

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Parents, on behalf of STUDENT,

v.

GARVEY SCHOOL DISTRICT.

OAH CASE NO. 2008010362

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on June 9, 10, and 11, 2008, in Rosemead, California.

Student was represented by advocate Matthew M. Pope, Office of Clients' Rights Advocacy, Protection and Advocacy, Inc. Student's mother (Mother), and Student's father (Father) (Parents), were present on all hearing days. Irene Lo, a Cantonese interpreter, was present on each day of hearing and interpreted the proceedings for Mother and Father.

Garvey School District (District) was represented by James Meeker, Attorney at Law, of Garcia Calderon Ruiz, LLP. Bonifacio B. Garcia, Attorney at Law, of Garcia Calderon Ruiz, LLP, was present for part of the hearing day on June 9, 2008. Jerlene Hales, Director, Special Education Division of the District, was present on all hearing days.

Student's Due Process Hearing Request (Complaint) was received by the District on January 2, 2008, and filed with OAH on January 4, 2008. OAH continued the matter on February 7, 2008, for good cause shown.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the matter was continued through and including July 14,

2008, by which time the parties were ordered to file their closing briefs. Student and District timely filed their respective closing briefs on July 14, 2008, at which time the record was closed and the matter was submitted.

ISSUE

Does the District's offer to Student of school-based speech and language (LAS) services in the amount of 30 minutes, one time a week in a group setting, and 30 minutes, one time a week individually, as stated in the amended Individualized Education Program (IEP) dated December 11, 2007, constitute a free appropriate public education (FAPE)?¹

REMEDIES REQUESTED

Student requests that District provide school-based LAS services at a frequency of three 30-minute sessions per week, one 30-minute session to be provided in a small group, and two 30-minute sessions to be provided individually. Student further requests that District provide two clinic-based LAS sessions a week with a non-public agency (NPA), for 50 minutes each session, and additionally requests that the Center for Developing Kids (CDK) be the preferred NPA for these services.

¹ The issue is narrower than the issue as framed in the prehearing conference order. This formulation of the issue conforms more closely to the allegations of Student's Complaint, and more accurately reflects the evidence and the argument presented at the hearing.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a seven-year-old boy, who was born on September 18, 2000, and who resides in the District. In 2004, Student was diagnosed with autism. District has provided Student special education and related service since 2004, when Student was attending pre-school in the District.

2. At Student's initial IEP meeting, which convened on August 27, 2004, when Student was four years old and in preschool, the IEP team found Student eligible for special education as a student with a speech and language impairment (SLI). At the IEP meeting held on March 29, 2006, when Student was five years old and in kindergarten, his eligibility category was changed to autism, based on a series of assessments.

3. Student is a relatively high-functioning autistic child, who is of average cognitive ability. Student's expressive, receptive, and pragmatic language skills are severely impaired. District has categorized him as an English Language Learner (ELL), because his home language is Cantonese. However, Student has minimal comprehension of Cantonese, and does not speak it. English is Student's primary language, and all recent assessments, whether performed by the District or independently, have been administered in English.

4. At the time of the hearing, Student was completing second grade at Hillcrest Elementary School (Hillcrest), his home school in the District. He began attending kindergarten at Hillcrest during the 2005-2006 school year, when he was five years old. At that time, he was a full-inclusion pupil in a general education class, with supports including occupational therapy (OT), a one-to-one aide, inclusion support services, and LAS services. His IEP at that time called for group LAS services, twice a week, for thirty minutes each session. In reality, since the other students with whom Student would ordinarily have group therapy were in an SDC setting, and not in

Student's general education setting, Student actually received his speech and language services on an individual basis during kindergarten. In addition to his school-based LAS, Student received clinic-based speech therapy from Children's Hospital one time a week for 60-minute sessions, beginning when he was in preschool in April 2005. This clinical therapy continued until approximately June 2006, when Student was completing kindergarten. It was discontinued due to termination of insurance funding.

5. Student attended first grade at Hillcrest, during the 2006-2007 school year, when he was just turning six years old, again as a fully-included pupil in a general education classroom, with services including resource specialist/consultation (RSP), one-to-one support, OT/consultation, inclusion support services, and group LAS services. He has remained in the full-inclusion general education placement at Hillcrest for second grade through the 2007-2008 school year, as a seven year old, with special education and related services similar to those he received in first grade. His one-to-one aide in second grade as of December 2007 was a behavioral aide.

STUDENT'S PREVIOUS SPEECH AND LANGUAGE GOALS AND HIS PROGRESS ON THOSE GOALS

6. A description of Student's previous goals in speech and language since kindergarten, and of the progress he has made on those goals, provides the background for analyzing Student's current needs regarding LAS services.

7. At the annual IEP meeting held on March 29, 2006, while Student was 5 years old and in kindergarten, the team discussed Student's progress on his language/communication goals for his kindergarten year, as well as other aspects of Student's educational program. The team changed Student's eligibility to autism.

8. With respect to Student's kindergarten language/communication goal, regarding eye contact, the team determined that Student had made "good progress" toward this goal, and was able to effectively use eye contact when his name was called

with 60 percent accuracy. The team noted that Student had made "good progress" in his ability to identify and label pictures depicting feelings, and could make faces imitating feelings, such as happy, sad, angry, and silly. The IEP team noted that Student met the goal of following simple two-step directions. The IEP team also noted that Student could answer simple yes/no questions, questions that asked "what," and most closed-ended questions with "good consistency." He struggled with open ended questions that asked "who," "when," and "where."

9. At this IEP meeting, the team set new language/communication goals, to be achieved during the 2006-2007 school year, when Student was in first grade. The first language/communication goal, under the subcategory "Socialization," stated that by February 2007, Student would play in the school environment next to another child, jointly sharing toys, as measured by observation over a period of six weeks with 70 percent accuracy. Short-term objectives led up to this goal, with the period of observation gradually lengthening. The second goal, under the subcategory "Pragmatics/Nonverbal Communication," stated that by February 2007, in the school environment, Student would initiate appropriate eye contact as measured by observation in four trials with 90 percent accuracy, with minimum cueing. Short-term objectives leading up to this goal gradually lengthened the observation period and gradually diminished the amount of cueing. In the subcategory of "Following School Routine," the team set a language/communication goal stating that by February 2007, Student would follow the class routine, as directed by the teacher/aide as measured by observation over six weeks, with 70 percent accuracy, with minimum cueing. Short term objectives leading up to this goal gradually lengthened the observation period and gradually diminished the amount of cueing.

10. The next language/communication goal the team set stated that by March 2007, given a social situation, Student would answer questions that asked "who,"

“when,” and “where” using a three- or four-word response, as measured by observation, with a success rate of 70 percent for a period of four weeks. Short term objectives leading up to this goal gradually lengthened the number of words in the response and varied the percentage of time that Student would successfully perform the task.

11. The team also set three additional language/communication goals in pragmatics. The first goal stated that by March 2007, given a social situation, Student would express his feelings (e.g., happy, sad, angry), as measured by observation, maintaining a success rate of 80 percent for a period of four weeks. Short term objectives set by the IEP team leading up to this goal gradually increased the success rate. This goal was similar to one of the goals in the previous annual IEP, but this goal eliminated the cuing aspect of the previous year’s goal. The second pragmatics goal stated that by March 2007, Student would initiate appropriate communication with peers and adults as measured by observation maintaining a success rate of 80 percent for a period of four weeks. The short term objectives accompanying this goal led up to the goal by gradually increasing the success rate. The third pragmatics goal stated that, by March 2007, given a social situation, Student would initiate eye contact as measured by observation maintaining a success rate of 80 percent for a period of four weeks. This goal built upon the previous year’s eye contact goal, by emphasizing Student’s initiating of the eye contact. This goal was also similar to the second goal described above, which emphasized eye contact in the classroom setting. The short-term objectives that accompanied this goal again gradually increased the success rate.

12. The notes of this IEP meeting reflect that the SLP would provide speech activities for Parents and Student to work on at home, and that Parents accepted the goals. The team agreed that Student would receive LAS services two times per week, in a group setting, for 30 minutes each session. Parents consented to the IEP.

13. The IEP team discussed Student's progress on his language/communication goals at the annual IEP meeting held on March 29, 2007, when Student was six years old and in the first grade. Student's progress was recorded both in the present levels of performance portion of the IEP, and in the IEP notes. Student could identify his feelings, and he could express his feelings given a choice of two, with prompts. Given a model, he would ask some questions to express his wants and needs. Sometimes he could ask some questions given a prompt. He required frequent modeling to ask a question. With respect to receptive language, Student could answer "wh"- questions given pictures or written cues or verbal prompts. He responded to "wh"- questions given a choice of two with 90 percent accuracy. However, he still had difficulty answering "wh"- questions without prompting. In the area of pragmatics, Student inconsistently engaged in eye contact when his name was called with 25 percent to 85 percent accuracy. He did not make eye contact with his peers. He could initiate communication with peers or adults, but he did not initiate interactions during speech therapy without prompting. He responded to greetings, but he did not initiate greetings. Sophia Chiu, the District Speech and Language Pathologist (SLP) reported that Student had not completely met his goals regarding expressive language, and he had made progress on his receptive language goals.

14. The IEP reflects that the team indirectly alluded to Student's previous year's language/communication goal in the subcategory of "Socialization" in its discussion of Student's social/emotional skills. The team noted that Student would engage minimally in some interactive play with peers.

15. The IEP team set three new Language/Communication goals for Student. The first goal stated that by March 2008, given a social situation, Student would ask appropriate questions to express his wants and needs by using "May I . . .?" "Can I . . .?" "Do you have . . .?" with 80 percent accuracy for four out of five trials as measured by

observation. The team set short-term objectives leading up to this goal, which gradually increased the percentage of accuracy. The second goal stated that by March 2008, given a social situation, Student would answer simple "who," "what," "when," and "where" questions given no choices with 70 percent accuracy for four out of five trials as measured by observation. The team set short-term objectives leading up to this goal, again gradually increasing the percentage of accuracy. The third goal stated that by March 2008, given a social situation, Student would initiate communication with adults and peers with good eye contact ("Hi," "Good-bye," "Thank you," "My turn," "I'm finished," "Will you help me?" "My name is. . .") with 80 percent accuracy for four out of five trials as measured by observation. The team set short-term objectives leading up to this goal, again gradually increasing the percentage of accuracy. The IEP provided that Student would receive LAS services in a group setting, two sessions a week, at 30 minutes a session. Parents requested that Student receive LAS services two times a week individually and one time a week in group, but their request was declined. Parents consented to the IEP, with some exceptions.

16. On May 14, 2007, District convened another IEP meeting. The IEP notes reflect that Parents requested that the team increase Student's speech therapy and provide 30 minutes of group speech therapy weekly, and two 30-minute sessions of individual therapy weekly. The team discussed the group therapy that Ms. Chiu was providing. Ms. Chiu stated that Student was making "good progress," and believed that the amount of services should remain the same. She advised that each child in the group, which consisted of three students, had many opportunities to speak, because the session was "fast-paced." The RSP teacher reported that Student was speaking more spontaneously, and in longer sentences. The classroom teacher stated that Student was coming to her to ask for help. The IEP notes do not reflect that these general comments

were specifically related to Student's progress toward his goals. Parents consented to the IEP, with certain exceptions.

RECENT SPEECH AND LANGUAGE ASSESSMENTS OF STUDENT

17. In summer 2007, before Student entered second grade, the Center for Developing Kids (CDK) provided six sessions of clinic-based speech therapy for Student, which was funded by the Eastern Los Angeles Regional Center. After Student completed those six sessions, CDK continued to provide clinic-based speech therapy to Student through the 2007-2008 school year, at the rate of two 50-minute individual sessions per week, paid for by Parents. CDK is a certified California NPA. Colette T. Caggiano, an SLP with CDK, assessed Student in speech and language over the course of approximately two hours during one day. She wrote a report of the evaluation, dated October 8, 2007. Ms. Caggiano received her M.S. in 2004 from California State University, Northridge, in Communication Disorders/Speech-Language Pathology. She holds a Certificate of Clinical Competence from the American Speech-Language-Hearing Association (ASHA), and a California license as a speech and language therapist. Ms. Caggiano assessed Student's expressive and receptive language skills based upon her own clinical observations, and she also administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4), with Mother reporting. She gathered additional information through a chart review and a telephone consultation with another of Student's therapists, whom Ms. Caggiano did not name in the report.

18. Ms. Caggiano's report reflected her clinical observations. Student made only fleeting eye contact, but used ritual greetings when prompted. He demonstrated multiple atypical behaviors, which increased as the demands of testing increased. He had a very short attention span. He used verbal requests when highly motivated or cued. He responded positively to deep pressure and proprioceptive input. His strengths included reading and the ability to use the internet to "Google" cars.

19. Ms. Caggiano attempted to administer the four subtests of the Core Language Score (CLS) of the CELF-4 that were appropriate for Student's chronological age. Due to his behaviors, only two of the subtests, Concepts & Following Directions, and Word Structure were completed. Ms. Caggiano attempted to use additional subtests to collect further data, but, due to Student's behaviors, was only able to record scores for the Expressive Vocabulary subtest. The data from the CLS subtests was insufficient to produce standardized scores, and could only be used to describe Student's deficits.

20. Student's developmental age, as reflected by the Concepts and Following Directions subtest, with moderate to maximal cueing and behavioral intervention support, multiple rest breaks, and repetitions, was less than 4 years. Student's developmental age on the Word Structure subtest, with moderate cueing and frequent rest breaks, was 4:2 years. Student's developmental age on the Expressive Vocabulary subtest, completed with Mother providing behavioral support and reinforcement strategies, was 4:11 years. Ms. Caggiano stated elsewhere in the report that Student's scores on the assessment did not reflect Student's communication potential due to his atypical sensory-related behaviors, which greatly interfered with his ability to participate in formal testing.

21. Ms. Caggiano did not formally assess Student's oral motor function and feeding. Informal observation revealed that, overall, jaw, lips, and tongue strength and coordination were adequate for feeding and speech production.

22. Ms. Caggiano concluded that Student had a severe receptive language delay marked by decreased attention to speakers and environmental cues, and inconsistent responses to sounds, words, phrases, or gestural communication. She also reported that he had a severe expressive language delay marked by restricted verbal and gestural communication, with very little initiation of communication attempts to

satisfy his wants and needs. She reported that Student would benefit from intensive therapy with consistent use of an appropriate sensory diet across all disciplines, to address his many communication and social deficits. Ms. Caggiano listed her recommendations, including increasing school-based LAS services to three times a week, with two individual sessions and one group session to address receptive and expressive language deficits. Due to the severity of Student's deficits, she reported that he would benefit from focused individual attention to maximize his potential for participation and learning during therapy sessions. She also recommended clinic-based individual LAS therapy, two times a week, for 50-minute sessions, to address his deficits in receptive and expressive language skills. Ms. Caggiano recommended including Student's family in the therapy. She concluded the report by suggesting three speech and language goals, directed at Student's joint attention skills and receptive and expressive language skills. The two goals directed at receptive and expressive language skills used several of the short-term objectives contained in Student's March 29, 2007 IEP.

23. At hearing, Ms. Caggiano elaborated upon her report. She was a credible witness, because she testified clearly, precisely, and in a forthright manner. She demonstrated knowledge of her field and, in particular, knowledge of how to provide speech therapy to autistic children. She acknowledged that she had not observed Student at school, and did not know any details regarding the LAS services Student was receiving at school.

24. Ms. Caggiano recommended a group LAS session at school, because Student must learn how to interact with peers at school. She recommended the individual LAS sessions at school because he has serious deficits that, in her opinion, would not be addressed in a group session. For example, he can type full sentences and she believed that he was capable of typing an entire script for a commercial. However,

he cannot speak in sentences. In her opinion, the “mismatch” between his abilities in written and spoken language could best be addressed in individual therapy. Ms. Caggiano explained that Student had a similar “mismatch” in his receptive language skills. In her opinion, Student responded measurably better to verbal directions combined with visual directions than to verbal directions alone.

25. Ms. Caggiano did not have a recommendation as to the length of Student’s LAS school-based sessions, in deference to the District’s scheduling constraints. She testified that it was important that the services be provided consistently to Student.

26. Ms. Caggiano also recommended therapy in the clinic setting, so that Student’s “mismatches” in his abilities could be more fully addressed. She stated that there are fewer constraints in the clinic setting with respect to the academic curriculum and the IEP goals, and that there was more flexibility to address a broader range of Student’s deficits in the clinic setting in contrast to the public school setting. She also testified that a variety of neurosensory and other activities are available to Student in the clinic setting, which could assist him in regulating his behavior so that he could better attend to the therapy. She could not render an opinion as to whether Student requires clinic-based therapy to advance in his education, because she does not know any details about the LAS services he received at school.

27. At hearing, Francis David, a District SLP, criticized Ms. Caggiano’s assessment and her report. Mr. Francis is a California licensed and credentialed SLP. He received his B.A. in Speech and Language Pathology from the University of the Philippines in Manila, and his M.A. in Speech and Language Pathology. At the time of hearing, he had completed all work required for certification by ASHA. Mr. David has been employed by the District as an SLP since April 2003.

28. Mr. David criticized Ms. Caggiano's test administration and report on several grounds. He criticized her administration of the CELF-4, on the grounds that it was not normed for ELL pupils such as Student, on the grounds that she did not administer the pragmatics portion of the test, on the grounds that a thorough assessment would have taken longer than two-hours, and on the grounds that she should have administered more than one standardized test. He criticized Ms. Caggiano's report on the grounds that it did not state her length of the evaluation and in that the section of clinical observations emphasized Student's behavior and did not reveal much information about Student's speech and language capabilities.

29. These criticisms, however, do not diminish the value of Ms. Caggiano's testimony and opinions. First, although District has classified Student as an ELL, there was no specific evidence that Student was properly classified as an ELL, or, in particular, that he would be considered an ELL for purposes of administering the CELF-4. In this regard, Student's designation as an ELL was not discussed with Parents at an IEP meeting. Second, Ms. Caggiano's report reflects that she had a great deal of difficulty administering Student the CELF-4, and that she did not consider the CELF-4 scores particularly reliable. Third, the opinions Ms. Caggiano rendered at hearing were not only based upon her assessment. Rather, they were based upon her observations of Student, his abilities, and his progress, as revealed during Student's clinical sessions at CDK. They were also based upon her experience and her training. Mr. David did not criticize these additional bases for Ms. Caggiano's opinions. Finally, Ms. Caggiano's ultimate conclusions in her assessment report, that Student has severe delays in expressive, receptive, and pragmatic language, are consistent with the District's assessment results described below. Under these circumstances, Ms. David's criticisms of Ms. Caggiano's report are not entirely relevant or persuasive.

30. In November and December 2007, Ms. Chiu, District SLP, performed a speech and language evaluation as part of Student's triennial assessment. Ms. Chiu has provided Student LAS services in District for three years: during pre-school, and in first and second grades. She has been employed as an SLP for six years. She holds an M.A. from the University of Oregon in Early Intervention and Communication Disorders, and an M.A. from California State University, Fullerton, in Communication Disorders. She is a licensed and credentialed SLP in California, and holds the CCC credential issued by ASHA. Ms. Chiu prepared a report of her speech and language evaluation, dated December 7, 2007. Ms. Chiu reported that the evaluation occurred over six sessions, with the sessions varying in length from 30 minutes to two hours. Some modifications of the assessments were made, such as extending the time for Student to process and respond. He had a very short attention span. Ms. Chiu repeated questions as many as four to five times, and frequently redirected Student, but gave no cues, prompts, or modeling. Ms. Chiu reported that Student's oral motor function was normal. She observed his articulation informally, and she considered it to be within normal limits. She noted that his speech was "highly intelligible." She also informally observed fluency and voice and did not observe any abnormalities.

31. She assessed Student's receptive single-word vocabulary skills using the Receptive One-Word Picture Vocabulary Test (ROWPVT). His expressive single-word vocabulary was assessed using the Expressive One-Word Picture Vocabulary test (EOWPVT). Student obtained a standard score of 94 on the ROWPVT, and a standard score of 88 on the EOWPVT. Mr. Chiu reported that both of these scores were within normal limits.

32. Ms. Chiu administered the Oral and Written Language Scales (OWLS) to assess Student's overall oral receptive and expressive language skills. He obtained a standard score of 66 in Listening Comprehension, which corresponded to an age

equivalency of 4:0, and a percentile rank of 1. He obtained a standard score of 59 in Oral Expression, which corresponded to an age equivalency of 3:3, and a percentile rank of .3. His Total Score was 60, which corresponded to an age equivalency of 3:8, and a percentile rank of .4. Ms. Chiu reported that these results demonstrated that Student's listening comprehension skills were significantly delayed. He had difficulty identifying basic concepts, such as size and number, adjectives, prepositions, and words with multiple meanings (i.e., trunk, match). In the area of syntactic semantics, he could understand superlative adjectives, subject-direct object, compound subject/plural verb, verbs with object, and past tense verbs. He had difficulty identifying plural nouns, plural nouns and verbs, prepositional phrases, negation, subjunctive verbs, passive voice, verb phrases, perfect tense verbs, and embedded complex sentence structures. In the area of supralinguistic semantics, Student had difficulty understanding humor by recognizing more than one interpretation of a sentence with double meanings. He also had difficulty making inferences by using world knowledge.

33. Ms. Chiu reported that Student's oral expression skills were also significantly delayed. In the area of lexical semantics, he had difficulty expressing certain prepositions. In the area of syntactic semantics, he had difficulty expressing possessive forms of a noun, direct and indirect objects, plural nouns, comparative adjectives, and plural nouns/verbs. In the areas of pragmatic semantics, he could express gratitude and farewell. He had difficulty expressing greeting, regret, description of appropriate action, and asking appropriate questions.

34. Ms. Chiu also administered non-standardized tests. She informally tested Student's overall language skills. He could identify the date on a calendar, but he could not state his birthday and age. She administered the Auditory Memory for Quick Stories to evaluate his auditory memory and comprehension skills. Given picture cues but no choices, he could answer yes/no questions with 75 percent accuracy, and "wh"-

questions with 33 percent accuracy. His accuracy with "wh-" questions increased to 60 percent accuracy when given two choices and picture cues. Ms. Chiu assessed Student's association skills and awareness of the functional relationship between pairs by using the game Things That Go Together Set 2: At School. She reported that Student had difficulty with this task, achieving only 40 percent accuracy.

35. Student performed well on a game regarding spatial concepts, identifying 10 prepositions given picture and word cues with 100 percent accuracy. He could express 10 prepositions given picture and word cues with 90 percent accuracy.

36. Ms. Chiu administered the Table Top Pocket Chart—Four Step Sequencing activity to assess Student's skills in sequencing or ordering of events, memory, observation, storytelling, and logical thinking. He was able to correctly order four pictures with 80 percent accuracy. He could also describe each scene and the action in the scene with 80 percent accuracy. He required cues and modeling for the first two trials, but then he completed the rest of the task independently. He generated a complete sentence for each picture scene.

37. Ms. Chiu also reported on Student's pragmatic skills, based on observation and the Pragmatic Skills Checklist—Interpersonal Communication completed by Student's classroom teacher, Carol Wong. Ms. Chiu reported that the results provided by Ms. Wong indicated significantly delayed pragmatic skills in the classroom. Ms. Wong scored Student with 0 on every category. Ms. Wong reported to Ms. Chiu that Student never initiated a conversation with the teacher and peers in the classroom. He did not interact with the teacher and the peers with appropriate social language, or ask any questions. He did not demonstrate appropriate non-verbal skills such as appropriate eye contact, facial expressions, gestures, and turn-taking. He also had deficits in his reasoning skills such as reacting to humor, making predictions, and problem solving.

38. Ms. Chiu's classroom and playground observations revealed similar severe pragmatic delays. Student always played by himself on the playground, and he did not interact with his peers. He did not demonstrate appropriate turn-taking skills. He always required prompts to line up after recess. He could initiate communication to express his wants and needs, if necessary, but he had difficulty expressing his feelings and explaining what happened. In general, he demonstrated short eye contact with 50 percent accuracy, and would respond when told to look at the speaker. Ms. Chiu concluded that Student's pragmatic skills were significantly delayed.

39. During the testing, Student demonstrated a very short attention span. He needed frequent redirections to continue the tests. He exhibited slow processing skills, and sometimes required five minutes to process a question. He also often required as many as four or five repetitions of one question. Additionally, Student's behaviors interfered with the assessment. During testing, he displayed the following: echolalia, kicking the table, making noises, putting his finger in his ear, covering his eyes, playing with his saliva, hitting the test books, moving his hands in front of his face, and laughing. He responded well to reprimands regarding the behavior. However, Ms. Chiu reported that the test results should be interpreted with caution, due to these behaviors. Ms. Chiu concluded that Student continued to qualify for LAS services.

TRIENNIAL IEP MEETING OF DECEMBER 11, 2007

40. District convened a triennial IEP meeting on December 11, 2007, to discuss the results of the triennial speech and language assessment and the development of behavioral goals and objectives. The team noted Student's disability as autism and that parents were concerned regarding Student's speech and language skills.

41. The team decided that Student would spend 81 percent of the time in the general education setting, with RSP consultation for four hours per month. The team discussed and set behavioral goals. Additionally, Ms. Chiu reviewed her speech and

language assessment report for the team. She reported that Student had very good one-word vocabulary skills, as demonstrated on the ROWPVT and the EOWPVT, and had made limited progress towards meeting his goals. The team agreed to set four new goals; two in the area of receptive language, one in the area of expressive language, and one in the area of pragmatics. The IEP notes reflect that Ms. Wong had not observed that Student's pragmatic skills in the classroom were significantly delayed.² In an attempt to address Parents' concerns that Student required more speech therapy, particularly individual speech therapy, District offered 30 minutes a week of group LAS therapy and 30 minutes a week of individual LAS therapy.

42. The team set new Language/Communication goals in receptive language, expressive language, and pragmatics. In receptive language, the team stated that by December 2008, given visual/picture cues, Student would retell stories using basic story grammar and relating the series of story events by answering "who," "what," "when," "where," "why," and "how" questions with 80 percent accuracy for four out of five trials as measured by observation. This goal is similar to Student's previous annual goal, but with an increased accuracy level and the specification that the goal relate to a story. The team set short-term objectives leading up to the goal which gradually increased the accuracy percentage. The team set a second receptive language goal, stating that by December 2008, given visual/picture cues, Student would classify items by association with 80 percent accuracy for four out of five trials as measured by observation. The team

² On its face, this comment conflicts with Ms. Wong's observations of Student's pragmatic skills in the classroom, as reported by Ms. Chiu in her December 7, 2007, assessment report. At hearing, Ms. Wong explained that this comment meant that she was not able to determine Student's pragmatic skills when he was on his own, because his one-to-one aide was constantly at his side.

set short-term objectives leading up to this goal, which again gradually increased the accuracy percentage.

43. The team also set an expressive language goal, stating that by December 2008, given visual/picture cues, Student would initiate communication with peers and adults by asking appropriate questions using "May I . . .?" "Can I...?" "Do you have ...?" "What are/do you...?" "When are/do you . . .?" with 80 percent accuracy for four out of five trials as measured by observation. The team set short-term objectives leading up to this goal, which again gradually increased the accuracy percentage. The team also set a pragmatic language goal, stating that by December 2008, given a social situation, Student would verbalize personal problems by using the structure "I feel (sad, mad, upset) because I . . ." with 80 percent accuracy for four out of five trials as measured by observation. The team again set short-term objectives leading up to this goal, which gradually increased the accuracy percentage. Parents did not consent to the IEP.

44. Ms. Chiu's opinion that Student has made progress is not supported by the written progress reports that describe the amount of progress that Student has made on his goals. Ms. Chiu testified that Student had met his receptive language goal, set in the IEP of December 11, 2007, that he classify items by association. He had not met any other goals set forth in IEPs for first and second grade. Rather, he made some progress on some of the short-term objectives relating to some of the goals for first and second grade. He made some progress on one short-term objective of the first grade goal of expressing his feelings, in that he could express his feeling given a choice of two. He made some progress on one short-term objective of the first grade goal of answering questions that ask "who," "when," and "where," by answering "who" questions given picture and written cues. He made some progress on one short-term objective of the first grade goal of initiating conversation with peers and adults by saying "Go Home" to adults and "May I borrow your crayon?" to his peer. He made some progress

on one short term objective of the first grade goal of initiating eye contact when his name was called. By the end of first grade, he had made some progress on one short-term objective of the goal of asking questions, and he demonstrated some progress on a short term objective of the goal of answering questions by answering "wh" questions with 25 percent accuracy. He would initiate asking for help if he really needed help, thereby making some progress on the short-term objective of the goal of initiating conversation.

45. In second grade, he made some progress on the short-term objective of the goal of asking questions to express his wants and needs by finishing the question after being prompted. He always required prompts to ask questions. He again made progress on one of the short-term objectives of the goal of answering "wh"- questions with picture and word cues, by answering such questions with 50 percent accuracy given no choices. He made some progress on one short-term objective of the goal of initiating communications with good eye contact by initiating asking questions when he really wanted something. Once, he initiated "I want play ball" with good eye contact, and he also said "Ms. Chiu. I want to play Monkey Around" with good eye contact.

46. At hearing, Ms. Chiu reiterated her opinion, as she expressed in the IEPs, and as she advised the RSP teacher in periodic "Instruction Planning Team Action Plan" reports, that Student was making progress in his speech therapy. She asserted that group therapy was better for Student than individual therapy, because he could learn from his peers. Ms. Chiu also testified that group therapy was better for Student because, in the "real world," people do not speak one-to-one; rather, they speak to many people. She also stated that Student has "basic skills," in that, with prompts, he can greet people by saying "Hi"; he can express farewell by saying "'bye"; he can respond to "How are you doing?" by saying "I am fine"; he can answer "yes" and "no" questions, and he can follow three-step oral directions with 100 percent accuracy.

However, he has difficulty transferring those skills to social situations. She testified that he interacted well with her one-to-one, but he did not interact with other peers or teachers. Therefore, in her opinion, Student required group LAS, as opposed to individual therapy, so that he could practice his pragmatic skills.

47. Ms. Chiu's opinion as to Student's progress, however, was often based upon isolated incidents. Several times she testified that on one or two occasions, Student had performed a task, such as asked her a question without prompting or followed an instruction. Student's IEP goals and short-term objectives, however, require that various tasks be done more than once or twice to be considered "progress." Moreover, the reasons that Ms. Chiu gave to support her opinion that Student requires group LAS services and not individual services are not entirely accurate. In the real world, people often speak privately, one-to-one, contrary to Ms. Chiu's observation. Moreover, Student's "basic skills" are clearly limited, in that his spontaneous speech is nearly non-existent. He is seven years old and cannot spontaneously speak in sentences. Auditory information has to be repeated to him numerous times. He cannot process a question for several minutes. Ms. Chiu reported that Student had very good one-word vocabulary skills, but Ms. Caggiano testified that Student does not have any one-word vocabulary skills with respect to abstract concepts. Further, Ms. Chiu acknowledged that the "fast-paced" group therapy sessions she described at the May 14, 2008, IEP slowed down when it was Student's turn to answer a question. These inconsistencies and inaccuracies in Ms. Chiu's testimony tended to diminish her credibility.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].)

DOES DISTRICT'S OFFER OF LAS SERVICES CONSTITUTE A FAPE?

2. Student contends that the District's offer of 30 minutes a week of school-based group LAS services and 30 minutes a week of school-based individual LAS services denies Student a FAPE. Student contends that his speech and language skills are significantly delayed and he has not made sufficient progress. Student contends that, to receive a FAPE, he requires three 30-minute sessions a week of school-based LAS services, with one 30-minute session to be delivered in a small group setting, and the remaining two 30-minute sessions to be delivered individually, plus two 50-minute sessions per week of individual clinic-based LAS therapy, preferably to be provided by CDK.³

³ In his Complaint, Student requested reimbursement for a variety of costs, some of which are legally not recoverable in a special education due process hearing. Student also requested the cost of "independent assessments." No evidence was presented at hearing regarding the costs of the CDK assessment or any other assessment. Generally, costs for an independent educational assessment (IEE) are reimbursable under certain circumstances. For example, if the student has notified the district that student disagrees with a district assessment and requests an IEE at district expense, and the district does not timely respond to the request, or the district cannot prove at a due process hearing that its assessment was appropriate, or that the IEE did not meet district criteria. (34

3. District contends that its offer in the December 11, 2007, IEP constitutes a FAPE, and that Student has made appropriate progress. District contends that students with autism will always have delayed speech and language abilities, even with appropriate services, and Student did not demonstrate that the services the District provided or offered were inappropriate.

4. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

5. Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental,

C.F.R. § 300.502(b)(1), (4); Ed. Code, § 56329, subds. (b), (c).) Certain equitable considerations also can support reimbursement for an IEE. However, there was no evidence of any such circumstances in this case. Student did not request the District to perform an IEE, Student did not challenge any of the assessments performed by the District, and Student offered no equitable justification for reimbursement of the costs of any IEE. Therefore, Student has not demonstrated that he is entitled to such costs.

corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).)

6. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R. part 300, Question 4 (1999 regulations).)

7. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479 at 1483.)

8. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, [102 S.Ct. 3034], the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to

satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

9. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by *Rowley* and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877 at 890.) Furthermore, educational benefit in a particular program is measured by the degree to which Student is making progress on the goals set forth in the IEP. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458 at 1467.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of

supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.)

10. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

ANALYSIS

11. District's offer of 30 minutes a week of group LAS services, and 30 minutes a week of individual LAS services does not constitute an offer of a FAPE. At the time that the IEP team made this offer, the team should have known that Student was not making adequate progress. Ms. Chiu's assurances to the team notwithstanding, Ms. Chiu's triennial assessment report dated December 7, 2007, showed that, despite two years of one hour a week of group LAS therapy, and a year of one hour a week individual LAS therapy, Student had severely delayed expressive, receptive, and pragmatic speech and language skills. (Factual Findings 1 through 47; Legal Conclusions 1 and 4 through 10.)

12. The "snapshot" available to the IEP team of Student's lack of sufficient progress in his speech and language skills illustrates that the program that District has offered was not designed to address Student's unique needs and was not reasonably calculated to provide the Student with some educational benefit. The District's offer to simply convert one-half of the services that it has been providing from group services to individual services does not, practically speaking, constitute the change in the level of

services that Student requires to address Student's severe and ongoing speech and language deficiencies. Student requires an increased level of services because, as of the time of the December 11, 2007, IEP, Student has received only minimal educational benefit. District may be correct that, as an autistic student, Student may always have speech and language deficiencies, and may not always meet his IEP goals. However, there was no evidence that Student's deficiencies are of such a nature that they cannot be ameliorated by appropriate LAS services so that Student can receive more than a minimal educational benefit, or that Student's deficiencies are so intractable that he can never meet more than one IEP goal and make little or no progress on the others. Moreover, *Rowley* and its progeny require that, regardless of Student's disability, he receive more than a minimal educational benefit. (Factual Findings 1 through 47; Legal Conclusions 1 and 4 through 10.)

13. Educational benefit is measured by the degree to which a student makes progress on the goals set forth in the IEP. Student has made little or no progress on his IEP goals during first and second grade. He has accomplished only one goal, and has only made some sporadic progress on some short term objectives on some of his other goals. Student still cannot answer basic questions, express his feelings, and express his needs, without prompts and cues. He cannot initiate conversations, ask questions, consistently ask for help, sustain consistent eye contact, or interact with peers or his classroom teacher. (Factual Findings 1 through 5 and 17 through 47; Legal Conclusions 1, 8, and 9.)

14. On the other hand, Student's proposal that the District provide 30 minutes of school-based group therapy one time a week, and two 30-minute sessions per week of school based individual therapy, plus two 50-minute sessions a week of clinic-based individual therapy, is a program designed to maximize Student's progress, not only educationally but otherwise as well. Ms. Caggiano recommended clinic-based therapy

largely because it is not restricted to Student's IEP, but can address a host of other issues that are beyond the scope of Student's IEP. District's responsibilities, however, are circumscribed by the Student's educational needs, and the services to address them, as determined by the IEP team. The law does not require the District to maximize Student's progress, nor to address needs beyond his educational needs. Furthermore, Ms. Caggiano was unable to state that Student required clinic-based therapy to advance in his education. Under these circumstances, Student did not demonstrate that he required clinic-based LAS services from a non-public agency such as CDK to receive a FAPE. (Factual Findings 1 through 47; Legal Conclusions 1 and 4 through 9.)

15. Ms. Caggiano did not recommend a particular amount of time for school-based individual LAS services, in deference to the District's scheduling restraints. Ms. Caggiano's recommendations regarding the level of services included both a school-based component and a clinic-based component, and, under this formulation, she recommended three school-based LAS sessions a week, (one in a group setting and two in an individual setting), pursuant to "convention." She credibly emphasized, however, that consistent and not sporadic delivery of services was important. (Factual Findings 17 through 29.)

16. There was no evidence as to what "convention" would be for the frequency and duration of school-based LAS without any clinical services. Given that Student has demonstrated that he is entitled to individual LAS services, but not to clinic-based services, reason suggests that Ms. Caggiano's formulation should be modified to include three, and not two, individual school-based LAS sessions a week, and one school-based group LAS session a week. Further, each of the sessions should be 30 minutes long, since the District has always delivered services to Student in 30-minute sessions. Such a program provides consistency, addresses Student's unique educational

needs, and is reasonably calculated to provide Student with some educational benefit. (Factual Findings 1 through 47, Legal Conclusions 1 and 4 through 10.)

ORDER

1. District has failed to offer Student a FAPE. Student's request for relief in the form of additional LAS services is granted.

2. District shall provide Student LAS services as follows:

(a) School-based LAS services in a small-group setting; at one session a week for 30 minutes, to start at the beginning of the 2008-2009 school year and to continue until the next annual IEP meeting;

(b) School-based individual LAS services at three sessions a week, for 30 minutes each session, to start at the beginning of the 2008-2009 school year and to continue until the next annual IEP meeting.

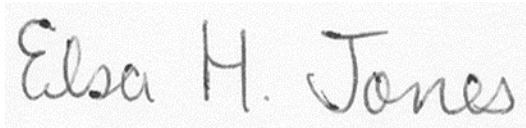
PREVAILING PARTY

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. Student prevailed on all issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: August 19, 2008

A handwritten signature in cursive script that reads "Elsa H. Jones". The signature is written in black ink on a light-colored, slightly textured background.

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings