

Issue 2: Petitioner prevailed only regarding the failure to offer 30 minutes of weekly individual speech-language therapy. The District prevailed on all of the remaining components of this issue.

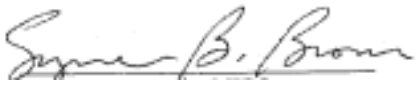
Issue 3: Petitioner prevailed only regarding the failure to clearly offer 30 minutes of weekly individual speech-language therapy. The District prevailed on all of the remaining components of this issue.

Issue 4: Petitioner prevailed only to the extent that he obtained reimbursement for his in-home behavioral program from January 22, 2005, through April 7, 2005, and also obtained reimbursement for one hour per week of individual speech-language therapy from January 22 to July 22, 2005, and from the start of the 2005-2006 school year to the date of this Decision The District prevailed on the all of the remaining components of this issue.

RIGHT TO APPEAL THIS DECISION

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

Dated: March 28, 2006



SUZANNE B. ROWN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division