BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS on behalf of STUDENT, V. FREMONT UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2006050433 Kailani Santiago

DECISION AFTER REMAND

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter on remand in Oakland, California, on February 23-25, 2009 .

Student was represented by Mandy G. Leigh and Jessica Cochran, Attorneys at Law. Parents were present throughout the hearing.

The Fremont Unified School District (District) was represented by Damara Moore and Sarah L.W. Sutherland, Attorneys at Law. Jack Bannon, the District's Director of Special Services, was present throughout the hearing.

On May 11, 2005, Parents filed a request for due process hearing on behalf of Student. The due process hearing was held before ALJ Marson on July 6-7, 10-14, and 24, 2006. On August 24, 2006, the ALJ ruled in favor of the District.

On February 22, 2008, Judge Susan Illston of the United States District Court for the Northern District of California partially reversed the ALJ's decision and remanded the matter for the hearing of additional evidence. *(K.S. v. Fremont Unified Sch. Dist.* (N.D.Cal. 2008) 545 F.Supp.2d 995 (Remand Order).)

OAH received the District Court's Remand Order and judgment on March 14, 2008. At the request of the parties, the matter was not calendared until settlement negotiations occurred. A trial setting conference was held on July 15, 2008, and the matter was set for further hearing on October 24, 2008, and November 17 and 18, 2008. The matter was later continued to February 23-25, 2009.

At the conclusion of the hearing, a continuance was granted to April 15, 2009, for the filing of closing briefs. On that date, the parties submitted briefs and the record was closed.

THE REMAND ORDER

The District Court's Remand Order instructed the ALJ as follows:

> ... the ALJ must reconsider his finding that plaintiff is severely mentally retarded and incapable of more significant progress than she has made to date .... [T]his finding must be based on more evidence than the testimony of a single and apparently unqualified witness. If on remand the ALJ finds it necessary to make a determination that plaintiff is severely mentally retarded and incapable of more significant progress, the ALJ should hear more evidence on this issue from both parties.

(Remand Order, 545 F.Supp.2d at pp. 1002-1003.)

In its Remand Order, the District Court also rejected certain credibility determinations in the 2006 Decision and remanded "for findings and conclusions consistent with appropriate credibility determinations," and "for redetermination of whether [Student] received a FAPE in accordance with this ruling." (Remand Order, 545 F.Supp.2d at p. 1006.)

ISSUES ON REMAND

At the trial setting conference on July 15, 2008, the parties agreed on the following formulation of issues, which was set forth in the Order Following Trial Setting Conference:

a. Whether Student, in the school years in issue, was capable of making significantly greater progress than she actually made; and
b. Whether, in light of all the evidence including that admitted on remand, the District denied Student a free appropriate public education in the school years in issue.

CONTENTIONS OF THE PARTIES

Student contends that in the school years 2003-2004, 2004-2005, and 2005-2006 (the school years at issue), she had the capacity to make significantly greater progress in her education than she actually made. She argues that because no valid measurement could be made of her intelligence quotient (IQ), her cognitive abilities during that period are properly measured by her difficulties in toileting and speech, by certain statistical predictors of the academic success of autistic children, and by the fact that her progress would have been significantly greater had she been given at least 30 hours a week of intensive training in Applied Behavior Analysis (ABA). She concludes that her progress in school was significantly less than her ability to progress, and that the shortfall demonstrates that the District denied her a free appropriate public education (FAPE) during those years.

The District agrees that no valid measurement of Student's IQ can be made, but contends that other measurements of her cognitive abilities were available and were used. It asserts that a diagnosis of severe mental retardation was not necessary to fashion an educational program for Student in the years at issue, and is not necessary to

resolve th.e issues here. The District further argues that Student's capacity for progress was not significantly greater than her progress in the relevant years, and that the District's Individualized Education Programs (IEPs) for Student were therefore reasonably calculated to allow her to obtain some or meaningful educational benefit, and at all times provided her a FAPE.

FACTUAL FINDINGS ON REMAND

BACKGROUND

1. The background of the dispute is as stated in Factual Findings (FF) 1-3 of the Decision in this matter filed on August 24, 2006 (the 2006 Dec.), and in the District Court's Remand Order (see, 545 F.Supp.2d at pp. 997-998.)

2. Mental retardation is a formal diagnosis recognized by the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. *2000)(DSM-IV-TR).* It is also a category of eligibility for special education. However, Student qualifies for special education because she is displays autistic-like behaviors, not because she may or may not be mentally retarded, and it is neither necessary nor appropriate that a formal finding be made concerning her possible mental retardation[1]

[1] The parties agreed at the trial setting conference that whether the label mentally retarded is appropriate for Student was not an issue for hearing, and that Student's cognitive capacity was relevant, but the propriety of the label was not. The Order Following Prehearing Conference confirmed that agreement.

It is not possible, however, to avoid the term mental retardation here, because the parties and their experts routinely used it.[2]

3. The most reliable way to determine a person's cognitive capacity is by obtaining a valid IQ. It is undisputed that Student's IQ cannot be validly determined due to the nature and severity of her disabilities. Attempts to complete a valid IQ test have been made by the District; by Dr. Robert Crawford, a Kaiser psychologist consulted by Parents; and by Dr. Howard Friedman, one of Student's experts. All agree that Student was unable to understand, concentrate on, or complete the test.

4. An IEP must be reasonably calculated to allow a student to derive some or meaningful educational benefit. The importance of Student's capacity to progress in her education is that it helps to determine whether Student's IEPs in the years at issue were reasonably calculated to allow her to derive such a benefit. The wisdom of an IEP team's calculation cannot be judged in hindsight; rather, it must be evaluated on the basis of the information available to the IEP team at the time the IEP at issue was written. This is known as the "snapshot rule": to gauge the adequacy of an IEP, a tribunal must consider a snapshot in time of the information available to the IEP team when the IEP was crafted. The opinions about Student's cognitive capacity expressed by all witnesses who testified at the remand hearing were formed after the last of the IEP meetings at issue here, and were therefore unavailable to the IEP team at the relevant times. The records reviewed by those witnesses, however, do form part of the snapshot of information that was available to Student's IEP team at its meetings during the school years at issue.

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[2]According to the American Association on Intellectual and Developmental Disabilities (formerly the American Association for the Mentally Retarded), the appropriate term is intellectual disability.

5. To comply with the snapshot rule, evidentiary limitations were imposed at the remand hearing. Because there was ample information already in the record concerning Student's progress, and capacity for progress, during the school years in issue, evidence about her progress in education after the end of the 2005-2006 school year was generally excluded. Dr. Bryna Siegal, one of the District's experts, had examined Student's records from the years in question and from later years as well. She had also observed Student in class in February 2008. Dr. Ronald Leaf, one of Student's experts, had examined the same range of records and observed Student in class in October 2007. Drs. Siegel and Leaf were instructed to express opinions formed only upon information from the years in issue, and to exclude from their testimony any impressions or opinions formed on the basis of records generated or events that occurred after June 2006, including their class visits. Each did so. The written reports of those two witnesses were redacted to eliminate references to events occurring after June 2006, and opinions formed on the basis of those events. Similar limitations were imposed on all other witnesses and on the introduction of documents in evidence.

6. Seven experts testified at the remand hearing about Student's capacity to progress in her education. Resolution of the issues requires discussion of each of their opinions.

THE DISTRICT'S EXPERTS

Dr. Bryna Siegal

7. Dr. Bryna Siegel is the Director of the Autism Clinic of the Children's Center (Autism Clinic), and Co-Director of the Autism and Neurodevelopment Center, at Langley Porter Psychiatric Institute at the University of California at San Francisco (UCSF). At the Autism Clinic, one of the largest of its kind in California, Dr. Siegel leads a multidisciplinary team of professionals, including psychiatrists and psychologists,

medical and graduate students, occupational therapists and speech and language pathologists. Under her direction, that team diagnoses autism spectrum disorders and related cognitive impairments, plans treatments, and makes educational recommendations. Dr. Siegel has assessed more than 4,000 children with autism. She trains school psychologists and clinical psychologists in the diagnosing and treatment of pervasive developmental disorders such as autism and mental retardation.

8. Dr. Siegel is also an adjunct professor at Langley Porter's Psychiatric Institute. In 1980, she received a Ph.D. in Child Development from Stanford, where she engaged in several years of post-doctoral research in adolescent development, psychiatric research methods, and developmental psychopathology.

9. Dr. Siegel was a member of the committee of professionals that developed diagnostic criteria for autism for the third and fourth editions of the *DSM* .From 1998 to 2004, she was a national board member of the Autism Society of America's Foundation Scientific Advisory Board. She is a referee for peer-reviewed journals such as the *Journal of Autism and Developmental Disorders,* the *Journal of the American Academy of Child & Adolescent Psychiatry,* the *Journal of Child Psychology and Psychiatry,* and the *European Journal of Child Psychiatry,* among others. Since 2001 she has acted as a grant reviewer for the National Institute of Mental Health, and from 1998 to 2004, for the Autism Society of America Foundation.

10. Dr. Siegel is the author of four books. The most recent is *Helping Children with Autism Learn: Treatment Approaches for Parents and Professionals* (Oxford Univ. Press 2003). She has written more than a hundred peer-reviewed articles and papers about children with autism.She has been an invited lecturer at scores of national and international conferences and symposia, and has written the *Pervasive Developmental Disorders Screening Test-II,* an autism protocol adopted in some states as a standard screening method. Dr. Siegel has qualified as an expert witness on services for the

developmentally disabled in more than 100 legal proceedings in several states and two Canadian provinces, usually in matters concerning autistic children and, frequently, the Individuals with Disabilities in Education Act (IDEA). Her testimony or writings on autistic children have been cited by numerous federal courts, ALJs, and hearing officers throughout the nation.[3]

11. Dr. Siegel also has extensive academic credentials. She has a master's degree in Education from Stanford University, and was once a credentialed special education teacher in Florida. Much of her life's work has concerned educational programming for autistic students.

12. Dr. Siegel recognized that no valid IQ score for Student exists. She testified she was nonetheless able to form a valid opinion concerning Student's intellectual capacity by a method known as convergent validity, which involves the gathering of as many different sources of information as are available to determine whether they all indicate the same thing. Dr. Siegel testified that if the data all point to the same conclusions, those conclusions can be drawn with a fair degree of certainty. This method was not challenged by any of Student's witnesses.

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[3] See, e.g., *T.W. v. Unified School Dist. No. 259(10th* Cir. 2005) 136 Fed.Appx. 122, 130 (unpublished); *Amanda J v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 886; *Wiles v. Department of Educ.* (D.Hawaii 2008) 593 F.Supp.2d 1176, 1188 fn. 12; L.M. *v. Department of Educ.* (D.Hawaii Aug. 9, 2006, Civ. No. 05-00345) 2006 WL 2331031, pp. 7-9; *Student v. Redlands Unified School Dist.* (2008) Cal.Ofc.Admin.Hrngs. Case No. 2006100159; *Student v. Pajaro Valley Unified School Dist.* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110472; *Rocklin Unified School Dist. v. Student* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110278; *Student v. Downey Unified School Dist.* (2005) Cal.Ofc.Admin.Hrngs. Case No. N2005070481

13. Dr. Siegel conducted a thorough and detailed review of available information about Student's capacities. She was able to examine and compare test scores on instruments previously administered to Student such as the Mullen Scales of Early Learning (Mullen), the Vineland Adaptive Behavior Scales (Vineland), and other tests as well; reports of Student's behavior at school, as well as her behavior during attempted cognitive testing, and in everyday life; and reported observations of Student at school and at play. In addition, Dr. Siegel examined all of Student's IEPs starting in October 9, 2002, through the years at issue, and all relevant assessments, progress reports, and teacher reports. She examined the records to determine whether everyone involved in Student's education saw her as having the same cognitive capacities, and concluded that they did.

14. Based on her thorough review of Student's records, Dr. Siegel concluded that Student is not only autistic, but is also severely mentally retarded. She learns slowly. She has very limited generalization skills, which is a significant indicator of severe intellectual disability. It slows Student's progress, and accounts for her low retention of mastered abilities. In her written report, Dr. Siegel concluded: "It is unquestionable that [Student] is educationally severely handicapped, and in terms of intelligence, functioning in the severely mentally retarded range." She further concluded that Student's degree of linguistic deficit and limited use of language, and her repetitive choices of the same narrow sensory activity "all are consistent with severe intellectual disability, severe mental retardation, and severe adaptive deficit."

15. Based on her review of Student's records from the relevant years, Dr. Siegel concluded that Student was making reasonable progress given her level of impairment, and that the educational program set forth in her IEPs was appropriate to her abilities. She saw no indication that Student has any capacity for greater progress than she has been able to achieve. In her report, Dr. Siegel concluded that Student "has

made expected progress ... for a pupil with her level of disability" and that she "has received consistent and appropriate interventions ... that have been appropriate in intensity given her degree of disability."

16. Dr. Siegel was a convincing witness. Her credentials and experience were unmatched by any other witness. Her review of Student's records was thorough, and Student does not argue that it omitted anything important. Dr. Siegel did not engage in advocacy; she was neutral and balanced in her testimony and her explanation of her record review and of Student's educational history and progress. When she disagreed with the District, she was willing to say so. For example, she testified that she did not agree with a sensory integration program the District once used for Student. Extensive cross-examination revealed no significant flaws in Dr. Siegel's work or reasoning. Her opinions that Student was progressing as could be expected under her IEPs, given her serious cognitive limitations, that she had no apparent capacity to progress at any greater rate, and that her IEPs were appropriate are entitled to substantial weight.

17. Student argues that Dr. Siegel's testimony should be "stricken or given no weight" since she is not a licensed psychologist. She is not allowed to perform "diagnoses" outside the context of her team's work at UCSF, Student argues, and therefore cannot diagnose Student as severely mentally retarded.[4] However, Dr. Siegel's legal capacity to diagnose is irrelevant here. She did not purport to make a formal diagnosis; she merely evaluated Student's cognitive abilities and her ability to progress in school for the purposes of educational programming. No diagnosis is necessary, or even appropriate, ·for the District to fashion an educational program for Student, who qualifies for special education because she is autistic, not because she is mentally

[4] The terms of Dr. Siegel's license allow her to diagnose mental retardation as part of her work with her UCSF team .

retarded. Dr. Sue Clare, a school psychologist who testified for the District and whose credentials are set forth below, explained without contradiction that there are two common usages to the term mental retardation. One refers to a formal diagnosis by a clinical psychologist in accordance with the *DSM-IV-TR;* the other is for special education eligibility and programming, and requires no diagnosis. Dr. Siegel has assessed more than 4,000 autistic children, and is eminently qualified to evaluate Student's cognitive abilities and capacity for educational progress.

18. Student argues that Dr. Siegel erroneously relied on Student's 2004 scores on the Mullen to conclude that Student was severely mentally retarded, since her scores fell outside the range accepted by the Mullen's authors for the computation of a developmental quotient. The Mullen is normed for children between 3 and 68 months old.[5] Student was 78 months old when Dr. Crawford administered the test to her. In declarations filed after the remand hearing, the parties dispute whether any use should be made of Student's Mullen scores since she was outside the age range for which it is normed. Dr. Howard Friedman, an expert psychologist who testified for Student, testified that the test should not be used to derive a developmental quotient. Dr. Sue Clare testified that best practices provide for the use of such information as one of many sources in determining a student's functioning relative to her peers. The test publisher, having examined the competing testimony, stated in a declaration that for the purpose of obtaining a "deviation score," the test should be used only within the age range for which it is normed. However, the publisher also declared:

> Administering a test "out of level," that is, to an examinee whose age is outside the age range of the test's norm

[5] A normed test instrument is standardized on a clearly defined group, and scaled so that each score reflects a rank within the norm group.

> sample, can be a valuable and professionally sound practice when assessing examinees whose abilities are far above or far below average, because it enables the examinee to attempt tasks that are within his or her range of capabilities.

19. Dr. Siegel's use of the Mullen results as one of many indicators of Student's capabilities was consistent with, and supported by, the publisher's guidance quoted above. Student's abilities are far below average, and therefore a test normed for younger children would be within her range of capabilities. At the remand hearing, Dr. Siegel did not use the Mullen results to obtain a deviation score. She used it only as one of many measures of Student's capabilities in determining the convergent validity of her opinion. The evidence established that such usage was proper and consistent with the publisher's advice.

20. Dr. Siegel also testified that the degree of intellectual disability disclosed by Student's scores on the Mullen in 2004 was "similar" across domains. Student argues that this testimony is not credible because there was a wide range in her scores across domains. However, the range was from 11 to 26 months' developmental age in expressive language and fine motor skills. Since Student was six years and six months old when the Mullen was administered, all of those scores are similar in that they indicate very serious delays, as Dr. Siegel correctly concluded.

DR. ROBERT CRAWFORD

21. Dr. Robert Crawford is a clinical psychiatrist at Kaiser Permanente's Autism Spectrum Disorders Clinic in San Jose, California. He was awarded a Ph.D. in Clinical Psychology by the University of Connecticut in 2004, and for several years at Kaiser has specialized in the assessment of children and teens with autism spectrum disorder and other developmental delays.

22. In 2004, at Parents' request, Dr. Crawford conducted a multidisciplinary evaluation of Student, who was then six years old. Dr. Crawford's evaluation included several interviews of Student and Parents; behavioral and developmental observations; and completion of two developmental behavioral checklists (a Parents' Evaluation of Disability Scale (PEDS) and a generic Autism Diagnostic Observation Schedule (ADOS)), the Vineland, and a developmental profile. He attempted to administer the Leiter Revised International Performance Scale (Leiter), but Student was only able to complete one of the five subtests. He also attempted, but was unable, to administer the Test of Non-Verbal Intelligence (C-TONI), and could not complete an IQ test for the same reasons others could not complete one.

23. Dr. Crawford found in 2004 that Student was in the 5th percentile on the one matching subtest of the Leiter that she could complete. He also administered the Mullen, and concluded that Student's estimated developmental age ranged from 9 months in expressive language and 11 months in receptive language to 21 months in gross motor skills and visual reception, and 26 months in fine motor skills. He presented the results of those tests with some caution, because, as noted above, Student's age was slightly outside the age range available for calculating standard Mullen scores. He testified that the Mullen results may have slightly understated Student's true abilities in the domains of visual reception, fine motor skills, and receptive language, because she did not understand what was asked of her, and had not developed the skill of pointing, which was required for many responses on the test.

24. Dr. Crawford also administered the Developmental Profile II (DP-II), on which Student scored in the "severely low range''; all her scores were delayed by at least 3 years in developmental age. Dr. Crawford administered the Vineland by interviewing Student's father. Across 11 domains on the Vineland, Student displayed developmental age equivalencies ranging from 11 months to 3 years 1 month. Dr. Crawford

summarized the Vineland results by stating that "[i]n comparison to her peers, [Student's] percentile rank in all areas are less than 0.1 % and at about 0.1 % for socialization."

25. Overall, Dr. Crawford concluded in 2004 that Student was clearly autistic. She also demonstrated poorly developed behaviors in all areas, and had comprehension typical of a two-year-old. He was unable to obtain a full cognitive profile because of difficulties of testing her intelligence, but estimated that she was, at age 6, at least 2 years delayed in all areas of cognitive functioning. He also concluded that Student presented with severe delays in all areas of adaptive functioning. In his summary, Dr. Crawford observed that Student's cognitive and adaptive delays could suggest that she was "at risk for mental retardation," but that more cognitive testing could be postponed until a more accurate measure of her IQ could be obtained.

26. Dr. Crawford testified at the remand hearing that he believed in 2004, and believes now, that Student is severely to profoundly mentally retarded.[6] He did not include that conclusion in his 2004 report because he was uncomfortable doing so in the absence of a valid IQ test, which is the only "definitive" method of diagnosing mental retardation. He stated on cross-examination that in some domains, Student "may" be capable of "a little bit more" than his testing indicated, since some of his scores could be attributed to her inability to understand what was being asked of her. This was consistent with his 2004 report.

27. Dr. Crawford was a credible and persuasive witness. He was unaffiliated with either party, appeared with separate counsel, and testified only because he was

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[6] The term "severe mental retardation" refers to the bottom 3-4 percent of individuals with mental retardation. The term "profound mental retardation" refers to the bottom 1-2 percent. *(DSM-IV-TR,* secs. 318.1- 318.2, pp. 43-44.)

subpoenaed and instructed to answer questions. Student now attacks his credibility by claiming his testimony "seems to suggest" an ulterior motive: that Kaiser might avoid responsibility for providing supplemental services if Student is found severely mentally retarded. There is nothing in the record to support such speculation. Student also observes that Dr. Crawford has relatively less experience than two of Student's expert witnesses, but does not explain why that would justify giving less weight to his analysis. Dr. Meredith Edelson, one of those more experienced experts, carefully analyzed Dr. Crawford's report, and testified that if Dr. Crawford thought that Student was mentally retarded, that would carry weight with her. Dr. Crawford based his opinions upon his examination and review of Student's records and his personal observations, and nothing significant emerged on cross examination to detract from his opinion and conclusions. His testimony is entitled to significant weight.

RICHARD PERLOW

28. Richard Perlow administers the California Alternative Performance Assessment (CAPA), which is part of the state's Standardized Testing and Reporting (STAR) system and is an alternative used, at the election of IEP teams, for testing students with significant cognitive disabilities.

29. Mr. Perlow established, based on his review of Student's records, that on September 24, 2004, Student's IEP team decided she should take the CAPA. On May 6, 2006, she did so, scoring "basic" in mathematics with some prompting, and "proficient" in English with some prompting. The test she took was Level One of the CAPA, which is the lowest level and is reserved for students with the most substantial cognitive delays.

30. The District argues that the fact that Student was given Level One of the CAPA and obtained those scores demonstrates that she is among the most cognitively impaired students in California. Student argues with some merit, however, that nothing can be inferred from Student's scores on the CAPA Level One because it is not normed,

and the conditions under which she took the test were not described. The District presented no evidence that would correlate Student's scores on the CAPA with a particular degree of cognitive impairment, other than to suggest that it is low. Nor did the District present evidence that would support any inference to be drawn from those scores about Student's capacity for educational progress or the appropriateness of her IEPs. Thus, Mr. Perlow's testimony about Student's CAPA scores is not helpful in resolving the issues presented on remand, and is given no weight here.

DR. SUE CLARE

31. Dr. Susan Clare is retired, and was most recently a private psychologist and educational consultant. She has a Bachelor of Science degree in Speech Pathology and Audiology from the University of Kansas, a Master of Science in Speech Pathology and Audiology from Portland State University, and a Ph.D. in Educational Psychology from the University of Utah. She is a licensed psychologist and board-certified as a school psychologist. Because of her emphasis on the education of autistic children, she sought additional training in behavioral science, and is a board certified behavior analyst. She has worked as a speech pathologist and therapist in numerous school districts since 1966. Her career in speech pathology and audiology has centered on autistic children. After working as a special education resource person, she became a special day class teacher in Davis County, Utah. She started an autism unit there that the state later designated as a teacher training site. As a result, she became the teacher and trainer for the Utah State Department of Special Education's model program for autistic children. In California, she established a program for the acquisition of language and social skills by autistic pre-schoolers at the Clovis Unified School District, where she worked for 16 years as a school psychologist. She taught a university-level class called "Teaching Language to Autistic Children" in Oregon, and a class on teaching autistic children at Utah State University. She has published and given presentations widely, and received

numerous honors and awards. Dr. Clare testified at the 2006 hearing as well as at the remand hearing.

32. In 2006, Dr. Clare testified, from her review of Student's records, that Student was likely severely mentally retarded, and that her rate of progress in school, given her cognitive capacity, showed significant improvement over time. In the 2006 hearing, Student did not question Dr. Clare's qualifications to make that assertion. In 2008, in its Remand Order, the District Court held that the record did not show that Dr. Clare was qualified to make a cognitive assessment of Student. The combined records of the 2006 and remand hearings riow establish, however, that Dr. Clare is highly qualified to determine the cognitive capacity of a student. She is a credentialed school psychologist, and by state statute, only a credentialed school psychologist may perform a psychological assessment of a student for special education purposes. (Ed. Code,§ 56324, subd. (a).) As the examples in the record show, psychological assessments of students by school psychologists routinely assess cognitive capacity. Every time a student is referred for a determination of eligibility for special education, a cognitive assessment must be done by a school psychologist. Dr. Clare was trained in cognitive assessment in her doctoral and post-doctoral education, and in her study for licensing as a school psychologist. She testified without contradiction that it is the duty of a school psychologist to assess in areas of suspected disability, particularly in the areas of processing, neurological deficits, and cognitive ability. Dr. Clare has more than 15 years of experience administering and interpreting cognitive assessments.

33. Dr. Clare established that among the duties of a school psychologist is determining whether a student qualifies for special education due to mental retardation. For educational purposes, no formal diagnosis of mental retardation is required. A determination that a child may have mild, moderate or severe mental retardation is made not to diagnose under the *DSM-IV-TR,* but to aid in designing intervention

programs to meet the child's educational needs. Determining the degree of retardation for educational purposes helps in deciding whether verbal therapy will work, whether vocational choices should be guided, and whether services and supports are needed for independent or supported living.

34. Dr. Clare testified that adaptive scales like the Mullen and the Vineland are useful in determining cognitive ability for educational purposes when the subject's intellect is below the level of accurate measurement by IQ tests.

35. Based on her review of Student's records for the years in question, including but not limited to her Mullen and Vineland scores, Dr. Clare testified that in her opinion Student is intellectually disabled and that her cognitive level affects her rate of learning. She regarded Student's test scores as consistent with mental retardation.

36. Dr. Clare testified in 2006 that, based on her review of Student's records, including IEPs, progress reports, and teacher notes, Student made progress that has been "significant for her," and that the educational programming in her IEPs was appropriate.

37. Dr. Clare also testified, based on her record review, that Student was receiving some discrete trial training (DTT) in the years in question, and would not have benefited from more because Student is a visual learner and prefers, and does better from, structured teaching.[7]

38. Dr. Clare's many qualifications and extensive experience made her an especially credible witness. As a credentialed school psychologist, she is the professional deemed by the Legislature to be most capable, among school personnel, of assessing the cognitive capacities of special education students. Her many years of experience, her

[7] Discrete trial training is the central teaching method of Applied Behavior Analysis (ABA).

concentration on autistic children, and her certification in behavior analysis made her unusually well qualified to express opinions on Student's cognitive abilities, how much DTT would benefit her, and the appropriateness of her·program. Her review of Student's records was thorough, and Student does not argue that it omitted anything important. Cross- examination revealed no significant flaws in her work or reasoning. Her opinion that Student was enjoying significant progress under her IEPs, given her serious cognitive limitations, is entitled to substantial weight.

39. Student faults Dr. Clare's analysis because Student's 2004 Mullen scores were among the many documents she relied on in forming her opinion. For the reasons set forth above in connection with Dr. Siegel's similar use of the Mullen scores, the evidence established that Dr. Clare's partial reliance on the Mullen scores was appropriate and consistent with the test publisher's advice.[8]

STUDENT'S EXPERTS

Dr. Ronald Leaf

40. Dr. Ronald Leaf is a licensed psychologist who received his doctorate in psychology from the University of California at Los Angeles (UCLA) in 1983. As an undergraduate and graduate at UCLA, he was a research assistant for Dr. 0. Ivar Lovaas, who is known for foundational work in Applied Behavior Analysis (ABA). Dr. Leaf later spent a year as Clinic Supervisor of UCLA's Autism Project. He is now the Executive

[8] At the 2006 hearing, Dr. Clare used Student's Mullen scores to make a rough estimate that Student's IQ is somewhere between 20 and 30. (2006 Dec., Factual Finding (FF) 20.) There is no need to resolve the parties' dispute about the validity of this estimate, because the estimate is not needed here. Factual Finding 20 in the 2006 Decision is not incorporated or relied on in this Decision on Remand.

Director of the Behavior Therapy and Leaming Center, a private organization. He is also a Co-Director of Autism Partnership and has been a consultant to the Straight Talk Clinic. He has been in private practice since 1990. He has written books on the education of autistic children, has written numerous articles, and has given many invited lectures. He consults with several school districts in California, primarily by training their staffs. Throughout his career he has worked with children of all ages who have autism as well as other disabilities.

41. Dr. Leaf testified that it is not appropriate to make a diagnostic determination of Student's level of cognitive delays in the absence of a valid IQ test, and that such a test cannot be completed because many of Student's presenting behaviors get in the way. He stated that a valid measure of IQ cannot be obtained until those behaviors are brought under control. As a consequence, he could not say whether Student was mentally retarded or not, and had no way to form an opinion of her cognitive capacity.

42. Despite his testimony that there was no way to determine Student's cognitive capacity, Dr. Leaf opined that Student is working far below her capacity in school. His opinion was formed in part by his perception that Student did not have "a communication system that's working." He testified that even if Student were "the most mentally retarded girl in the history of autism," she should be able to communicate better than she does. He also relied on the fact that Student, in the years in question, had not been successfully toilet- trained. He testified that any autistic child, no matter how cognitively challenged, should be toilet trained by age six. He stated he could be "pretty sure" that Student should be more advanced on those two levels. He then stated: "Whether she's far more capable than that, I can't tell you because her behaviors have not been addressed, her foundational learning skills have not been addressed, and so you can't tell how quickly she really truly can learn."

43. Dr. Leafs belief that Student had no working system of communication in the years at issue is at odds with the record. During those years, Student successfully learned to employ the Picture Exchange Communication System (PECS). By the time of the April 22, 2005 IEP meeting, Student's principal teacher reported that she was making progress in communication, moving from PECS alone to the spoken word. At that meeting Parents submitted a document that asked for details about Student's transition from PECS to the spoken word, and stated: "We feel she is ready for the next step." (See also, 2006 Dec., FF 26-27, 29, 31, 34, 40-42.)

44. Dr. Leafs assertion that any autistic child, no matter how retarded, should be toilet-trained by age six rested on his general experience with children, and on a study done thirty-five years ago of retarded but not autistic adults in correctional institutions, all of whom could be toilet-trained. Asked whether she agreed with that analysis, Dr. Siegel stated that, normally, an autistic child should be toilet-trained by age six. She added, however, that such success required that the child's toileting program was consistently followed everywhere, including at school and at home. Dr. Siegel pointed out that school records contained some indications that Student was not receiving adequate toilet training at home, since she was coming to school with wet diapers. The 2006 record shows that Student, at least during some periods, was receiving a separate private toilet training program at home that was not necessarily coordinated with the one at school. There was no evidence that any toileting program was followed at home consistently, or that any such program was coordinated with the program at school. Dr. Leafs opinion failed to allow for these factors.

45. Even though Dr. Leaf testified that he had "no idea" whether Student had cognitive deficits, he concluded that Student's capacity for progress in school was far greater than her actual progress. In his report, he wrote that "[Student] is operating far, far below her capacity" and "[w]ith adequate education, [Student] should be operating

at a far higher level." Dr. Leafs credibility was lessened by the obvious contradiction between his statements that he had no idea what Student's cognitive capacity is, but that her capacity for progress was far greater than her actual progress. Dr. Leaf sought to escape this contradiction by arguing that certain predictors showed she could make progress, and that she would be making considerably more progress if she were receiving at least 30 hours a week of intensive ABA therapy.

46. In his report, Dr. Leaf stated that "there are several factors that appear to be prognostic indicators of children who will respond favorably to effective education." He listed three factors as relevant to his opinion about Student's capacity to make progress:

1. Level of communication. Although any attempt to communicate is a good sign, the presence of verbal communication is quite favorable. [Student] not only has some communications skills; although very limited she continually demonstrates communication intent.
2. Social Interest. Children who demonstrate an awareness of others, are responsive to social interaction or even attempt to interact typically respond favorably to education. [Student] clearly is interested in other children. She was often observed to smile when approached by a peer. She also exhibited joint attention on multiple occasions.
3. Level of passivity. Perhaps surprisingly, children who exhibit disruptive behaviors (e.g., crying, tantrums, non-compliance, aggression, etc.) achieve a more favorable outcome than those children who are passive. Children with disruptive behaviors clearly are attempting to alter the environment and are responding to environmental factors. Thus it is a matter of teaching them the appropriate behaviors and skills to meet their needs. [Student] is clearly not passive.

(Emphases omitted.)

47. Dr. Leafs reliance on these factors was less than persuasive for a number of reasons. First, it was unclear what these factors actually predict. Dr. Leafs report states only that they are "prognostic indicators of children who will respond favorably to effective education." Nothing in Dr. Leafs report or testimony indicates how that prognostication means Student has a greater capacity for progress in school than the District believes she has. Elsewhere, Dr. Leaf equated effective education with ABA.

48. Dr. Leaf chose to omit two factors from his report, though he recognized them at hearing. One was whether the child engages in self-stimulatory behavior, as Student does. Assuming that this factor does not support Dr. Leafs prognosis (which was not clear from his testimony), the fact that Dr. Leaf simply omitted from his report a factor suggesting a different conclusion lessens confidence in his result. The other omitted factor is a child's "rate of acquisition"; i.e., the rate.at which she learns. Dr. Leaf testified that this is the most important of the factors, but he had to omit it because he had no way to determine what it was. Thus, that factor may or may not support his conclusion.

49. Dr. Siegal criticized Dr. Leafs use of these prognostication factors on a number of grounds. She testified that these factors pertain largely to very young children who had not yet received intervention of any kind. Applying these prognosticators to Student, who had received years of special education by the time most of the relevant IEP decisions were made, was like mixing apples and oranges.

50. Dr. Siegel also faulted Dr. Leafs claim that Student has good prospects because she engages in disruptive behavior rather than being passive. Dr. Siegel testified that this is a controversial view, and does not allow for differences among students. The analysis may well apply to students who misbehave as a tactic, in the expectation that they will be rewarded for it, but not to someone like Student, who

frequently misbehaves simply out of frustration that she cannot communicate. The former type of child may kick a refrigerator in order to get specific needs met, and that may indicate a positive prognosis. The latter, like Student, may simply kick a refrigerator because she has no way of letting people know what she is thinking. That kind of behavior does not predict future success.

51. Dr. Siegel noted that Dr. Leaf had omitted or overstated certain predictors . The most important factor that predicts success for an autistic student is cognitive ability, which is missing from Dr. Leafs analysis. In addition, Student's records show that her social skills are sufficiently low and non-spontaneous that they forecast a low level of acquisition of social skills in the future. Another predictor omitted by Dr. Leaf is the ability to imitate, which Student does not display in significant measure. Dr. Siegel stated that she did not think Dr. Leaf had ever seen someone functioning like Student, in the years at issue, who subsequently made remarkable changes. There is nothing in the record to contradict her assertion.

52. Dr. Clare agreed with Dr. Siegel that Dr. Leafs use of his predictors was incomplete, and also described it as somewhat obsolete.

53. The final reason Dr. Leaf asserted he could form an opinion about Student's capacity for educational progress, while knowing nothing of her cognitive abilities, was that she had not had the benefit of intensive ABA training. Dr. Leaf testified that Student was not realizing her full potential for progress because her undesirable behaviors (self-stimulating, tantrums, repetitive movement, and the like) got in the way of her education, and that those behaviors had to be brought under control first, before she could make any meaningful educational progress. Accomplishing that, he testified, required the concentrated application of ABA techniques before Student's education could proceed.

54. During the years in question, Student received what Dr. Leaf called an "eclectic" educational program that included some ABA training and a number of other methodologies as well. Citing various academic studies, Dr. Leaf testified that every autistic child, without exception, can benefit from 30 hours a week of DTT. He appeared to reason backward from the perceived superiority of ABA to his conclusion that Student is capable of significantly more educational progress than she now achieves. He testified that intensive ABA has been shown to be superior to all other methods of teaching autistic students, and so would allow Student to achieve more progress; therefore, since she was not receiving enough ABA in the years at issue, she was achieving less progress than she could have been achieving; and therefore, she has a greater capacity for educational progress than the Di trict thinks she has.

55. Dr. Leafs conclusion about Student's capacity for progress and its relationship to ABA was undermined by the testimony of the District's experts. Drs. Siegel and Clare both testified that the belief Dr. Leaf espoused was widespread some years ago, but in more recent years, in educational circles at least, the prevailing view is now that ABA is not the preferred method for every autistic student. Citing other academic studies, Dr. Siegel testified that ABA is not effective with students with relatively low cognitive capacity, especially the mentally retarded. Dr. Clare testified that about 20 years ago the view prevalent among behavior analysts was that a child's interfering behaviors had to be removed before other education proceeded, but that professional associations like ABA boards now support using positive behavior programming while other things are taught. She testified that the bulk of modem research and literature now refutes the model Dr. Leaf urged.

56. Dr. Siegel also testified that DTT is not appropriate for Student because she has shown very poor generalization skills. Such a student would not profit from ABA because her learning would be "entirely rote acquisition." In her report, Dr. Siegel wrote

that "severely retarded children with autism do not show nearly as significant benefits from intensive early interventions such as discrete trial training ... as children with autism having IQs in the average to mildly impaired range." Dr. Siegel testified, as Dr. Clare had, that Student is much more a visual and procedural learner who would benefit from a structured, visibly supported curriculum that would give her focused choices, rather than the open-ended choices ABA training would offer. She testified that, during the years in issue, the District was providing Student just such a program.

57. Dr. Clare testified that more recent studies than those cited by Dr. Leaf had shown that as many as 50 percent of students did not have a favorable outcome from DTT. She believed that Student would gain more from a more eclectic program that included occupational therapy, speech and language therapy, and more structured teaching. Those are characteristics of the programs in Student's IEPs.

58. The criticisms of Dr. Leafs view by Drs. Siegel and Clare were credible and substantial. Notably, Student made no response to these criticisms. Neither Dr. Leaf nor any of Student's other experts was asked to respond to them, and none did.

59. A central flaw in Dr. Leafs analysis is that it depends very little on the characteristics of Student herself. Rather, it depends on statistical predictors derived from experience with other autistic students, and a faith in a particular methodology, ABA, as a one-size-fits-all program under which all autistic students will derive more benefit than from any other programs. Speaking in broad generalities, Dr. Leaf testified that eclectic programs had repeatedly been proved to be inferior to ABA. He made no allowance for the differences among eclectic programs. As Dr. Siegel wisely pointed out, asking whether an eclectic program is good is rather like asking whether fruit salad is good; it depends on what is in the salad, and who is allergic to it. There are many kinds of eclectic programs, because they are designed to serve the unique needs of different students. It was apparent from Dr. Leafs testimony that he assumed that ABA, properly

done, is always superior to every alternative. It is a generalization that could be used to argue that every autistic student who.has not been given 30 hours a week of ABA has been denied a FAPE. IDEA, on the other hand, requires the tailoring of educational programs to the unique needs and characteristics of each individual student.

Dr. Meredith Edelson

60. Dr. Meredith Edelson is a clinical psychologist and a tenured professor of psychology at Willamette University in Salem, Oregon. She received her master's and doctoral degrees.in clinical psychology from the University of Illinois, and has extensive experience reviewing assessments of autistic children and drawing conclusions concerning their intellectual abilities .

61. Dr. Edelson studied some of Student's records, particular Dr. Crawford's Kaiser report from 2004. She testified that no measurement of Student's cognitive abilities could be obtained without a valid IQ test. She opined that Dr. Crawford could not have validly determined whether Student was mentally retarded, since he was unable to eliminate or minimize the influence of autism on Student's responses to test questions. Dr. Edelson also testified that adaptive behavior scales like the Mullen and the Vineland, on which Dr. Crawford relied, are tests of developmental level, not cognition. She conceded on cross- examination, however, that low adaptive skills made up one element of mental retardation. The American Psychiatric Association endorses the use of adaptive behavior scales in determining adaptive behavior in the context of mental retardation. *(DSM-IV-TR,* p. 42.)

62. Dr. Siegel had testified that the majority of autistic children are also mentally retarded to varying degrees, a mainstream view also endorsed by the American Psychiatric Association. (See, *DSM-IV-TR,* sec. 299.00, p. 71.) In response, Dr. Edelson testified that in her opinion there is not enough evidence to make such a conclusion validly. In part, this view stems from her experience in publishing a study of 215 other

studies about mental retardation in autistic children. Dr. Edelson concluded, in her study of other studies, that insufficient evidence supports the majority view that most autistic children are also mentally retarded. Dr. Edelson conceded that hers is a minority view.

63. Dr. Edelson also testified that symptoms such as limited functional communication, repetitive behavior, and a lack of generalization skills are symptoms of autism, and, in her opinion, are often mistaken as symptoms of mental retardation. In her view, language abilities are independent of intelligence, as are repetitive behaviors and, in some cases, limited ability to generalize. This led her to the conclusion that what Dr. Siegel perceived as symptoms of mental retardation in Student were nothing more than symptoms of autism. In this, too, Dr. Edelson takes a minority position; the *DSM-IV-TR* states that "[i]mpairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation." *(DSM-IV-TR,* p. 42.)

64. Dr. Edelson's testimony had little application to the issues at the remand hearing. She had not met Student and did not venture an opinion on Student's cognitive capacities, or whether Student is severely mentally retarded. She was unwilling to draw a conclusion about Student's capacity to make progress in her education. No other witness supported Dr. Edelson's view that what most psychologists see as symptoms of mental retardation are in fact symptoms of autism. On this record, it is simply the theory of one psychologist who disagrees with many in her profession. At most, Dr. Edelson established what Dr. Crawford had already conceded: that in the absence of a valid IQ score, no single assessor can be fully confident that Student is severely mentally retarded. Notably, Dr. Edelson conceded that Student's records were "consistent with the belief that she is severely mentally retarded," although she testified that no valid assessment supported that conclusion.

Dr. Howard Friedman

65. Dr. Howard Friedman is a clinical neuropsychologist who has been in private practice for more than 25 years. He holds a Ph.D. degree in Psychology, is licensed as a psychologist in five states, belongs to many professional associations, and has substantial experience in neuropsychological assessment. He was recently the President of the Northern California Neuropsychology Forum, and performs security-related evaluations for the Department of Energy. Dr. Friedman also testified at the hearing in 2006.

66. Like Dr. Leaf, Dr. Friedman testified, based on his review of Student's records, that Student was consistently off-task, inattentive, and not focused during the school years at issue. He also believed that the primary emphasis of her educational program should be on improving her attention with intensive one-on-one intervention through ABA before anything else could be accomplished. He interpreted Student's records as showing that, even when Student's skills improved somewhat, they were not consistently reinforced and were "allowed to, basically, drop out." As an example, he cited an IEP dated October 9, 2002, before the years at issue here, in which it was stated that Student could match objects, shapes, and pictures, could scribble, use Play Doh and glue, put shapes into a foam board by looking at the correct spots without trial and error, and complete puzzles. He stated that at this point Student was "displaying a cognitive capacity beyond what later reports displayed," and that this suggested her capacity was not reinforced and her attention was allowed to dissipate. The same was true for the social skills she displayed, in the form of smiling, making good eye contact at circle time, and cooperating with routines.

67. Dr. Friedman testified that, in the absence of a valid IQ score, it could not be definitively determined, one way or the other, whether Student is mentally retarded. He admitted it was possible that she is mentally retarded, and that mental retardation

could be a provisional or "rule out" diagnosis, but a firm diagnosis could not be made. When Dr. Friedman was asked whether Student.has a capacity to learn greater than someone who has severe mental retardation, he did not answer yes or no. Instead he mentioned some of her successful functions.

68. Although Dr. Friedman is a highly qualified clinical neuropsychologist, his expertise has limits that affect the weight to be given his testimony in this proceeding. In his field he is a generalist. He testified in 2006 that he considers himself an expert at diagnosis and assessment across the gamut of psychiatric and developmental disorders. He testifies frequently in court in matters across that spectrum. His exposure to children like Student is narrow. Dr. Friedman testified that over the last 20 years he had assessed approximately five autistic students in the age range of five to eight, but he could not remember how many of those were also mentally retarded. Asked how an IQ could be obtained from someone with an IQ less than 40, he said he had not looked into the question. Asked whether he would consider using alternative assessments for such a persori, he said he would probably refer the person out.

69. Dr. Friedman agrees that he is not an expert in education. He never observed Student in school. His personal exposure to Student consisted of an examination of an hour and a half in his office, a "one-on-one situation," he testified in 2006, "in sort of the best possible setting, where the highest level of function in a response might be obtained." For the purpose of educational programming, observations about Student's capabilities in the school environment are somewhat more persuasive.

70. Dr. Friedman testified that, in-his opinion, intensive ABA produced more improvement in autistic children than an eclectic approach. His evaluation of Student's capacity for progress was affected by his belief in the superiority of ABA for autistic students, and in the wisdom of addressing behavioral problems with intensive ABA

before other educational tasks are undertaken. He admitted, however, that he was no expert on ABA, and had last studied the matter in school in 1982. When asked whether ABA theory had changed any since then, Dr. Friedman said that he did not know.

71. Dr. Friedman's characterizations of Student's records were frequently oversimplified and inaccurate. He testified in 2006 that "there has been nothing developed" about her attention, and that in the records he reviewed there was "never" any focus on Student's attention needs; and that "there doesn't seem to be anything directed toward development of behavior regulation" in her IEPs. At the remand hearing, his only summary of Student's progress in school was that she began with skills and later was allowed to lose them. However, the record shows that, in the years in question, Student's principal teacher employed many methods to improve Student's attention to task, and that Student's IEPs always addressed her poor attention and always contained goals to improve it. (See, 2006 Dec., FF 100-102.) The record also shows that when, near the end of school year 2004-2005, Student's behavior worsened somewhat, the District developed a detailed behavior plan and added a new behavior goal to Student's September 23, 2005 IEP. In the 2006 Decision, these measures were ruled adequate to cope with Student's behavioral difficulties. (2006 Dec., FF 91-94.) Student's school records do not support Dr. Friedman's general claim that the skills noted in her October 9, 2002 IEP were allowed to dissipate.

72. Dr. Friedman testified that the primary explanation for Student's alleged lack of progress, or. diminution of skills, would have to be flaws in her educational programming. He expressed that view even more firmly in 2006, when he stated that if an autistic student was given an appropriate plan, and the plan was appropriately implemented, there would be progress, and if there were no progress that meant either the plan or the implementation was at fault. He could think of no third possibility.

73. Dr. Friedman's view, or assumption, that educators are most likely to blame for any failure of an autistic child to make progress was unconvincing, since it was unsupported and unexplained, and made no allowance for any other cause. A great deal happens in the life of any child. Dr. Friedman agreed that autistic children have a tendency to lose skills as a consequence of their autism around the time when their autism is determined. Student was determined to be autistic before age three. To the extent that Student did regress in some skills, the evidence did not show that the regression was the fault of the District's educational programming or implementation. For example, one of the two areas in which Student's skills have been most delayed is speech. Dr. Crawford's 2004 assessment mentions that Student began to regress in her speech skills at her second birthday, starting a regression that continued "through" age four. Student did not enter the District's schools until about her fourth birthday.

WEIGHING THE EXPERT TESTIMONY

74. The District Court's Remand Order states that, under the IDEA, low expectations are to be avoided, and courts must be careful not to find that a disabled child is incapable of making much progress unless there is significant evidence to that effect. (Remand Order, 545 F.Supp.2d at p. 1001.) The combined record of the 2006 and remand hearings now contains a great deal of evidence that Student is incapable of making significantly greater educational progress than she was making in the years at issue. Drs. Siegel and Clare credibly so testified, confirming the views of Student's teachers and most of the IEP team. The record now shows that the District's expectations for Student are not unjustifiably low. They are realistic, and firmly based on Student's records and performance.

75. It is telling that Student has never forthrightly claimed in this administrative proceeding that she is anything other than severely intellectually disabled or severely mentally retarded. Student argued in 2006 that the District was remiss in

failing to assess her for mental retardation. She produced no evidence at the 2006 hearing concerning her cognitive capacity or her ability to make educational progress, and stated in her 2006 Closing Brief that her "true potential for learning is still unknown." At the remand hearing, Student focused on arguing that the District's measurements of Student's capacity were inaccurate and inadequate, and that her true cognitive capacity could not be known without a valid IQ score. But Student never argued she was not severely intellectually disabled or mentally retarded.

76. At the end of the remand hearing, the ALJ asked Student's counsel: "Is it Student's position that [she] is not intellectually disabled?" Student's counsel declined to answer at the time, but stated it was Student's position that whether she is mentally retarded cannot be definitively determined. The ALJ then requested that, in her closing brief, Student describe "what your position is on the nature and severity of her intellectual disability, if any." Student's counsel agreed to do so.

77. In her closing brief after the remand hearing, Student responded to the ALJ's request by arguing that she "does not present as someone with severe mental retardation." No witness supported that view. That claim in Student's closing brief is limited to the assertion that her symptoms are not as severe as the severely retarded child involved in *Battle v. Pennsylvania* (3d Cir. 1980) 629 F.2d 269, a decision cited in the 2006 Decision in support of a legal standard. (2006 Dec., Legal Conclusion 10.) However, the fact that the symptoms of another child are more severe than Student's does not prove anything about the degree of Student's cognitive deficits. Student also argues at length that "[t]he District failed to present evidence to demonstrate that [Student] is severely mentally retarded." That argument is misdirected because the burden of proof is not on the District, no diagnosis is necessary, and no finding of mental retardation is at issue. The discussion of mental retardation here is only an intermediate step toward determining Student's capacity to progress in her education.

78. Student proved at the remand hearing, and the District did not dispute, that no valid IQ score could be obtained for Student. The importance of that fact is limited, since there was substantial other information available to the IEP team at its relevant meetings. A clinician may postpone forming an opinion about a child's cognitive capacities, as Dr. Crawford did. An IEP team does not have that luxury. It must have an IEP in place for a special education student at the beginning of the school year, no matter how difficult it is to determine her cognitive capacity. The record shows that the IEP team did what it could with the information it had. Student identifies no information that could have been considered by the IEP team at the relevant meetings, but was not.

79. For the many specific reasons set forth above, the opinions of Drs. Siegel and Clare that Student is not capable of significantly greater educational progress than she is now making were more persuasive than the opposing opinions of Drs. Leaf and Friedman. The opinions of the District's experts, like the opinions of Student's teachers and providers that they supported, were formed on the basis of information about Student herself. Dr. Leafs opinion, on the other hand, depended heavily on the use of predictors derived from experience with other autistic children, and on his faith in the superiority of ABA for all autistic children. Dr. Friedman's testimony also depended in substantial part on his belief in the superiority of that methodology.

80. Drs. Siegel and Clare have significantly greater educational expertise than Drs. Leaf and Friedman, who are essentially clinicians. Dr. Leaf has written and lectured on the education of autistic children, and has extensive experience working with autistic children of all ages, and taught for less than a year in 1976. However, there is nothing in the record to suggest that his work with individual students since 1976 as been educational rather than the rapeutic. Dr. Friedman is admittedly no expert in education.

There is no evidence that Dr. Leaf or Dr. Friedman observed Student in school or spoke to her teachers during the period in question.

81. Of the witnesses who testified at the remand hearing, only Dr. Crawford met or knew of Student during the years in issue, and he did not state an opinion on her capacity to make educational progress. Drs. Siegel, Clare, and Leaf became aware of Student well after the time at issue. Dr. Friedman became aware of her only after the end of the 2005- 2006 school year, the last school year at issue. The opinions of these four experts were not, and could not have been, available to the IEP team at the meetings in which the IEPs challenged here were written. Under the snapshot rule, the only usefulness of the testimony of these four witnesses is in weighing how the IEP team should have viewed Student's records at those meetings. In their testimony, Drs. Siegel and Clare showed greater familiarity with Student's records, and did not make mistaken claims about them. Drs. Leaf and Friedman engaged in sweeping generalities about Student's records that were frequently inaccurate.

82. Student did make progress in the school years in issue. (See, 2006 Dec., FF 24-44.) In light of the entire record, including both the 2006 and 2009 hearings, and after weighing the testimony of expert witnesses for both sides, the evidence does not show that Student was capable of making significantly greater educational progress than she was making in the years in issue. On the contrary, the preponderance of evidence shows that, due to the severity of Student's autism and intellectual disability, she was not capable in the relevant years of making significantly greater educational progress than she was making. The evidence shows that, in those years, Student was making educational progress at the rate reasonably to be expected in light of the nature and extent of her disabilities. The evidence shows that, during those years, Student made educational progress that was, for her, both meaningful and significant.

83. At each of the IEP team meetings in the years in issue, the IEP team considered the nature and rate of Student's educational progress in the school years preceding the meeting. In light of the entire record, the evidence shows that at each of those meetings, the IEP team reasonably concluded that Student was making educational progress at the rate reasonably to be expected in light of the nature and extent of her disabilities, and that her progress; given those limitations, was not meaningless, trivial, or insignificant. Each of Student's IEPs in the school years in issue was reasonably calculated to allow her to derive meaningful educational benefit. For these reasons, and for the additional reasons set forth in the 2006 Decision, the evidence shows that the District provided a FAPE to Student in the relevant school years.

RECONSIDERATION OF CERTAIN 2006 CREDIBILITY DETERMINATIONS

84. Factual Findings 1-3, 5-15, 17-19, 21-50, 52, 54, 56-58, 60-106, and 108-155 in the 2006 Decision are restated and incorporated by reference.

85. Factual Findings 4 and 20 in the 2006 Decision are vacated. Whether Student is severely mentally retarded is not an issue herein, and no finding is made on that subject.

86. In its Remand Order, the District Court held that it was error to regard District witnesses as conclusively more credible than Student's expert witnesses on the ground that they had more extensive personal experiences with Student than Student's experts did. (Remand Order, 545 F.Supp.2d at pp. 1004-1005.) Accordingly, Factual Finding 51 in the 2006 Decision is restated and incorporated by reference, except for the sentence "Accordingly, the opinions of District witnesses concerning Student's progress are entitled to substantially greater weight." That sentence is vacated. Factual Finding 92 in the 2006 Decision is restated and incorporated by reference, except for the sentence "District witnesses who dealt with Student daily based their opinions on much more

direct experience, and for that reason were more persuasive." That sentence is vacated. Factual Finding 107 is vacated. The significantly greater experience of District witnesses with Student is still given some weight here, but it is far from determinative. In evaluating the credibility of District witnesses, reliance is placed on their greater experience with Student only to the extent approved by decisions of the Ninth Circuit Court of Appeals. (See, Legal Conclusions on Remand 11-12.) However, the same findings would be made, and the same result reached, if the greater experience of District witnesses with Student were not considered and given no weight.

87. In its Remand Order, the District Court held that it was error to regard Student's witnesses as less credible than District witnesses because their interpretations of Student's records differed from the interpretations of the District witnesses who created the records. (Remand Order, 545 F.Supp.2d at pp. 1004-1005.) Accordingly, Factual Finding 53 in the 2006 Decision is vacated. No weight is given here to the fact that testimony of some of Student's witnesses about Student's records contradicted the testimony of the District witnesses who created the records. The same findings are made, and the same result reached, without consideration of that fact.

88. In its Remand Order, the District Court held that it was error to find witnesses more credible simply because they agreed with the District's position. (Remand Order, 545 F.Supp.2d at pp. 1004-1005.) Accordingly, Factual Finding 54 on the 2006 Order is restated and incorporated by reference, except that footnote 5, appended to Factual Finding 54, is vacated. No reliance is placed here on the facts that District witnesses agreed with each other or with the District's position. The same findings are made, and the same result reached, in the absence of that consideration.

89. In its Remand Order, the District Court held that it was error to find Father less credible because of his role as advocate for his daughter. (Remand Order, 545 F.Supp.2d at p. 1005) Accordingly, Factual Finding 59 in the 2006 Decision is vacated. No

reliance is placed here on Father's role in advocating for his daughter. Equal weight is given to the advocacy roles of Father and of the District witnesses. Factual Findings 58, 60, and 61 in the 2006 Decision, which also related to Father's credibility, have been restated and incorporated by reference here. The same findings are made, and the same result reached, without consideration of Father's role as advocate for his daughter.

90. In her closing brief, Student makes several factual criticisms of the goals and objectives in her IEPs, and of findings in the 2006 Decision concerning her educational progress. Those arguments either repeat or embellish arguments made and rejected in the 2006 Decision. They have been considered here, but do not furnish any ground for vacating or reversing the Factual Findings made in the 2006 Decision except as specifically stated above.

LEGAL CONCLUSIONS ON REMAND

1. Legal Conclusions 1- 10 and 12-44 in the 2006 Decision are restated and incorporated by reference.

2. Legal Conclusion 11 is vacated, due to the repeal of the cited regulation.

BURDEN OF PROOF

3. Student, as the party seeking relief, has the burden of proving the essential elements of her claim. *(Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].) Student asserts that because the matter has been remanded by the District Court for reconsideration, the burden of proof has somehow been reversed and is now on the District. Neither logic nor authority supports that claim.

STANDARD FOR FAPE

4. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d *690](Rowley),* the Supreme Court held that the IDEA does not require school districts to provide

special education students the best education available, or to provide instruction or services that maximize a student's abilities. *(Rowley, supra,* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. *(Id.* at p. 201.)

5. Student asserts that *Rowley* is no longer governing law. She cites *JL v. Mercer Island School Dist.* (W.D.Wash. Dec. 8, 2006, No. C 06-494P) 2006 WL 3628033 *(Mercer Island),* for the proposition that, since 1997, the IDEA has required that a school district provide instruction and experiences that enable the child to prepare for later educational experiences and post-secondary activities, including formal education, employment, and independent living. Student does not explain how these standards might apply to her or to this case. Since *Mercer Island* was decided, the Ninth Circuit has reaffirmed that the appropriate standard for determining whether an IEP provides FAPE still is whether it is reasonably calculated to enable the child to receive educational benefit. *(Joshua A. v. Rocklin Unified School Dist.* (9th Cir. March 19, 2009, No. 08-15845) 2009 WL 725157 (unpublished); *B.S. v. Placentia-Yorba Linda Unified School Dist.* (9th Cir. 2009) 306 Fed.Appx. 397, 399 (unpublished); *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 793-794.) One decision in the Northern District of California has expressly rejected the theory accepted in *Mercer Island. (San Rafael Elem. School Dist. v. California Special Educ. Hearing Office* (N.D.Cal. 2007) 482 F.Supp.2d 1152, 1156-1157.) *Mercer Island* is on appeal in the Ninth Circuit. Until it is decided, *Rowley* is still the law and governs this Decision.

REASONS FOR LACK OF SUCCESS

6. An IEP does not guarantee a student's success. (*CJN v. Minneapolis Public Schools* (8th Cir. 2003) 323 F.3d 630, 642.) A school district does not violate the IDEA if a disabled student's lack of progress is attributable to factors other than flaws in her

educational programming. *(Garcia v. Board of Educ.* (10th Cir. 2008) 520 F.3d 1116, 1127; *Bend-Lapine School Dist. v. DW* (9th Cir. 1998) 152 F.3d 923, p. 3 (unpublished); *Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d 119, 133; *Ashland Sch. Dist. v. Parents of Student R.J* (D.Ore. Oct. 6, 2008, No. 07-3012-PA), 2008 WL 4831655, p. 19; *Blickle v. St. Charles Community Unit Sch. Dist. No. 303* (N.D.Ill. July 29, 1993, No. 93-C-549) 1993 WL 286485, p. 4, fn. 7; p. 8, fn. 10.)

SNAPSHOT RULE

7. Since 2006, the Ninth Circuit has uniformly adhered to the principle it first articulated in *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, that an IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. *(B.S. v. Placentia-Yorba Linda Unified School Dist., supra,* 306 Fed.Appx. at p. 398; *JG v. Douglas County School Dist., supra,* 552 F.3d at p. 801.)

AVOIDANCE OF UNNECESSARY LABELING

8. The unnecessary use of labels is to be avoided in providing special education and related services for individuals with exceptional needs. (Ed. Code, § 56001, subd. (i).)

ROLE OF SCHOOL PSYCHOLOGISTS.

9. In California, only a credentialed school psychologist may perform a psychological assessment of a student for special education purposes. (Ed. Code, § 56324, subd. (a).)

DUTY TO HAVE IEP IN PLACE

10. At the beginning of each school year, a district must have an IEP in effect for each child with a disability. (20 U.S.C. § 1414(d)(2)(A); Ed. Code,§ 56344, subd. (c).)

CREDIBILITY OF SCHOOL DISTRICT WITNESSES

11. An ALJ may not give conclusive weight to the testimony of school district witnesses on the ground that they have more extensive personal experience with a student than the student's witnesses have. *(Ojai Unified School Dist. v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1476; Remand Order, 545 F.Supp.2d at p. 1004.) However, as long as conclusive weight is not given to that factor, some weight may be accorded to it in an appropriate case. *NB. v. Hellgate Elem. School Dist.* (9th Cir. 2008) 541 F.3d 1202 *(Hellgate)* is closely similar to this case, in part because it involved conflicting opinions about a student's educational progress. In *Hellgate,* a student's experts had testified at the administrative hearing that his language skills were just beginning to emerge. However, members of the IEP team testified that the student was making steady progress. Relying on the data generated by district staff, the hearing officer found the testimony of the district witnesses who worked with the student more credible than the testimony of experts who had not met or observed him. *(Hellgate, supra,* 541 F.3d at p. 1212.)

12. In *Hellgate,* the hearing officer also concluded that the testimony of district personnel who had a daily relationship with the student was more persuasive than that of Student's witnesses, "whose opinions were predominantly based on impersonal file reviews." *(Hellgate, supra,* 541 F.3d at p. 1212.) The Ninth Circuit agreed with and upheld that analysis:

> We conclude that it was reasonable for the hearing officer to rely on the testimony of Hellgate's witnesses because they had observed [the student's] school performance. In contrast, Appellants' witnesses based their opinions predominantly on file reviews.

(Ibid.) Some deference to the opinions of a student's teachers is also appropriate where, as here, a student's expert witnesses did not observe the student at school or speak to school personnel. *(R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 944-945.)

13. In *L.M v. Department of Educ.* (D.Hawaii Aug. 9, 2006, Civ. No. 05-00345) 2006 WL 2331031, the plaintiff made the same argument Student makes here: that Dr. Bryna Siegel is not qualified to opine on the abilities and progress of a student in an IDEA case because she is not a licensed psychologist. Both the hearing officer and the court rejected the argument. *(L.M v. Department of Educ., supra,* at pp. 8-9.)

APPLIED BEHAVIOR ANALYSIS VERSUS ECLECTIC PROGRAMS

14. In *Rowley,* the Supreme Court held that courts must refrain from imposing their views of preferable educational methods upon school districts, because courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy. *(Rowley, supra,* 458 U.S. at p. 208.) Accordingly, as long as the requirements of IDEA are satisfied, "questions of methodology are for resolution by the State." *(Ibid.)*

15. Federal courts of appeal have consistently interpreted *Rowley* to mean that, as long as a district provides or offers a FAPE, the choice of methodology is up to the district, not the parent. *(TB. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84; *Gill v. Columbia 93 School Dist.* (8th Cir. 2000) 217 F.3d 1027, 1036-37; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834; *Barnett v. Fairfax County School Ed.* (4th Cir. 1991) 927 F.2d 146, 152; *Lachman v. Illinois State Bd of Educ.* (7th Cir. 1988) 852 F.2d 290, 296-97; see also, *MM v. School Bd of Miami-Dade County* (11th Cir. 2006) 437 F.3d 1085, 1102-03; *Adams v. Oregon, supra,* 195 F.3d at 1149-50.)

16. Several federal courts have considered the argument that the intensive DTT employed by ABA is the best or the only way to treat an autistic student, and that

without it a school district has denied the student a FAPE. For the most part, they have rejected that argument. Most recently, the Ninth Circuit affirmed an OAH decision in which the ALJ heard extensive evidence on the relative merits of ABA and eclectic programs, rejected the argument that intensive ABA training was necessary to provide the student in that case a FAPE, and ruled that the school district's eclectic program was reasonably calculated to allow the child to obtain meaningful educational benefit. *(Joshua A. v. Rocklin Unified School Dist., supra, affirming Rocklin Unified School Dist. v. Student* (2007) Cal.Ofc.Admin.Hmgs. Case No. N2006110278.)

17. In *Adams v. Oregon, supra,* parents argued that their autistic child had been denied a FAPE because the child's individual family service plan (IFSP) had given their child only 12.5 hours a week of ABA services at home, and that he needed 40 hours a week of intensive ABA (the "Lovaas method"). Several well-credentialed experts testified for parents that intensive ABA training was the best method of training for autistic children, and that their child would be denied a FAPE without it. The Ninth Circuit observed that:

> 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. [Citation omitted.] 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, supra, 195 F.3d at pp. 1149-1150.) In *Adams,* the hearing officer had received, but not agreed with, extensive testimony in favor of ABA. The Ninth Circuit supported the hearing officer's weighing of the evidence:

> While Appellees' experts may not have been as highly qualified as Appellants' experts, they nevertheless were qualified to give their expert opinions as to the appropriateness of Lucas' IFSP program. Thus, the district court's deference to the hearing officer's credibility findings was not clearly erroneous .... Furthermore, in view of the testimony by [District experts] before the hearing officer and the Dawson & Osterling research findings, we are persuaded that the March 6 IFSP was reasonably calculated to develop Lucas and be responsive to his individual needs.

(Adams, supra, 195 F.3d at 1150.) The court concluded that the child's program was reasonably developed based on information available to the team that wrote it, and therefore provided him a FAPE, even though it did not provide the intensive ABA therapy parents wanted. *(Adams, supra,* 195 F.3d at 1150; see also, *Deal v. Hamilton County Dept. of Educ.* (6th Cir. 2008) 258 Fed.Appx. 863, 865 (unpublished); *Gill v. Columbia 93 School Dist.* (8th Cir. 2000) 217 F.3d 1027, 1036-1038; *Burilovich v. Board of Educ.* (6th Cir. 2000) 208 F.3d 560, 571-572; *Dong v. Board of Educ.* (6th Cir. 1999) 197 F.3d 793, 802-804; *JP. v. West Clark Community Sch.* (S.D.Ind. 2002) 230 F.Supp.2d 910, 938-939.)

18. *Issue a: Was Student, in the school years in issue, capable of making significantly greater progress than she actually made?* Based on Factual Findings on Remand 3 and 7-90, and Legal Conclusions on Remand 1-17, Student was not capable,

in the relevant school years, of making significantly greater progress than she actually made.

19. *Issue b: In light of all the evidence, including that admitted on remand, did the District deny Student afree appropriate public education in the school years in issue?* Based on Factual Findings on Remand 3 and 7-90, and Legal Conclusions on Remand 1-17, the District did not deny Student a FAPE in the school years in issue.

ORDER

1. The Order in the 2006 Decision is reaffirmed and incorporated here.
2. Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on both issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code,§ 56505, subd. (k).)

DATED: May 29, 2009

CHARLES MARSON

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings