

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

In the Matter of:

STUDENT,

Petitioner,

v.

HACIENDA LA PUENTE UNIFIED
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007050041

DECISION

Darrell Lepkowsky, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on June 25, 26, and 27, 2007, at the offices of the Hacienda La Puente Unified School District in La Puente, California.

Attorney Bruce Bothwell represented petitioner (Student) and his parents. Student's mother was present throughout the hearing.

Attorney Jonathan Read, of Fagen, Friedman & Fullfrost, LLP, represented respondent, Hacienda La Puente Unified School District (District). Beth Nishida, the District's Director of Special Education, was present throughout the hearing.

Student filed a request for due process on April 30, 2007. Neither Student nor the

District requested a continuance in the matter. At the due process hearing, the ALJ received sworn oral testimony and documentary evidence. At the conclusion of the hearing, the parties agreed that the record would remain open in order for the parties to submit post-hearing closing briefs. Both parties timely filed their briefs on July 9, 2007. The ALJ closed the record and deemed the matter submitted as of that date. The parties stipulated to tolling the time in which a decision was due until July 23, 2007.

ISSUES¹

For the 2007-2008 school year, did the District fail to offer Student a free appropriate public education (FAPE) in its IEP offer dated March 22, 2007, by reason of the following:

(A) Failing to have Student's current private school preschool teacher at the IEP

¹ At the prehearing conference, Student withdrew any issues relating to occupational therapy and speech and language services that he had raised in his complaint. During the hearing, Student withdrew his issue relating to an independent educational evaluation. Although Student originally raised the issue, in his complaint and at the prehearing conference, of the District's alleged failure to assess Student in all areas of suspected disability, Student did not present any evidence addressing this issue at hearing and Student does not address it in his closing brief. In his closing brief, Student withdrew any issues related to least restrictive environment or placement in a non-certified private school. These issues are therefore not addressed in this decision. The issues have been restated as presented in Student's closing brief and as consistent with the evidence presented at hearing.

- meetings;
- (B) Predetermining Student's placement;
 - (C) Failing to inform Student's parents of the changed location of the Headstart inclusive program offered by the District;
 - (D) Failing to provide Student with a trained one-on-one aide;
 - (E) Failing to provide a program that includes a sufficient amount of individual instruction and supervision by individuals trained and experienced in working with autistic children, which is scientifically based and supported by peer-reviewed research;
 - (F) Failing to develop an appropriate plan to transition Student from his current educational program to the program offered by the District.

REMEDIES SOUGHT BY STUDENT

Student seeks District funding of 40 hours per week of direct applied behavior analysis (ABA) therapy, with related supervision and clinic meeting attendance, to be provided by Stepping Stones Center for Autistic Spectrum Disorders (Stepping Stones), Student's current ABA provider. Student requests that the ABA program be implemented at Student's home, and in the District's Headstart program through a one-to-one aide provided by Stepping Stones, who should also determine the apportionment of ABA hours between school and home. Student also seeks a determination that Student has prevailed on each of the issues heard and decided.

CONTENTIONS OF THE PARTIES

The overlying issues in this case concern the prospective placement for Student for

the 2007-2008 school year and how best to prepare Student for participation in a general education kindergarten class for the 2008-2009 school year. The parties do not dispute that Student should be placed in a preschool with at least some typically developing peers. They do dispute, however, whether Student requires additional supports to be able to access his education in that type of classroom.

Student initially contends that the District committed procedural violations of the IDEA during the IEP process by failing to have his private preschool teacher at the IEP meeting, by predetermining his placement in the Headstart class, and by failing to inform his parents of the correct location of the Headstart class. Student further contends that the IEP offer is substantively defective because it fails to include a 40-hour per week ABA program, which he needs in order to be successful in the District's Headstart class. Student contends that the 40-hour program should be apportioned between in-home ABA therapy and in the Headstart class through the provision of a one-on-one aide from Stepping Stones. Student contends that the program offered by the District in the IEP dated March 22, 2007, failed to offer him a FAPE because it does not provide for a one-to-one aide and fails to provide an ABA program that is scientifically based and supported by peer-reviewed research. Student further contends that District personnel are not trained to provide the ABA therapy to him. He also contends that the District's IEP offer is insufficient because it does not contain a plan to transition him from his present educational program to the Headstart class proposed by the District.

The District contends that it did not commit any procedural violations of the IDEA. It further contends that the educational program offered to Student in the March 22, 2007 IEP will provide Student with educational benefit and permit him to progress in the curriculum. The District contends that the teachers and aides in the Headstart class are

capable of addressing all of Student's educational needs. The District further contends that Student does not require 40 hours a week of ABA therapy and does not require a one-on-one aide for more than the first month of school because the Headstart classroom has a sufficient number of teachers and aides to address all of Student's individual needs. Finally, the District contends that it did offer transition services to Student albeit not specifically labeled as such in his IEP. The District therefore contends that the program it offered provides a FAPE to Student.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student was born on March 13, 2003, and is currently four years and four months old. Student lives with his Parents within the boundaries of the District. Student was previously found eligible for special education services on the basis of "autistic like behaviors." Student is presently enrolled in a private church-based general education preschool called Shepherd of the Valley. Student also receives 30 hours a week of ABA therapy from Stepping Stones, a non-public agency (NPA).² He began receiving ABA therapy from Stepping Stones in October 2005. His present ABA program consists of approximately 20 hours a week of in-home therapy and 10 hours a week of one-on-one aide services, nine hours of which are at his private preschool and one hour of which is at an extracurricular program.

2. Student was first determined to have developmental delays when he was two

² Funding for the 30-hour a week ABA program is presently divided between the District and the county regional center.

years old. He was thereafter diagnosed with autism, displaying deficits in both receptive language and communication skills. The assessor recommended 25 hours a week of in-home therapy based on discrete trial training (DTT). Dr. Robin Morris, a child psychologist, later assessed Student. Dr. Morris confirmed the autism diagnosis and confirmed the recommendation for intensive in-home therapy, although she recommended a 40-hour a week ABA program. Thereafter, Student began receiving in-home ABA services as described above. He has never received the 40-hour per week program recommended by Dr. Morris.

3. Student was later referred to the District, which conducted its own assessments of Student. His initial IEP was held on March 2, 2006. At that time, the District offered Student a placement in a preschool special day class (SDC) for 20 hours a week, along with certain related services and ten hours per week of DTT/modified ABA services. Student's parents declined the offer and initiated a due process hearing. The parties eventually settled the case, resolving all issues between them through August 31, 2007. The settlement is not at issue in this case.

4. The District re-assessed Student in March 2007. The assessments included, in pertinent part, a multidisciplinary report by school psychologist Yael Edelstein and program observations by Dr. Pegeen Cronin from the University of California at Los Angeles (UCLA). Additionally, Regina Chadwick, who is a District program specialist and a coordinator of the District's early intervention program for children with autism, prepared a behavioral and educational report. Student's parents also obtained a private re-assessment from Dr. Morris.

5. The parties do not dispute the assessment results. Student was determined to have made significant progress in the last year and a half. He improved in his ability to

comply, focus, and be attentive. His ability to comment and to respond to questions increased considerably. Student's cognitive abilities were strong. However, both his functional language skills and Student's ability to interact socially remained significantly delayed.

PROCEDURAL VIOLATIONS THAT MAY CONSTITUTE A DENIAL OF FAPE

6. Student claims that the District committed specific procedural violations at the March 22, 2007 IEP meeting and during the IEP process, which prevented him from receiving a FAPE. However, not every procedural violation constitutes a denial of FAPE. Procedural flaws that result in the loss of educational opportunity, seriously infringe upon the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits will constitute a substantive denial of FAPE.

Failure to Include Student's Private Preschool Teacher as a Necessary Team Member

7. Student contends that failure to include Student's private preschool teacher at the March 22, 2007 IEP team meeting denied him a FAPE because it interfered with his parents' ability to participate in the IEP process and denied him educational benefits. However, a school district is not required to invite a student's present private general education teacher to the IEP meeting. The only requirement is that one regular education teacher of the student be present at the meeting. Therefore, as long as a general education teacher who is, or may be, responsible for implementing the student's IEP, is present, the district has met its legal responsibility.

8. Student presently attends Shepherd of the Valley preschool, a church-affiliated school that provides general education classes to its students. Although Maria

Leidelmeijer, Student's present private general education teacher, did not attend the IEP meeting on March 22, 2007, Kathy Jarvey, the general education teacher who presently teaches the Headstart inclusive class, was present at the meeting. There was no legal requirement that the District assure that Student's present private general education teacher attend.

9. Additionally, the ALJ notes that the District did make sufficient attempts to include Ms. Leidelmeijer at the IEP meeting. The District invited her to attend the meeting. The notice of IEP meeting sent to Student's parents indicates that the District was inviting her as a participant. Yael Edelstein, the District psychologist who assessed Student, called Shepherd of the Valley preschool to reiterate the invitation and personally stress the need for the preschool teacher to attend the meeting. Student's mother also left an urgent message with the preschool teacher urging her to attend. However, despite the requests from both the District and Student's mother, no one from Shepherd of the Valley chose to attend the IEP meeting.

10. Shepherd of the Valley is a private church-affiliated school. There is no evidence that the District has ever contracted with it for services, or that the District has any control over its operations or over its personnel. Shepherd of the Valley was under no obligation to attend the IEP meeting and the District had no authority to compel the attendance of any of Shepherd of the Valley's employees. Therefore, even if the District was under an obligation to invite the private school teacher to the IEP meeting, it met that obligation by its efforts in attempting to secure her presence.³ The failure of the private

³ Additionally, the multidisciplinary assessment conducted by the District included a teacher evaluation prepared by Ms. Leidelmeijer. Her evaluation was incorporated into the assessment and reviewed at the IEP team meeting. The District therefore made significant

preschool teacher to attend the IEP meeting, therefore did not amount to a procedural violation of the IDEA and did not constitute a denial of FAPE to Student by the District.

Predetermination of Placement

11. A school district may commit a procedural violation of the IDEA if it comes to an IEP meeting without an open mind and several options to offer for discussion with all team members. A district fulfills its obligation in this regard if it does suggest different potential placements, and discusses and considers any suggestions and/or concerns a parent has concerning the child's placement.

12. A school district is also required to make a formal written offer that clearly identifies its proposed program. However, it is proper for district IEP team members to discuss among themselves the parameters of programs available to a student and to write a draft of a program they may want to discuss with a student's parents. It is also proper for a district to invite to the IEP meeting educators who are part of a potential program or placement that the district wishes the IEP team to consider. Furthermore, parents do not have a right to their choice of service providers, as long as the district's choice of providers offers a FAPE to the student.

13. Student contends that the District had already determined to place Student in its inclusive Headstart class before it participated in the IEP meeting on March 22, 2007, and therefore denied his parents an opportunity to participate in the IEP process, resulting in a denial of FAPE to him. Student bases his assertion on the fact that District witnesses acknowledged that Student is the only child in the District presently receiving services from a NPA. Further, the District witnesses acknowledged that there are no other preschool

efforts to assure that Ms. Leidelmeiher's input was received and considered.

autistic children in the District who are receiving in-home ABA services. From these facts, Student argues that the District has a policy against providing these services and, therefore, predetermined that Student should be placed at a District preschool without the provision of in-home ABA therapy provided by a NPA. The District contends that it did not predetermine Student's placement before the IEP meeting.

14. The IEP team held Student's annual IEP meeting on March 22, 2007. Among those in attendance were a general education teacher, a special education teacher, Sharon Venezia, a consultant from Stepping Stones, various District representatives, and Student's mother. The team reviewed Student's present levels of performance and developed goals for him. Neither is at issue in the instant proceedings. After reviewing assessments, including reports from Student's private school teacher, and hearing comments from the team members, including Student's mother and Ms. Venezia, the District proposed a placement with attendant-related services for Student. The placement offered by the District consisted of the inclusion Headstart preschool class at Kwis Elementary School with three and a half hours a day in general education and one hour a day in special education, occupational therapy and consultation, speech and language therapy, and five hours a week of DTT at the school site, one hour per day.

15. Student offers no evidence that the District has a policy of refusing to consider non-public agency placement or in-home ABA services for its students, other than the fact that Student is the only child presently receiving those services. No District witness was asked, nor did any District witness state, that such a policy existed. Nor is there any evidence that the District refused to consider in-home ABA therapy for other children. The fact that Student is presently receiving those services, partially funded by the District, indicates that the District has considered and agreed to provide them in the past. Without

more evidence than the fact that Student is presently the only child receiving in-home ABA services from a NPA provider, the ALJ cannot find that a predetermined policy against providing these services exists in the District.

16. Student also asserts that the District had predetermined his placement because several of the District employees met prior to the IEP meeting without one of Student's parents in attendance. However, the evidence does not support Student's contention that these meetings resulted in a predetermination of placement for Student. First, not all District IEP team members attended the meetings. Second, the purpose of the meetings was to discuss the multidisciplinary assessment, which District employees had administered to Student. Third, the evidence indicates that District team members did not all initially have the same recommendation for placement and that a District consensus was not developed until the end of the IEP team meeting on March 22, 2007.

17. Dr. Cronin, the District's consultant, originally recommended that Student's placement be in a SDC for autistic children that would address Student's social delays. However, by the end of the IEP meeting, based upon a review of the assessments, input from the team, including Student's mother, and comments by Student's consultant from Stepping Stones, Dr. Cronin changed her recommendation to that of the inclusive Headstart class. Yael Edelstein, the District school psychologist who administered a psycho-educational assessment to Student, also initially believed that a SDC placement was appropriate for Student. She too changed her mind at the IEP meeting after reviewing and discussing the assessments and observations of Student. District program specialist Regina Chadwick also initially believed that Student required placement in a SDC. However, by the end of the IEP meeting she too was persuaded by the results of Student's assessments and observations of him by other team members and IEP meeting attendees that Student

should be placed in the less restrictive environment of the Headstart inclusive class. Additionally, Ms. Chadwick initially believed that Student required a one-on-one aide in the classroom. During the course of the IEP meeting, she changed her recommendation, believing that a review of all factors indicated Student did not require the aide.

18. Rather than support Student's position that the District had predetermined a placement for him, the evidence demonstrates that each District team member had his or her own beliefs about what might constitute a proper placement for Student, each considered all factors presented at the IEP meeting, including assessments and observations of Student, and input from parent, staff and consultants, and each was open to considering other recommendations. The IEP team considered and noted the input of Student's mother and Student's consultant. The IEP offer was developed after due consideration, taking into account Student's individual needs. There is no convincing evidence that the District predetermined a placement for Student or was unwilling to consider any suggestions that Student's mother may have had. No procedural violation occurred.

Failure to Identify the Proper Location of the Headstart Classroom

19. Student contends that District failed to inform his parents of the changed location of the Headstart classroom, resulting in a denial to them of their right to participate in the IEP process. The District contends that it informed Student's parents that the location of the class was being changed as soon as it was aware of the fact. The District further contends that a change in location of services is not the same as a change in placement; therefore, the District did not commit a procedural violation by changing the class location after it made the offer of placement and services to Student.

20. A school district is required to make a formal written offer of placement and

services to a student. However, the exact location or exact classroom in which services are to be provided need not be specified in the IEP document or to parents. Rather, the focus of the IDEA and the case law is in assuring that the specific educational program and related services a district is offering to a student are identified for the student and his or her parents so that they can adequately assess the offer.

21. The District originally placed the Headstart inclusive class at Kwis Elementary School. At the time of the IEP team meeting on March 22, 2007, the program was still being offered at Kwis. Subsequent to this meeting, District special education personnel were notified that the location of the classroom was going to be changed to Glenelder Elementary School for the 2007-2008 school year. Immediately thereafter, District staff notified Student's mother of the change in location and arranged an additional IEP team meeting with Student's mother to discuss it. Student's mother chose to cancel the meeting and agreed to the change as part of the IEP without the need to convene an IEP team meeting. Pursuant to Student's request, the District prepared an addendum IEP to memorialize the change in classroom location.

22. Student presented no evidence that any classroom at Glenelder Elementary School would be inappropriate for the Headstart class or for Student, or that the District has a custom or policy of placing students in inappropriately situated classrooms. Further, the District persuasively argues that the location of classes and services is at its discretion, citing to the United States Department of Education's (DOE) comments to the new federal regulations. There, the DOE states that placement refers to the provision of special education and related services rather than to a specific location of a classroom or to a specific school.

23. There is no dispute that the IEP of March 22, 2007, offered a specific

placement for Student in the District's Headstart inclusive program, with a specified number of DTT hours and specified related services. The District therefore met its obligation to make a specific written offer of placement and services to Student. The District did not commit a procedural violation of the IDEA when it changed the location of the Headstart classroom after the IEP meeting.

ADEQUACY OF THE DISTRICT'S OFFER OF PLACEMENT AND SERVICES

24. Student alleges that the District failed to offer him a FAPE because its placement offer failed to provide Student with a one-on-one aide, failed to afford Student sufficient individual instruction provided by properly trained personnel, failed to provide an educational program that was scientifically based and supported by peer-reviewed research, and failed to provide Student with an adequate transition plan. The District asserts that the program it offered Student will provide him a FAPE.

25. A school district provides a FAPE to a student if its program or placement was designed to address the student's unique educational needs and was reasonably calculated to provide some educational benefit in the least restrictive environment. A school district is also required to provide a student with special needs a program, including support services, designed to address the child's unique needs. If the school district's program met the substantive factors, then it provided a FAPE, even if the student's parents preferred another program and even if his or her parents' preferred program would have resulted in greater educational benefit to the student than the program offered by the district. The district's program must provide some educational benefit; it need not maximize the student's potential.⁴

⁴ Contrast this standard with the applicable standard under California's Lanterman

Student's Unique Needs

26. Student's weaknesses continue to be in socialization, rather than in the area of cognition. He continues to demonstrate traits typically associated with autism. Student often does not smile when engaging in activities and needs an adult to focus his attention, as he will move away from an activity once an adult also leaves. He has difficulty remaining seated for long and often will stay in constant motion. He will often verbalize and vocalize inappropriately. Student also has a tendency to perseverate on a single toy or activity. He sometimes requires many repetitions of his name before responding to it. Student requires prompting and hand-over-hand assistance from his aide in order to engage in many school activities. He also often requires prompts from his aide in order to interact with his peers. Student has such difficulty transitioning between activities that the IEP wrote a specific goal to address the difficulty.

Need for One-on-One Aide Support

27. Although Student does not now dispute that placement in the District's Headstart inclusion class is appropriate to meet his educational needs, he asserts that he can only make progress in that class with the assistance of a one-on-one aide, which has not been offered by the District. The District contends that once it determined that

Developmental Disabilities Services Act (Welf. & Inst. Code, § 4501 et seq.) which states that "It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community." (Welf. & Inst. Code, § 4640.7.)

Student's mother felt that Student required the one-on-one aide, it clarified its IEP offer of March 22, 2007, by subsequent correspondence, by proposing to provide a one-on-one aide during at least the first month of the 2007-2008 school year. Student responds that the District did not offer the aide in the IEP document and that, in any case, he requires an aide for more than a month.

Since the District has stated that it is ready to provide a one-on-one aide for Student for the first month of the school year, the core dispute is whether one month will address Student's needs.

28. Student has had a one-on-one aide while attending his private preschool at Shepherd of the Valley. The aide is with him during the nine hours he now attends the preschool as well as for an hour of extracurricular activities. Stepping Stones employs the one-on-one aide and the hours the aide is with Student are part of the 30 hours a week of ABA therapy Stepping Stones provides to Student.

29. A review of the assessments administered to Student, and the observations conducted of him, lead to the conclusion, as discussed more fully below, that Student presently requires a one-on-one aide. As will also be discussed below, the provision of an aide for only a month does not fully address Student's unique needs and does not take into consideration the necessity for gradually weaning Student of his possible dependence on the aide.

30. Yael Edelstein has been employed by the District as a school psychologist for 30 years. She is a licensed educational psychologist who received her Bachelor of Arts degree in psychology from Tel Aviv University, with minors in education and sociology. Ms. Edelstein received a master's degree in school psychology from California State University, Northridge. She has been involved in coordinating and conducting multidisciplinary

assessments for the District for many years, as well as in the District's early intervention program, its child find program, and its early start program. At hearing, Ms. Edelstein testified that she concurred with the conclusion of the IEP team that Student did not require a one-on-one aide. However, a review of the results of assessments Ms. Edelstein administered to Student, as well as a review of her observations of Student, does not support that conclusion.

31. Ms. Edelstein conducted a psycho-educational assessment of Student in February 2007. The assessment included standardized tests as well as observation of Student in Ms. Edelstein's office and at Student's private preschool. Student's results of his cognitive ability (using the Play-Based Assessment) showed Student to have non-verbal abilities in the average to high-average range. His test scores for visual motor development, based upon administration of the Beery Developmental Test of Visual-Motor Integration and the Developmental Stepping Stones, indicated that Student has average visual-motor skills. However, the results of the Vineland Adaptive Behavior Scales test (Vineland), which Ms. Edelstein administered to Student, indicated that Student's adaptive skills were in the range of mild delay. Particularly low were Student's scores in the subtests for daily living skills and socialization, where Student, then one month shy of his fourth birthday, only scored at age equivalent one year, eleven months and one year, one month, respectively.

32. The Vineland measures daily functioning, independence, and social responsibility. It measures what a student is actually doing or accomplishing, not what his or her capabilities are. Student, like many other autistic children, demonstrates cognitive strength and strength in the motor skills domain, but weakness in socialization. Student has made significant progress over the year in his communication skills but not so in his

daily living skills.

33. Ms. Edelstein's classroom observation of Student confirmed that he continues to have deficits and exhibit autistic-like traits in that setting. Student continues to ignore questions asked of him and to mumble responses. He will often not participate in play activities unless physically assisted by his aide. He still requires prompts and hand-over-hand assistance from his aide in order to join in many activities with other children at school and does not remain focused on an activity or task. Student also continues to require sensory input and engages in behaviors such as smelling paint and touching the hair of other children in his class. Transitioning from one activity to another for Student also often requires a prompt from his aide.

34. As noted by Ms. Edelstein, Student continues to demonstrate delays in communication and social interaction and continues to engage in repetitive activities and stereotyped movements. He demonstrates diminished resistance to control and unusual responses to sensory experiences. As stated by Ms. Edelstein, Student's educational needs require provision of an educational environment that will enable him to develop social, adaptive, and readiness skills.

35. The District also contracted with Dr. Pegeen Cronin to conduct an observation of Student. Dr. Cronin received her doctorate in clinical psychology and philosophy from the Pacific Graduate School of Psychology. She is presently the Clinical Director for the Autism Evaluation Clinic at the University of California, Los Angeles. She has held that post for 10 years. Her specialization is autistic disorders. The clinic, which she directs, provides assessments and consultation for individuals on, or perceived to be on, the autism spectrum. Dr. Cronin has published, alone or with other colleagues, various articles concerning the assessment, diagnosis, and treatment of autism disorders.

36. Although Dr. Cronin concurred with the District IEP team that Student does not require a one-on-one aide, her conclusion is not supported by her observations of Student or her testimony at hearing.

37. Dr. Cronin observed Student at his private preschool on February 13, 2007. Her observations of Student are similar to those of Ms. Edelstein and confirm that Student still requires a significant amount of prompting in order to participate in school activities. Student often requires hand-over-hand assistance in order to engage in some play activities as well as in activities in the classroom. Dr. Cronin confirmed Ms. Edelstein's observations that Student often does not demonstrate joint attention or enjoyment in many activities. He continues to need prompting to respond to overtures from his peers. He continues to demonstrate a lack of interest in his peers and continues to prefer self-directed play, often perseverating on toy cars or trains, even when prompted by his aide to join the play of other children. Although Student has made considerable gains in the last year in speech and language and cognition, he continues to suffer deficits in his ability to pay attention, to focus, to stay on task, to socialize and to engage independently in activities. He continues to require significant prompting and redirection. Student continues to present as a primarily non-verbal child who does not relate to others or his surroundings, and who functions much lower than assessments and observations of him would suggest. Student's persistent pursuit of his restricted interests, his inattention, and his disregard for his peers and adults heightens his symptoms of autism.

38. Regina Chadwick, a District program specialist and its coordinator for Early Intervention, conducted a behavioral and educational assessment of Student on February 2, 2007. Ms. Chadwick has a master's degree in Special Education. She has worked with special education children, emphasis on children on the autism spectrum, for over 10 years.

Her testimony was particularly candid and forthright as she had no hesitancy in acknowledging the gains Student has made since he began receiving intensive ABA therapy. Ms. Chadwick administered the Psychoeducational Profile-Revised (PEP-R) to Student. The assessment has a behavioral section and a developmental scale. The behavioral section looks at the student's behavior in relation to skills in relating, materials, sensory issues, and language. The skill levels are then assigned a rating of appropriate, mild or severe. The developmental scale addresses a student's ability to perform specific tasks in the areas of imitation, perception, fine motor, gross motor, eye-hand integration, cognitive performance (in reception skills), and cognitive verbal (in expressive skills). The student's skills are assessed as passing, emerging, or failing (i.e. not ready). The purpose of the PEP-R is to provide appropriate programming suggestions for the student.

39. Ms. Chadwick found that Student's overall developmental score was in the 43 to 47 month range (Student was aged 47 months at the time of the assessment). However, she also found that, although Student should be placed in an inclusive SDC class, the support of an aide would be beneficial to him to assist with facilitation of his social interaction with peers and adults.

40. The evidence of the District's own staff therefore demonstrates that Student is unable to navigate a classroom, access his education, and interact with his peers without significant assistance and prompting from an aide.⁵ Although Dr. Cronin is confident and optimistic that Student will be successful without an aide, there is no empirical evidence to

⁵ Student also called three of his own expert witnesses, Sharon Venezia, Dr. Robin Morris, and Dr. Hank Schlinger, all of whose testimony supported Student's contention that he presently requires a one-on-one aide in the classroom.

support her opinion in this regard. Student's continued lack of focus and attention and his need for redirection, prompting, hand-over-hand instruction, as well as his tendency to perseverate, verbalize and vocalize inappropriately, and engage in inappropriate sensory activities, support Student's contention that he cannot presently be successful in a preschool classroom without the support of a one-on-one aide trained to assist children on the autism spectrum.⁶ Given Student's demonstrated deficits and unique needs, the District's offer of a one-on-one aide for just one month is not reasonably calculated to sufficiently address his needs and fails to provide him with some educational benefit.

Lack of Sufficient Individual Instruction that is Scientifically Based and Supported by Peer-Reviewed Research

41. Student contends that he requires a 40 hour per week ABA program and that the five hours per week of DTT therapy offered to him by the District is insufficient to provide him with meaningful educational benefit. Student also contends that the program offered to him is not scientifically based and supported by peer-reviewed research as

⁶ Both Dr. Cronin and Ms. Edelstein believe that the methods used by Student's present one-on-one aide have made Student prompt-dependent and do not foster his ability to imitate his peers and become independent. That may be true; however, Student's dependence on his aide only reinforces his argument that he presently still requires one-on-one aide and would, to quote Dr. Schlinger, "drown" if he were placed in a classroom without one. Certainly, weaning Student from the aide so that he can be fully integrated into a general education class for the 2008-2009 school year should be a goal for Student. It will be up to the IEP team to determine how long Student requires the aide and to develop a plan to fade out the aide's services.

required by the reauthorized IDEA. The District contends that Student has not met his burden of proving that the program it offered will not provide at least some educational benefit to him.

42. A school district's program offers a FAPE if it was designed to meet Student's unique needs and provides some educational benefit, even if a program preferred by the student's parents would furnish a greater benefit to the student. An IEP must contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to a student who qualifies for special education.

43. The Headstart class proposed by the District is composed of 18 children, half of whom have IEPs and half of whom are typically developing general education students. A general education teacher and a special education teacher along with one general education aide and one special education aide teach the class jointly. The first three and one-half hours each day of the class are devoted to general education teaching of the children. Although there are special education principles "embedded" in the curriculum, no specific special education methodologies are employed during those hours. Rather, the curriculum follows the state Headstart curriculum based on a creative and emerging curriculum. The goal is to prepare the children for kindergarten using the Desired Results Developmental Profile. The general education children leave after the three and one-half hours. Thereafter, an hour each day is spent solely with the special education students, working on implementing the goals from their IEPs and providing them with other needed guidance to assist them in participating in the general education curriculum. The program proposed by the District also included an additional five hours a week of DTT therapy for Student.

44. The consensus of the witnesses who testified at hearing was that Student is capable of participation in the Headstart inclusive class, albeit with aide support. Student contends, however, that he also requires additional individual hours of ABA therapy, which is scientifically based and supported by peer-reviewed research, to supplement the Headstart program. Student's evidence demonstrated that he has significantly benefited and progressed in the last year to year and a half based upon the intensive ABA therapy he has received. However, he has failed to meet his burden of proof to show that he will not gain some educational benefit from the program offered by the District.

45. The Headstart inclusive program offers Student three and one-half hours a day, five days a week, in a preschool class taught in a general education format in which half the children have IEPs and half are typically developing peers, as well as one hour a day in a class with just the special education students. In addition, the program offered by the District includes one hour a day, five days a week, of DTT therapy.

46. During the three and one-half hour general education portion of the Headstart class, a highly experienced general education teacher provides instruction, assisted by Antonio Garza, a special education teacher who has just received his master's degree in early childhood special education. A general education aide and a special education aide assist the credentialed teachers. The special education aide has a bachelor's degree and has approximately six years of experience with autistic children.

47. The three and one-half hour general education program is designed to meet California standards to prepare preschool children for kindergarten. At the beginning of the class, while waiting for other children to arrive, the students go to small tables and engage in manipulative activities, such as writing their names. Once all children have arrived, the class has morning circle time. The children sing songs, work on the day's

calendar, and share any special events from home or of interest to them. During circle time the teachers prepare the children for the day's activities, advise them of visitors that may be coming, and of any other atypical events. They then have breakfast and a restroom break before going to the playground for recreation time. After the recess, the children transition back to the classroom for instructional circle time. They sing songs, play games to identify colors, shapes, or number recognition. By the end of the school year, the teachers begin introducing phonics and phonemes during the instructional circle time. The next activity is in small groups with activities directed by one of the teachers or aides. The children are placed in groups of four or five to a table with one teacher or one aide assigned to each table. The children work on letters, sounds, and numbers, with the activities based on the needs of each of the children in the group. For example, if a child needs practice using scissors, an activity will be planned around that need.

48. The last part of the general education portion of the class is dedicated to what Antonio Garza, the special education teacher assigned to the class, described as a "creative curriculum" approach to learning. The classroom has areas dedicated to building blocks, dramatic play, library books, science and arts. Each area is labeled. The children take their name cards and hang them on a hook in the area they independently choose to access for this activity. After the activity is over, the children clean up and go back to a final circle time where they have a musical activity or story time. The general education day ends with a family-style lunch. Food is served in large bowls and each child serves him or her self, places the food on his or her plate, and passes the bowl to the next child. Lunch is thus a focal point to practice social skills such as conversation and sharing.

49. The general education students leave after lunch, at approximately 11:30 a.m. While they are leaving, the special education students may access picture books to keep

themselves amused during the transition of the other students leaving the classroom. The special education teacher and special education aide then initiate a circle time solely with the special education students, which lasts about a half hour. The educators focus on each student's needs, such as the need for social interaction. They target each child's IEP goals as well as pre-teaching activities planned for the following day or re-teaching lessons from earlier that day to reinforce activities and ensure the special education students understand the lesson or activity. For the last half of the special education hour, the students break into two groups and rotate in teacher-directed activities such as using the computers or where additional emphasis is placed on targeting an IEP goal. The special education hour ends with a closing circle, where the students and educators discuss things such as the calendar or days of the week. The day then ends with a closing song.

50. Although not specifically an ABA program, the special education teacher incorporates elements of ABA theory into his instruction of the class. Additionally, the program offered by the District to Student includes five hours a week of DTT similar in approach to the home-based DTT he is presently receiving.⁷

⁷ The ALJ agrees with Student that it is unclear from the testimony at hearing of the District's witnesses if the five hours of DTT offered to Student is in addition to or in lieu of the one-hour special education component of the Headstart inclusive program offered to him. However, a detailed reading of the March 22, 2007 IEP indicates that the District offered Student a four and a half hour per day Headstart inclusive program in addition to one hour a day of DTT. To the extent the ALJ finds the offer was FAPE, that finding is based on a program consisting of a total of 22.5 hours a week in Headstart and five hours a week of DTT, in attention to the related services (not at issue here) of two 30-minute per week group speech and language sessions and one 30-minute per week individual speech

51. The consensus of the both Student and District witnesses is that Student has significantly progressed in his cognitive abilities, and that he has the potential to be placed in a general education kindergarten in one year. The witnesses, as well as Student's mother, also agree that Student's deficits are primarily in the areas of communication, focusing, attention, and socialization. Student has increased his capacity to make spontaneous comments and social overtures, particularly to adults. His deficits are much more pronounced at school than at home.

52. The testimony of knowledgeable District witnesses, including Ms. Edelstein, Ms. Chadwick, and Mr. Garza, established that the Heartstart placement, with the DTT component, will address Student's needs and will allow him to make educational progress. The program offered by the District is specifically designed to address Student's deficits and implement his goals at school. The speech and language therapy the District has offered Student will address Student's deficits in the area of pragmatic language and social language skills. The general education Headstart program, accompanied by one-on-one aide support, will prepare Student academically and socially for the general education kindergarten class in which all parties believe Student should be enrolled next year. The general education class, along with the special education component, will address Student's IEP goals and objectives in the area of study skills, speech and language, as well as in social/emotional issues, behavior issues, and daily living skills. Student will have typically developing peers whose behavior he can model. The DTT offered Student will focus on any deficits he may have at school, and, specifically, will assist him in generalizing his skills into the classroom setting, a deficit of Student emphasized by his experts.

and language session.

53. The testimony of Sharon Venezia, Dr. Morris, and Dr. Schlinger, who were presented as Student's expert witnesses, all stressed the necessity of intensive in-home ABA therapy for Student in addition to any preschool hours in which he might be placed. Their testimony in this regard, however, was not persuasive. First, their opinions are based more on their philosophical position that in-home ABA therapy is necessary for all autistic children than on a recommendation for Student based on his individual needs. In that regard, their recommendations contradict the acknowledgment of both Ms. Venezia and Dr. Morris that Student has progressed substantially in the last year and half and that his most pronounced deficits are in communication and socialization, both of which can be, and should be, addressed in a classroom setting. Second, none of these three witnesses is a special education educator. Their testimony was therefore not persuasive that Student would not be able to achieve educational benefit from the Headstart/DTT program offered by the District.

54. Furthermore, Student has not presented any credible evidence that the DTT portion of the program offered to him by the District is dissimilar to his present DTT therapy and/or not based on scientifically researched, peer-reviewed methods. However, even if the DTT did not specifically follow the Lovaas ABA method advocated by Student, the failure to do so does not mean the District's program denies him a FAPE. As stated in Legal Conclusions 18 through 22, the choice of methodology of instruction is up to the District as long it offers FAPE. Assuming, *arguendo*, that the Lovaas method is superior, Student presented no credible evidence that the District's DTT program would deny him educational benefit.

55. Student is correct that no specific peer-reviewed, researched-based program of education was specified in his IEP document and that the four and a half hour Headstart

inclusive program does not appear to be specifically based on those criteria. However, the program offered to Student in the IEP addressed all of his unique needs and offers support services that will permit Student to access his education and progress in the curriculum. Student offered no evidence that the program developed by the District's IEP team would not meet those goals. Student and his witnesses all agreed that his abilities and needs were greater than could be provided in a special day class that does not include typically developing peers. They also agreed that the Headstart inclusive class, which, as described above, is based on a general education preschool curriculum with special education supports as needed, is the appropriate placement for Student provided he has one-on-one aide support. It is a contradiction to assert that a general education class is appropriate for Student but then to contend that the curriculum be based upon scientifically researched, peer-reviewed studies. There is no requirement that a general education curriculum be based on those criteria. Therefore, the failure of the District to offer a general education program based upon peer-reviewed research did not deny Student a FAPE.

56. Student also contends that District personnel are not sufficiently trained or experienced in working with autistic children, but this contention also fails. As stated above, Mr. Garza, the special education teacher, has just received his master's degree in early childhood special education. Although new to teaching, his education and credentials are sufficient to qualify him to teach a special education class. Additionally, as indicated above, the special education aide has a bachelor's degree as well as approximately six years of experience in working with autistic children. Student has failed to support his contention with any credible evidence regarding the actual qualifications of the staff that would be assigned to Student, and therefore has failed to meet his burden on this issue.

57. In conclusion, the program offered by the District to Student contains a total of 27.5 hours of individualized instruction: five hours of DTT and, with the inclusion of a trained one-on-one aide, 22.5 hours of individual class instruction. Student presently receives a total of 30 hours of individualized instruction. Student has presented no compelling evidence that he will not receive some educational benefit from the 27.5-hour program offered by the District. He has failed to show that he required a scientifically based, peer-reviewed instructional method in the Headstart inclusive class in order to obtain educational benefit from the class. Student has also not met his burden to show that the five hours of DTT therapy offered by the District will not permit him to obtain educational benefit from the therapy or that the DTT offered by the District is not based on scientifically based peer-reviewed principles. Student has therefore failed to meet his burden that the District's program denies him a FAPE.

Lack of a Transition Plan

58. Student contends that the District failed to include a specific plan for his transition from a home-based ABA program into the District Headstart inclusive program. The District's IEP offer of March 22, 2007, does not discuss a transition plan. The District contends that while the IEP team did not specifically use the word "transition," the team discussed Student's transition needs at the IEP team meeting and the District later offered a transition plan to Student by offering a one-on-one aide for the first month of school.

59. A school district is required to offer a student an educational program and related services that meets his or her unique needs. A student's unique needs may require the formulation of a plan to transition the student into a new program provided by the school district, which the student has not previously attended. Where appropriate, an IEP is required to include a provision for the transition of a student from a special class or

nonpublic, nonsectarian school into a regular class in a public school for any part of the school day. If the IEP team finds that a transition plan is appropriate, it should included in the plan a description of the activities provided to transition the student into the regular program at the public school.

60. Here, the District proposed that Student transition from a program that included only 9 hours of preschool with 20 hours of in-home ABA therapy, to a program that is composed of 22.5 hours of preschool with five hours of DTT, all taught at school. While the District's program will provide only two and a half less hours a week than the program in which Student is presently placed, the amount of time that Student will spend at school increases significantly while the amount of time Student will spend concentrating on DTT decreases significantly.

61. Additionally, Student's attendance in the Headstart program will involve a change of location, a change of teachers, a change of one-on-one aide, and a change from primarily a one-to-one learning environment at home to a group classroom setting, with new peers and new tasks required of him. District and Student witnesses testified to the difficulty Student has with transitions, and acknowledged his difficulty by writing a goal in the proposed IEP to address Student's difficulty with transitioning between classroom routines. Given Student's difficulties with transitions and his autism per se, it was both appropriate and necessary that a plan for transitioning Student from his present program to the one offered by the District be included in his IEP.

62. The March 22, 2007 IEP did not contain a transition plan. Nor has the District subsequently provided Student's parents, with specific parameters for transitioning Student into the proposed Headstart inclusive program. The District's assertion that discussing transition without identifying it as such at the IEP team meeting sufficiently met its

obligation in this regard is not persuasive given the mandate to make a clear, written offer of FAPE and the District's obligation to offer a program and services that meet Student's unique needs. The brief discussion of transition issues at the IEP meeting, even as referenced by the District, does not address Student's unique needs. Nor is the District's assertion persuasive that agreeing to provide a one-on-one aide for the first month of school amounts to a sufficient transition plan. The provision of the aide does not address the need to transition Student from a 20-hour a week ABA program or the need to transition him into a 22.5-hour preschool program.⁸

63. Student has therefore met his burden of proof that the District failed to provide him with an adequate transition plan that would meet his unique needs, and thus substantively denied him a FAPE.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. Student filed for a due process hearing and bears the burden of persuasion.

GENERAL PRINCIPLES

2. Under the Individuals With Disabilities Improvement Act (IDEIA) and state

⁸ It will be the responsibility of the IEP team to determine the nature, extent, and duration of Student's transition plan.

law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).)

3. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*).) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) As long as a school district provides a FAPE, the type of methodology employed in providing a FAPE is left to the district's discretion. (*Id.* at p. 208.)

4. The Ninth Circuit as well as the United States District Court for the Northern District of California, have recently reaffirmed that the appropriate standard for

determining whether an IEP provides FAPE is still whether it is “reasonably calculated to enable the child to receive educational benefits.” (*Hood by Hood v. Encinitas Union Sch. Dist., et al.* (9th Cir. 2007) 486 F.3d 1099; *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031 (citing *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877); and *San Rafael Elementary Sch. Dist. v. California Special Education Hearing Office* (9th Cir. March 28, 2007) 2007 U.S. Dist. Lexis 27764.)

5. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district’s proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (hereafter, *Gregory K.*.) If the district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if the student’s parents preferred another program which would have resulted in greater educational benefit. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

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

PROCEDURAL VIOLATIONS

7. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural

violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist., supra*.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*Target Range, supra*, 960 F.2d at p. 1482.)

8. Procedural errors during the IEP process are subject to a harmless error analysis. In *M.L., et al., v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, fn. 9, the Ninth Circuit decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA. Utilizing the harmless error analysis, the court determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at pp. 652, 658.)⁹

⁹ Judge Alarcon, the author of the opinion in *M.L.*, utilized a structural defect analysis in concluding that the failure of a general education teacher to participate in the IEP process denied M.L. a FAPE.

PARTICIPATION OF A STUDENT'S PRIVATE SCHOOL TEACHER AT THE IEP MEETING

9. The Ninth Circuit has recently found that there is no requirement that a student's current regular education teacher be present at an IEP meeting. The court found that the change in statutory language of the reauthorized IDEIA, effective July 1, 2005, from specifying that "the teacher" be present at the meeting, to specifying that "at least one regular education teacher of such child" be present, indicates that there is no requirement that the current general education teacher attend. Therefore, as long as a general education teacher is present who is, or may be responsible for, implementing the student's IEP, the district has met its procedural burden to assure the presence of a general education teacher. (*R.B., by and through her Guardian Ad Litem, F.B., F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. July 16, 2007, No. 05-16404) _ F.3d. _ (hereafter, *Napa Valley*), 20 U.S.C. § 1414(d)(1)(B)(ii)-(iii); Ed. Code, § 56341, subds. (b)(2),(3).) Therefore, there is no requirement that a student's present private school general education teacher be invited to attend an IEP meeting.

PREDETERMINATION OF PLACEMENTS

10. In determining the educational placement of a disabled student, the public agency must ensure that the placement is based on the child's IEP. (34 C.F.R. § 300.116.) Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation.

(*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2005) 392 F.3d 840.)

11. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

CHOICE OF SERVICE PROVIDER

12. Like the choice of methodology to be used to instruct a student, a school district also has the right to select the choice of service provider, as long as the provider is able to meet the student's needs. IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.)

LOCATION OF PLACEMENT AND SERVICES

13. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer that clearly identifies the proposed program. (*Union Sch. Dist. V. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth

Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) However, that right does not mean that a change in location of a program amounts to a change in placement, or that the district failed to make a clear, written offer of placement. As stated by the United States Department of Education in its comments to the newly-authorized federal regulations: "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed.Reg. 46687 (Aug 14, 2006); see also *Johnson v. SEHO* (9th Cir. 2002) 287 F.3d 1176.)

THE IEP

14. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the district cannot be "judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

15. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the

initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) Nevertheless, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

METHODOLOGY/PEER-REVIEWED PROGRAM AND SERVICES

16. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F. Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.*, 361 F.3d at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour per week ABA/DTT program modeled after the research of Dr. Lovaas. The

Ninth Circuit Court of Appeal explained:

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

17. The reauthorized IDEA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51-57; 46 IDELR 45, 106 LRP 29290, (which provides a comprehensive summary of decisions discussing the matter).)

18. In holding that the ALJ erred in assuming that there is only one appropriate methodology for educating autistic children, and further erred because the ALJ failed to consider the wealth of evidence provided at hearing that there is no one correct

methodology for teaching autistic children, the *Dea*/Court stated, at page 48:

Many federal courts have struggled to address whether 'Lovass style ABA' program is a necessary component of an appropriate program for autistic children under the IDEA. Some courts have found that a school district's program was appropriate despite the parents' preference for a 'Lovass style ABA' program. Other courts have determined that the school district's proposed program was not appropriate and that the parents' proposed Lovass program was appropriate in contrast. However, this Court has not located any authority suggesting that a 'Lovass style ABA' program is the *only* appropriate program for young autistic children under the IDEA. (Original italics.)

19. Courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Deal, supra*, at pp. 65-68.)

20. Title 34 Code of Federal Regulations part 300.320(a)(4) (2006), states IEPs shall include a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*. The language "to the extent practicable" regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program. The United States Department of Education's comments and discussions regarding "peer-reviewed research" state that "We decline to require all IEP Team meetings to include a focused discussion on research-based

methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome.”

TRANSITION PLAN

21. If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. (Ed. Code, § 56345(b)(4); *T.P. and S.P. v. Mamaroneck Union Free Sch. Dist.* (S.D.N.Y. May 10, 2007) 47 IDELR 287, 107 LRP 27096.)

DETERMINATION OF ISSUES

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO HAVE STUDENT’S CURRENT PRIVATE SCHOOL PRESCHOOL TEACHER PRESENT AT THE IEP TEAM MEETING ON MARCH 22, 2007?

22. No, it did not. As stated in Legal Conclusion 9, a recent ruling from the Ninth Circuit Court of Appeals finds that the reauthorized IDEA no longer requires that a school district invite the present general education teacher of a student to his or her IEP team meeting. Rather, the requirement of the statute is that a general education teacher be present who is now, or may be responsible in the future, for implementing the child’s IEP be present at the meeting. Based upon Factual Findings 7 and 8, the District did ensure that the general education teacher from one of Student’s possible placements was present at the IEP meeting, therefore meeting the District’s obligation under the reauthorized IDEA.

23. Furthermore, based upon Legal Conclusions 7 and 8, even if the District had an obligation to ensure the presence of the private school general education teacher at the

IEP team meeting, the District's failure to do so would be harmless error. As stated in Factual Findings 9 and 10, the District made significant efforts to obtain the presence of the private school teacher at the IEP meeting. The District designated her as a team participant in the IEP meeting notice, sent her invitation to the meeting, and followed up the invitation with a phone call reiterating the invitation. The private school teacher chose not to attend. Additionally, the District considered her written assessment when constructing Student's IEP. The District, who had no control or authority over the private school teacher, made all necessary efforts to obtain her presence and consider her input. Therefore, the District's failure to have the private school teacher present at the IEP meeting was harmless error and thus did not amount to a procedural violation of the IDEA.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY PREDETERMINING HIS PLACEMENT AT THE DISTRICT'S HEADSTART INCLUSIVE PROGRAM BEFORE THE IEP MEETING ON MARCH 22, 2007?

24. No, it did not. As stated in Legal Conclusions 10 and 11, a school district may not make a determination of the proper placement for a student without the participation of the student's parents. Participation means that the parents have been informed of their child's problems, are given an opportunity to attend IEP meetings, are permitted to express disagreement with the proposals made by the district, and are given the opportunity to request revision of the IEP. Although a district may not predetermine the placement and services for a student, preparing a draft IEP and/or discussing an IEP prior to the IEP meeting does not constitute predetermination. The requirement is that the district attend the IEP meeting with an open mind and is prepared to offer and discuss various potential options for the child's program before making a final recommendation.

25. Based upon Factual Findings 11 through 18, there is no compelling evidence

that the District predetermined that it would not consider or offer a home- based ABA program or an ABA program provided by a NPA. Nor is there any compelling evidence that the District had predetermined to place Student in its Headstart inclusive program. The fact that District employees discussed Student's assessments and potential placements without the presence of Student's parents is not convincing evidence that the District did not go to the IEP meeting without an open mind and several options to discuss, or that it was not open to considering the input of Student's parents and other advocates. As stated in Factual Findings 11 through 18, the weight of the evidence is that the District did not predetermine Student's placement.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO INFORM STUDENT'S PARENTS OF THE CHANGED LOCATION OF THE DISTRICT'S HEADSTART INCLUSIVE PROGRAM?

26. No, it did not. Based upon Legal Conclusions 7 and 8, 11, and 13, and Factual Findings 19 through 23, the failure of the District to identify the correct location of the Headstart program did not constitute a procedural violation of the Student's rights under the IDEA. The District informed Student's parents of the change as soon as it was made aware of it and subsequently obtained the authorization of Student's parents to include the change as an addendum to the IEP document. More importantly, the change in the location of a program does not amount to a change in placement. Therefore, no violation occurred when the District changed the location of the Headstart program after it made the offer of the program to Student's parents at the March 22, 2007 IEP team meeting.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY OFFERING A PLACEMENT TO HIM IN THE DISTRICT'S INCLUSIVE HEADSTART/SDC PROGRAM WITHOUT PROVIDING STUDENT WITH A ONE-ON-ONE AID?

27. Yes, it did. As stated in Legal Conclusions 2 through 6, 14, and 15, an IEP must be designed to address a student's unique needs. As set forth in Factual Findings 24 through 40, the District's failure to first specifically offer the services of a one-on-one aide to Student in the IEP document, and then to subsequently only offer it for the first month of the school year, failed to address Student's unique need for the aide. The evidence is compelling that Student's unique needs indicate he will be unable to be successful in an inclusive general education class without the aide based upon his continued need for and possible dependence on prompts, hand-over-hand assistance, and his general autistic-like behaviors. The District's failure to provide for a one-on-one aide and to determine a fade out program for the aide substantively deprived Student of a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR IN ITS IEP OFFER OF MARCH 22, 2007, BY FAILING TO PROVIDE STUDENT WITH A SUFFICIENT AMOUNT OF INDIVIDUALIZED INSTRUCTION AND SUPERVISION BY INDIVIDUALS TRAINED AND EXPERIENCED IN WORKING WITH AUTISTIC CHILDREN, WHICH IS SCIENTIFICALLY BASED AND SUPPORTED BY PEER-REVIEWED RESEARCH?

28. No, it did not. As is stated in Legal Conclusions 2 through 6, 14, and 15, a school district must provide an educational program, which is reasonably calculated to offer a student educational benefit. The IEP does not need to maximize the student's potential or conform to a program preferred by the student's parents, even if that program is superior to the one offered by the school district. Rather, the IEP must provide a basic floor of opportunity that consists of access for the student to specialized instruction and related services that the IEP team has designed to provide educational benefit to the

student and meet his or her unique needs. However, as stated in Legal Conclusions 3 and 16 through 20, the district is entitled to its choice of instructional methodology as long as its program offers the student a FAPE. Further, courts have consistently rejected the proposition that an ABA- only program is the only effective method for educating autistic children. Moreover, the reauthorized IDEA only requires that an IEP contain a program that is scientifically based and peer-reviewed to the extent practicable. As stated in Factual Findings 41 through 57, the District offered Student an educational program that provided him educational benefit and met his unique needs.¹⁰ Additionally, as stated in Factual Finding 56, Student has failed to meet his burden of proof that District staff are not trained to work with autistic children. Student has therefore failed to meet his burden that the District's offered program denied him a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR IN ITS IEP OFFER OF MARCH 22, 2007, BY FAILING TO PROVIDE A SPECIFIC PLAN TO TRANSITION STUDENT FROM HIS PRESENT HOME-BASED ABA PROGRAM TO THE PROGRAM OFFERED BY THE DISTRICT?

29. Yes, it did. As is stated in Legal Conclusions 2 through 6, the District is required to meet the unique needs of students with disabilities. As stated in Legal Conclusion 21, a plan to transition a student from a private special education program to a district's general education program is required where appropriate. Factual Findings 58 through 63, demonstrate that a transition plan for Student was both appropriate and necessary based upon Student's autism, his consistent need for prompts, redirection and

¹⁰ The District's Headstart inclusive program is found to provide FAPE only if a one-on-one aide is presently assigned to Student.

hand-over- hand assistance, his continued perseveration, and his difficulty in transitioning between activities and environments. The failure to provide a specific transition plan in Student's IEP therefore failed to address his unique needs and thus denied him a FAPE.

ORDER

1. The District is directed to provide to Student a one-on-one aide trained to work with autistic children as part of its offer of FAPE.¹¹ The aide shall be provided for the fall semester of the 2007-2008 school year. At least 30 days prior to the start of the spring semester of the 2007-2008 school year, the IEP team shall meet to reevaluate Student's need for a one-on-one aide and if, when, and how the aide should be faded out.

2. Within 30 days of this order, the IEP team shall meet to develop an appropriate plan to transition Student from his 20-hour a week intensive ABA program into the District's Headstart inclusive class.

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

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on Issues D and F. The District prevailed on Issues A, B, C, and E.

¹¹ As stated in Legal Conclusion 12, the District has the authority to select its choice of provider of aide services for Student as long as the aide has been trained in working with autistic children.

RIGHT TO APPEAL THIS DECISION

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

DATED: July 23, 2007

A handwritten signature in black ink, appearing to read "Darrell L. Lepkowsky". The signature is written in a cursive style with a horizontal line under the last name.

DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings

Special Education Division