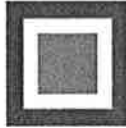




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FAQS ON PROGRAMS FOR STUDENTS ON THE AUTISM SPECTRUM

Introduction. It now is estimated that an average of 1 out of every 110 children in the United States has an autism spectrum disorder. School districts face the growing challenge of developing appropriate and “defensible” educational programs that meet the unique needs of these students. While many school districts are equipped to offer sound autism programs supported by research-based standards and best practices, disputes continue to surface, and resurface, over issues involving choice of methodology, level of supports and services, and placement decisions for students with autism.

This section answers challenging questions school districts confront in delivering programs to students with autism. For organizational purposes, we have classified each question and its corresponding answer in one of five main categories:

- **Ingredients Common to All Special Education Programs**
- **Choice of Methodology**
- **Goals and Objectives**
- **Placement and the Least Restrictive Environment**
- **Services, Aids, and Supports**

I. Ingredients Common to All Special Education Programs.

A. Question 1: What are the legal ingredients of a special education program?

Answer: “Special education” is defined as “specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability. . . .” (34 C.F.R. § 300.39(a); Ed. Code, § 56031.) Special education includes instruction in the classroom, home, hospital, institutional, and other settings, as well as instruction in physical education. (*Id.*)

Each student’s individualized education program (“IEP”) must contain the following:

1. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent



practicable, to be provided to the child, or on behalf of the child; and

2. A statement of the program modifications or supports for school personnel that will be provided to enable the child:
 - (a) To advance appropriately toward attaining the annual goals;
 - (b) To be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and
 - (c) To be educated and participate with other children with disabilities and nondisabled children.

(34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

Both federal and California law require school districts, at a minimum, to include the items specified above in a student's IEP. Beyond these requirements, school districts have discretion to determine the additional components necessary to afford the student a free, appropriate public education ("FAPE").

Because students with autism exhibit a wide range of needs, school districts must determine the essential ingredients of an educational program that will address each of those unique needs. School districts should be careful not to utilize a "cookie cutter" approach when identifying the essential ingredients and making an offer of FAPE (e.g., not all students with autism will require occupational therapy to receive educational benefit). Instead, school districts should follow independent, research-based standards for selecting an appropriate program that is designed to meet the student's unique needs. Developing and implementing these standards will also help school districts defend an offer of FAPE in the event of a parent dispute.



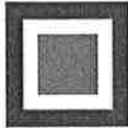
B. Question 2: What components of a special education program are appropriate for students with autism?

Answer: Identifying the appropriate components of a special education program for a student with autism depends on the type and severity of the student's unique needs as well as the student's age and/or grade level. Students with autism exhibit a wide range of behaviors, including, but not limited to, any of the following:

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

(Ed. Code, § 56846.2; Cal. Code Regs., tit. 5, § 3030, subd. (g).)

Below we provide a chart of common program components designed to address the wide-ranging needs of these students. The components are organized into three categories: preschool, elementary school, and middle/high school.



Preschool	SDC Home-based instruction 1:1 aide Classroom aide ABA services (or other methodology) ABA supervision Speech and language therapy Occupational therapy Adaptive P.E. Extended school year Transition plan (if transferring from home/private program) Transportation
Elementary School	General education classroom SDC Mainstreaming for recess, lunch, and assemblies Resource Specialist Program support 1:1 aide Classroom aide ABA services (or other methodology) ABA supervision Behavior Support Plan Behavioral Intervention Plan Speech and language therapy Occupational therapy Adaptive P.E. Extended school year Transportation
Middle/High School	General education classroom SDC Mainstreaming for recess, lunch, and assemblies Resource Specialist Program support 1:1 aide Classroom aide Social skills Behavior Support Plan Behavioral Intervention Plan Speech and language therapy Occupational therapy Adaptive P.E. Counseling Post-school transition plan Vocational educational training Extended school year Transportation



II. Choice of Methodology.

A. Question 3: How does methodology fit within the framework of a special education program?

Answer: Discussions regarding methodology typically arise when selecting an appropriate educational placement for a student with a disability, especially students with autism. Choice of methodology, however, is not limited to placement decisions. Rather, methodology can extend to all components of a student's special education program, including goals and objectives, related services, and one-to-one aide or behavior support.

School districts have significant discretion in selecting educational methodologies for students with autism. In the landmark decision of Board of Education of the Hendrick Hudson Central School District v. Rowley, the United States Supreme Court held that because courts lack the expertise to evaluate the effectiveness of a particular educational intervention, decisions regarding choice of methodology are properly left with the school district. So long as the methodology provides the student with a FAPE, courts and hearing officers will not second guess the school district's judgment. (Board of Education of the Hendrick Hudson Central School Dist. V. Rowley (1982) 458 U.S. 176. See Adams v. Oregon (9th Cir. 1999) 195 F.3d 1141; Student v. Hacienda-La Puente Unified School Dist. (OAH 2007) Case No. 2007050041.)

School districts are not obligated to specify a particular methodology in a student's IEP unless the methodology is necessary for the student to receive a FAPE. (Rowley, 458 U.S. at 207-08.) The regulations to the IDEA state that "[s]pecially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3).) The IDEA also provides that "[n]othing in this section shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required in this



section.” (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d).) The United States Department of Education (“USDOE”) explained:

There is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies. Therefore . . . we cannot interpret [the IDEA] to require that all elements of a program provided to a child be included in an IEP. The Department’s longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive a FAPE, the instructional methods may be addressed in the IEP.

(Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46665 (August 14, 2006).)

B. Question 4: Must a school district discuss or provide documentation of specific methodologies during an IEP meeting?

Answer: No. Because choice of methodology is generally reserved for school districts, the law does not require them to engage in detailed discussions during IEP meetings regarding specific methodologies. School districts are also under no obligation to provide parents with documentation of methodologies they intend to use to educate their child. The USDOE stated that imposing these obligations on school districts is “unnecessary and would be overly burdensome.” (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46665 (August 14, 2006).)

This does not mean that school districts should tell parents they are unwilling to discuss the appropriateness of a methodology if parents request that information. Refusing to discuss the issue could deny the parent meaningful participation in the IEP decision-making process and possibly result in a FAPE violation.



C. **Question 5: When must a school district provide prior written notice regarding methodology-related requests?**

Answer: It depends on the type of request. For example, if a parent requests documentation of the specific methodologies the school district intends to use in educating his or her child, the school district is not required to issue prior written notice of its refusal to provide such documentation. In contrast, if a parent requests that the school district implement a particular methodology, the school district must issue prior written notice if it refuses to do so.

The law requires a school district to provide parents with prior written notice whenever it proposes or refuses to “initiate or change the identification, evaluation, or educational placement of a student with a disability.” (20 U.S.C. § 1415(b)(3) & (4); 34 C.F.R. § 300.503; Ed. Code, § 56500.4.) In the first example above, refusing a parent’s request for documentation of the school district’s methodologies would not impact or otherwise change the “identification, evaluation, or educational placement” of a student. Consequently, the prior written notice requirements are not triggered. In the second example, however, a school district’s refusal to implement a parent’s requested methodology would amount to a refusal to initiate or change the “educational placement” of the child. Therefore, the school district would be required to issue prior written notice to the parent of its refusal.



PRACTICE POINTER. In the event a parent requests a particular methodology, the school district should carefully consider the request and respond. If the school district does not believe that the requested methodology is required to provide FAPE, and perhaps even believes the requested methodology is counter-indicated, explain to the parent or representative how the methodologies used in the school district's program are appropriate to address the child's unique needs. As addressed above, the school district should document its response to the parent's request and the reason for its decision either in the IEP meeting comments or in a prior written notice letter that meets the requirements of federal and California law.

D. Question 6: What methodologies have courts and hearing officers found to be appropriate for students with autism?

Answer: Courts and hearing officers have found a variety of instructional methodologies to be appropriate for teaching students with autism, including Applied Behavior Analysis ("ABA"), Treatment and Education of Autism and Related Communication-Handicapped Children ("TEACCH"), and the "eclectic" approach. Because autism manifests differently in each affected student, school districts must determine what methodology is appropriate to meet the particular student's unique needs. The following is a brief overview of these methodologies.

1. **Applied Behavior Analysis ("ABA").** ABA is a methodology widely employed by school districts and private service providers. ABA focuses on reshaping the child's behavior using reinforcement techniques by rewarding desirable behaviors and extinguishing undesirable behaviors. Methods used to implement ABA include:

- (a) **Discrete Trial Training ("DTT").** DTT is a method that focuses on breaking down skills into small distinct tasks in a structured setting;



- (b) Picture Exchange Communication System ("PECS"). PECS is a form of augmentative and alternative communication ("AAC") that uses pictures, icons, or photographs, rather than words, to facilitate communication.

(Student v. East Whittier City School Dist. (OAH 2009) Case No. 2008090101.)

- 2. Treatment and Education of Autism and Related Communication-Handicapped Children ("TEACCH"). TEACCH is a methodology that emphasizes visual instead of verbal learning in a structured educational setting. The program focuses on communication and socialization designed to help the student generalize skills that are fostered in the educational environment.

(Student v. Pomona Unified School Dist. (OAH 2006) Case No. 2006010049.)

- 3. Eclectic Approach. Some school districts utilize an "eclectic" program, which blends techniques from a variety of methodologies to address the specific deficits of the student. There is no single type of eclectic methodology because, by definition, educators draw from an array of methodologies to design a program uniquely tailored to the needs of the particular student. (Rocklin Unified School Dist. v. Student (OAH 2007) Case No. 2006110278; Joshua A. v. Rocklin Unified School Dist. (9th Cir., March 19, 2009, No. 08-15845) 2009 WL 725157, 52 IDELR 64.)

E. **Question 7: Must a proposed methodology be supported by peer-reviewed research?**

Answer: Not necessarily. A proposed methodology must only be based on peer-reviewed research to the extent that it is practicable. New with IDEA 2004, every eligible child's IEP must contain "a statement of the



special education and related services and supplementary aids and services, based on *peer-reviewed research to the extent practicable*. . . .” (20 U.S.C. § 1414(d)(1)(A)(i)(IV) (emphasis added).) The impetus for adding the phrase “based on peer-reviewed research to the extent practicable” to IDEA 2004 was Congress’ goal of aligning the requirements of IDEA with No Child Left Behind (“NCLB”). Because students with disabilities serve as an important subgroup for calculating adequate yearly progress under NCLB, Congress included the additional IEP requirement in IDEA 2004 to ensure that services, aids, and supports that yielded the most successful results would be available to these students.

Neither the IDEA nor its implementing regulations include a definition of “peer-reviewed research.” The USDOE explained:

“Peer-reviewed research” generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. However, there is no single definition of “peer-reviewed research” because the review process varies depending on the type of information to be reviewed.

The USDOE concluded that it would go beyond the scope of the regulations to provide a specific definition of peer-reviewed research and the different processes used for peer reviews. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46664 (August 14, 2006).)

The phrase “to the extent practicable” was also left undefined in the IDEA. To provide clarification, the USDOE stated:

The phrase “to the extent practicable,” as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the



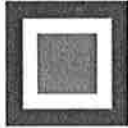
availability of peer-reviewed research. . . . States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available.

The USDOE went on to explain that this “does not mean that the service with the greatest body of research is the service necessarily required for a child to receive a FAPE.” In addition, “there is nothing in the [IDEA] to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE.” The USDOE concluded that the ultimate decision rests with the child’s IEP team and depends on the child’s unique needs. (*Id.* at p. 46665.)

F. Question 8: How can a school district support an “eclectic” program given the “scientifically-based” and “peer-reviewed” standards?

Answer: The “eclectic approach” is one type of methodology employed by school districts that is not itself scientifically-based or peer-reviewed. Courts and hearing officers have nevertheless found this methodology to be appropriate to meet the educational needs of students on the autism spectrum where (1) the component parts of the eclectic program were based on peer-reviewed research; and (2) the IEP team determined the program was appropriate to meet the unique needs of the student. (*Joshua A. v. Rocklin Unified School Dist.* (9th Cir., March 19, 2009, No. 08-15845) 2009 WL 725157, 52 IDELR 64.) *Rocklin*, however, does not mean that a court or hearing officer will validate every “eclectic” program employed by a school district. The IEP team should tailor the mix of peer-reviewed autism methodologies to the individual needs of the student.

In *Rocklin*, the Ninth Circuit issued a memorandum in which it upheld the appropriateness of the district’s “eclectic approach” for Student, a six-year-old boy with



autism. Before reaching the Ninth Circuit, the district had filed an action with OAH to obtain a ruling that its autism program afforded Student a FAPE. The district's program incorporated an array of methodologies into Student's educational program, including Social Communication, Emotional Regulation and Transactional Support ("SCERTS"), visual cues and schedules, TEACCH, Relationship Development Intervention ("RDI"), PRT, and ABA. Student alleged, however, that the district's eclectic approach did not offer him a FAPE because it was not backed by peer-reviewed research. Student contended that the district should have offered an ABA program, since it was the only methodology that was both supported by peer-reviewed research and proven to be effective for students with autism.

The ALJ found in the district's favor, emphasizing that the IDEA "does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students." The ALJ concluded:

[I]f the component parts of a plan are peer-reviewed, then it follows that the sum of those parts should be considered as peer-reviewed as well, particularly in light of the moral, legal and ethical constraints that prevent the truest form of scientific study from being conducted. The ultimate test is not the degree to which a methodology has been peer-reviewed, but rather, whether the methodology chosen was believed by the IEP team to be appropriate to meet the individual needs of the child.

On appeal, the Ninth Circuit agreed with the ALJ's decision. In reviewing the ALJ's findings, the Ninth Circuit found that the district's implementation of an eclectic program was based on accepted principles in the field of autism education. The findings were also consistent with the opinions of experts who testified that the district's program "conformed with the best practices



in the field and was effectively used to educate autistic children with similar conditions.” The Ninth Circuit found that the district’s eclectic approach, though not itself peer-reviewed, was still based on peer reviewed research to the extent practicable. Therefore, the district’s offer of FAPE, which included the eclectic program, was appropriate for Student notwithstanding the district’s refusal to offer a purely ABA-based program.

Note. The Ninth Circuit’s memorandum was not issued for publication and, therefore, cannot be cited as legal authority by other courts. Nevertheless, the memorandum provides valuable insight into how courts view eclectic programs and the extent to which school districts must utilize methodologies based on peer-reviewed research.

G. Question 9: What is the National Standards Project and does it change or otherwise impact a school district’s choice of methodology?

Answer: The National Autism Center recently published a report for its “National Standards Project” that evaluates the effectiveness of certain treatment approaches for individuals on the autism spectrum. The National Autism Center did not conduct its own research for the report. Rather, the report is based on a review of scientific and educational literature on autism treatments written by outside professionals (e.g., psychologists, educators, speech and language pathologists, etc.). The National Autism Center used this research to develop a classification/rating system to assist parents, caregivers, educators, and service providers in selecting “effective” treatments for individuals on the autism spectrum. We also note that the report consistently uses the term “treatment” to describe these approaches rather than “methods” or “services”, which suggests a medical, rather than educational, analysis. To the extent that these interventions are designed to address a child’s medical needs, school districts should be careful in considering parent requests for medically-related interventions. The IDEA generally does not require



school districts to provide medical services unless it is for diagnostic or evaluation purposes. (34 C.F.R. § 300.34(a).)

We do not want to legitimize the report or suggest that this classification/rating system should set the standard for how school districts evaluate the appropriateness of a particular methodology. Nevertheless, we believe this report can serve as a useful and strategic tool for school districts when their proposed methodologies are challenged by parents and/or their representatives.

The report identifies numerous treatment interventions for individuals with autism. These treatments are classified into one of four categories based on the quality, quantity, and consistency of research findings. These categories include:

1. **Established.** A treatment approach is “established” if there is sufficient evidence to confidently determine that a treatment will produce favorable, effective outcomes for individuals on the autism spectrum. Examples of “established” treatments include antecedent and behavioral interventions (such as ABA), comprehensive behavioral treatment for young children, joint attention interventions, modeling, naturalistic teaching strategies, peer training, PRT, schedules, self-management, and story-based interventions.
2. **Emerging.** A treatment approach is “emerging” when one or more studies demonstrate that the treatment produces favorable outcomes, but there is still a need for additional high quality studies to consistently show this outcome before firm conclusions may be drawn about the treatment’s overall effectiveness. Examples of “emerging” treatments include augmentative and alternative communication, cognitive behavioral intervention, developmental relationship-based treatment, exercise, exposure interventions, imitation-based interaction, initiation training, language training,



massage/touch therapy, multi-component interventions, music therapy, peer-mediated instructional arrangement interventions, PECS, reductive interventions, scripting, sign instruction, social communication intervention, social skills, structured teaching, technology-based treatment, and theory of mind training.

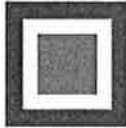
3. **Unestablished.** A treatment approach is “unestablished” if there is little to no evidence available to determine its effectiveness for individuals on the autism spectrum. Examples of “unestablished” treatments identified in the report include academic interventions, auditory integration training, facilitated communication, gluten- and casein-free diet, and sensory integration.
4. **Ineffective/Harmful.** A treatment approach is “ineffective” or “harmful” if “[s]ufficient evidence is available to determine that a treatment is ineffective or harmful for an individual on the autism spectrum.” The report did not identify any treatments that had sufficient evidence specific to individuals on the autism spectrum that met these criteria.

For a detailed description of each of the treatment approaches listed above, please see the **Appendix** for a copy of the report on the National Standards Project.

PRACTICE POINTER. Special education administrators and educators should become familiar with the contents of the report and be prepared to answer questions that parents and/or their representatives might ask regarding the findings.

H. **Question 10: Has OAH supported school districts when they refuse to offer ABA to older students?**

Answer: Yes. Recent OAH decisions have supported districts who have offered social skills programs rather than ABA programs for older students with autism.



OAH has found that a social skills program, for example, may be appropriate to address the social, behavioral, and communication needs of older students with autism, whereas ABA-based methodologies may be appropriate for preschool-age children who need to develop the foundational skills to participate in a group educational environment. (Corona-Norco Unified School Dist. v. Student (OAH 2009) Case No. 2009010538; Ripon Unified School Dist. v. Student (OAH 2007) Case No. 2007050230.)

In Corona-Norco Unified School District, the district refused to provide in-home behavioral therapy to a thirteen-year-old student who was eligible for special education and related services due to "autistic-like behaviors." Instead, the district offered Student a social skills group conducted by ABA-trained specialists to address his behaviors and social and communication deficits. The social skills group would be held on a school campus within the district and be comprised of six students with autism and three typical peers. Student, however, alleged that he was entitled to an in-home ABA program to address his needs. The ALJ found in favor of the district, concluding that Student did not need an in-home ABA program because he did not display any behaviors at school that prevented him from accessing his education. Moreover, the district's social skills group would be less restrictive and would likely provide him with more opportunities to socialize with other children than the in-home program. (Corona-Norco Unified School Dist. v. Student, supra.)

Similarly, in Ripon Unified School District, the ALJ found that Student, a fourteen-year-old girl with autism, did not require ABA services to receive a FAPE. Giving substantial weight to the testimony of the district's experts, the ALJ concluded that there was no research supporting the effectiveness of ABA-based methodologies for older students. Rather, "scientific research supporting ABA is focused on early intervention for students up to the age of seven" and is designed to help "younger students with more severe autistic



symptoms who are missing precursor skills." Although research may not support the use of ABA-based interventions for older students, school districts must determine a student's needs on a case-by-case basis and, regardless of age, identify whether the student requires such an intervention to access his or her education. (Ripon Unified School Dist. v. Student, supra.)

I. **Question 11: Must district staff (e.g., teacher, aide, service provider) have certain qualifications to instruct a student using a particular methodology and must those qualifications be documented in the student's IEP?**

Answer: Not typically. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C § 1412(a)(14).) The term "qualified personnel" is defined as personnel who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. (Id.; 34 C.F.R § 300.156(a).) IDEA, however, does not mandate that an individual be specifically trained or qualified to instruct a student using a particular methodology. Therefore, the lack of a particular teaching credential or other technical qualification will not automatically constitute a denial of FAPE. (Student v. Downey Unified School Dist. (OAH 2009) Case No. 2008070358.)

With respect to individuals instructing students with autism, OAH has considered the education, training, and experience of the individual overseeing or implementing the program to determine whether he or she is sufficiently qualified to address the student's needs. (Id.; Student v. Los Altos Elementary School Dist. (OAH 2006) Case No. 2005070166.) For example, in Downey, the ALJ found that Student's one-to-one ABA teacher was appropriately qualified to provide Student's ABA services based on her extensive experience utilizing ABA strategies in her teaching, strong knowledge of ABA techniques, and the fact that she was in the process of becoming a Board Certified Behavior Analyst.



The IDEA does not afford parents a specific right to be informed of the qualifications of individuals providing special education and related services to their children. (Letter to Dickman (OSEP 2002) 37 IDELR 284.)

Therefore, school districts are not required to document in the IEP the particular qualifications of these individuals. However, if the IEP team determines that, in order to provide the student a FAPE, it is necessary for the individual providing these services to have specific training, experience, and/or knowledge, then it would be appropriate for the IEP to include those specifications. (Id.)

Unlike the IDEA, NCLB requires school districts receiving Title I funds to inform parents at the beginning of each school year that they are entitled to request and receive information regarding their student's classroom teacher's qualifications. However, this disclosure does not need to be documented in a student's IEP. (20 U.S.C. § 6311(h)(6)(A).)

III. Goals and Objectives.

A. Question 12: Must a school district develop IEP goals in every content area, particularly related services?

Answer: Not necessarily. School districts must develop IEP goals that are designed to (1) "meet the child's needs that result from the child's disability to *enable the child to be involved in and progress in the general education curriculum*," and (2) "meet each of the child's other *educational needs* that result from the disability." (20 U.S.C. § 1414(d)(1)(A)(i)(II) (emphasis added); Ed. Code, § 56345(a)(2).) The IDEA's mandate for including measurable annual goals in a student's IEP provides a mechanism for school districts to determine whether the student's placement, supports, and services are appropriate and whether the student is making progress in his or her educational program. (Letter to Hayden (OSEP 1994) 22 IDELR 501.) Every annual goal in a student's IEP should contain corresponding



items of instruction, supports, or services to enable the student to achieve those goals.

School districts, however, are not required to write goals for every item contained in a student's IEP if the item is not related to an identified area of *educational* need. For example, if the IEP team determines that a student with autism needs a related service, such as transportation, to enable him to attend school, but that service is not intended to address skills related to his educational program, no goals are necessary. In contrast, if the student will receive instruction as part of that related service to increase his independence or improve his socialization and behavior while traveling to and from school, then goals must be included in the student's IEP to address these identified areas of need. (*Id.*; Letter to Smith (OSEP 1995) 23 IDELR 344.)

The IDEA also does not require school districts to include annual goals specifically for related services. For example, if the IEP team determines that a student with autism has expressive and receptive language delays and needs speech and language therapy, the school district is not required to write separate "speech and language therapy" goals. (Letter to Hayden (OSEP 1994) 22 IDELR 501.) However, the IEP would need to contain goals related to speech and language, as appropriate, to address the student's needs, which could be implemented during the student's speech and language therapy sessions and perhaps by other service providers. (Student v. Clovis Unified School Dist. (OAH 2009) Case No. 2008080686.)

B. Question 13: Is a school district obligated to include goals in a student's IEP proposed by a parent which are based on the recommendations of the student's private service provider?

Answer: Not necessarily. The IDEA and California law do not require a school district to accede to a parent's demands to include certain items in a student's IEP without first having the opportunity to consider appropriate alternatives. (See e.g., Blackmon v.



Springfield R-XII School Dist. (8th Cir. 1999) 198 F.3d 648.) Nevertheless, school districts must consider parents' (and/or their child's private service providers') suggestions and, consistent with true consideration, incorporate those suggestions, as appropriate, into the IEP. If incorporation is warranted, failing to do so may result in a defective IEP and a substantive denial of FAPE. Whether or not incorporated, failing to consider such suggestion may provide evidence of a lack of meaningful parent participation, providing grounds for a finding of a procedural denial of FAPE. (34 C.F.R. § 300.322; Ed. Code, § 56342.5; see also Joshua A. v. Rocklin Unified School Dist. (9th Cir., March 19, 2009, No. 08-15845) 2009 WL 725157, 52 IDELR 64; Deal v. Hamilton County Board of Education (6th Cir. 2004) 392 F.3d 840.)

In Rocklin, Parents agreed with the district's 14 annual goals and 28 objectives contained in Student's proposed IEP but also requested that the district incorporate 324 goals recommended by Student's private service provider. At the administrative hearing, the ALJ found that the district had properly considered, but had chosen not to incorporate, each of the 324 proposed goals when drafting Student's IEP. The district established that many of the goals were embedded in the district's 14 goals and 28 objectives, certain goals covered grade level standards that were already implicitly a part of the IEP, and some of the goals addressed subject matters outside of the IEP process. In addition, the district demonstrated that implementation of the proposed goals would have diluted its efforts to remediate Student's principal needs in the area of functional communication. The Ninth Circuit affirmed the decision, finding that the district's decision not to incorporate the proposed goals was defensible.

If a school district's proposed goals fail to provide a student with a FAPE, a judge or hearing officer could order the school district to adopt and implement a private provider's recommended goals.

In Student v. Garvey Elementary School District, Student



received both home-based and school-based ABA services through a nonpublic agency (“NPA”). The NPA drafted five goals in the areas of compliance, attention, and social skills, which the district considered but decided not to incorporate into the IEP. Instead of the NPA’s proposed goals, the district developed one social goal. Student, however, established that the goal was inappropriate, vague, and not measurable. Due to the district’s failure to develop measurable annual goals to address Student’s identified needs, the ALJ ordered the district to adopt and immediately implement four of Student’s five proposed goals, which Student established did provide him with a FAPE. (*Student v. Garvey Elementary School Dist.* (OAH 2008) Case No. 2007080433.)

PRACTICE POINTER. Be sure to document in the IEP notes that the IEP team discussed and considered the private service provider’s proposed goals, including the extent to which any proposed goals were adopted and the reasons for adopting or denying the inclusion of those goals.

C. Question 14: Must a school district develop home-based and school-based IEP goals if the student is receiving instruction in both settings?

Answer: No. Neither California nor federal law explicitly require a school district to tailor a student’s IEP goals to a particular educational setting (e.g., home, school, NPA). Detailing the setting in which the student’s goals will be implemented unduly restricts service providers. For example, specifying that a student’s behavior goal will be implemented in the home setting could force the school district to provide a home-based instructional program, even when the student’s goal could be met at school.

It should be noted, however, that if a student’s goals must be implemented in a home or other setting to receive a FAPE, then the IEP team should draft those goals accordingly.



IV. Placement and the Least Restrictive Environment.

A. Question 15: Do OAH decisions endorse a certain number of hours per week in an autism program as necessary for a student to benefit from his/her education?

Answer: There is no set formula or magic number of hours that ALJs have supported for all children with autism. While private service providers may recommend that every young child with autism receive 40 hours per week of a behavior-based program such as ABA or TEACCH, the IDEA and California law only require a school district to develop a program that is designed to meet the child's unique needs, which may not necessitate a 40-hour per week program.

40-Hour Per Week Program Unnecessary To Provide Student a FAPE.

In a recent case, Student v. Downey Unified School District, Student contended that the district's offer of one-to-one ABA instruction was insufficient for her to receive educational benefit. Student, a seven-year-old girl who was eligible for special education due to autism, presented with significant communication deficits, social impairments, stereotypic behaviors, and academic and fine motor delays. The district offered Student one-to-one ABA instruction in both the school and home settings for a total of 11 hours and 40 minutes per week. The team later amended the IEP to provide a program consisting of 17 hours of one-to-one ABA divided between the school and home settings and 13 hours of structured SDC class time, for a total of 30 program hours per week. Student claimed that the district's offer of ABA services did not enable her to acquire learning readiness skills, and the services were not adequately incorporated into her school day or sufficiently home-based.

Student's experts criticized the amount of individualized ABA offered by the district but were unable to agree on what level of individualized instruction Student actually



needed. One expert believed that Student required far more than 40 hours per week of ABA, though he stated that 40 hours per week would be sufficient for Student to make progress. Another expert recommended 30 to 35 hours per week of intensive ABA therapy plus 10 to 15 hours of in-home instruction in her assessment report, though at hearing she was uncertain as to the proper level of therapy Student needed and how these services should be delivered. Given the inconsistencies in expert opinion and Student's failure to present specific evidence that the district's program was insufficient, the ALJ concluded that Student failed to meet her burden to show that the frequency and duration of ABA instruction offered by the district was inappropriate to meet her needs. (Student v. Downey Unified School Dist. (OAH 2009) Case No. 2008070358.)

40-Hour Per Week Program Necessary to Provide Student a FAPE.

There may be some circumstances, however, in which an ALJ could find a 40-hour per week ABA program to be necessary for a student with autism. In Hemet Unified School District v. Student / Student v. Hemet Unified School District, Student was a five-year-old boy with autism who had serious deficiencies in the areas of speech, behavior, and socialization. The district proposed to place Student in its kindergarten autism program with the support of an instructional aide. The district also offered 16 hours per week of individualized in-home ABA services along with other supports and services. Student contended that he could not receive educational benefit in the district's proposed program and asked the ALJ to find that his private placement in The Center for Autism and Related Disorders ("CARD") program, which consisted of 40 hours per week, 52 weeks per year, of intensive in-home ABA instruction, was appropriate to meet his unique needs.

The ALJ agreed with Student, finding that the district's proposed kindergarten program, including the additional supports and services, was inappropriate because the classroom was too unstructured and there was very little



facilitation of language and social interaction. The ALJ gave substantial weight to the testimony of Student's experts, who opined that Student lacked the language and behavior skills necessary to participate in a classroom or group setting. In crediting their opinions, the ALJ explained that "[w]ithout the precursor skills of attention, language, self-regulation of maladaptive behaviors, and compliance, it was not credible that Student could obtain educational benefit in the group classroom. . . . Until Student had these learning skills, the one-to-one setting was the educational setting Student needed to obtain educational benefit." The ALJ concluded that parents' placement of Student in the CARD program was appropriate. The ALJ ordered the district to fund Student's placement in the CARD program, with up to 40 hours of ABA services per week, through the end of the school year. (Hemet Unified School Dist. v. Student / Student v. Hemet Unified School Dist. (OAH 2008) Case Nos. 2007090175, 2007100997.)

Lesson learned. As these decisions illustrate, whether a student requires an intensive 40-hour per week autism program may hinge on the credibility of the experts. In the Downey decision, the ALJ discounted the testimony of Student's experts because they failed to collectively agree on (1) the number of programmatic hours per week Student required; (2) an appropriate educational setting; and (3) why the district's proposed placement was inappropriate. Conversely, in the Hemet decision, the ALJ found that Student's experts presented an accurate and cohesive statement of Student's unique needs based on comprehensive assessments, numerous observations of Student in his educational setting, and a thorough review of the appropriateness of the district's proposed placement.

PRACTICE POINTER. If a parent dispute arises regarding the number of hours per week of the district's proposed autism program, make sure to have a strong expert(s) who can articulate, based on objective data (e.g., assessment, observation, documented progress on IEP goals), why the district's offered number of hours is appropriate to address the student's needs.



B. Question 16: When is a home-based, rather than school-based, program appropriate for a student with autism?

Answer: It depends. Whether a home-based program is appropriate for a student with autism may depend on the student's age and the type of foundational skills he or she needs to function in a classroom environment.

The law requires that students with disabilities be educated in the "regular educational environment" unless the nature or severity of their disability requires placement in a more restrictive setting. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1, subd. (b).) For preschool-age students (ages three to five), California law recognizes that the "regular educational environment" may include instruction in the home setting. Specifically, Education Code section 56441.2 states that an early education program must "include both individual and small group services which shall be available in a variety of typical age-appropriate environments for young children, including the home . . ." (Ed. Code, § 56441.2, emphasis added.)

However, for school-age students (e.g., students over the age of five) the "regular educational environment" is typically going to include a school-based program. As clarified by the USDOE, "regular educational environment" encompasses regular classroom and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46585 (August 14, 2006).)

With respect to skill level, OAH has found that home-based programs may be appropriate where the student needs individualized instruction to develop certain pre-academic, academic, and/or social skills necessary to participate in a classroom environment. In Hemet Unified School District v. Student / Student v. Hemet Unified School District, the ALJ agreed that Student, a five-year old boy with autism, required intensive one-to-one in-home instruction to develop the precursor skills of



attention, language, self-regulation of maladaptive behaviors, and compliance before he could receive educational benefit in a group setting. According to the ALJ's findings, the evidence showed that the district's proposed kindergarten SDC placement was inappropriate because district staff were not trained in the areas of Student's disability, the SDC was too unstructured, there was little facilitation of social interaction, and the methodologies implemented in the classroom were not appropriate to address Student's serious speech needs. Thus, the ALJ concluded that the home setting represented an appropriate educational environment for Student. (Hemet Unified School Dist. v. Student / Student v. Hemet Unified School Dist. (OAH 2008) Case Nos. 2007090175, 2007100997.)

There may be circumstances, however, in which a school district may not have an obligation to provide a purely home-based program, even where the child is of preschool-age and has yet to develop the skills necessary to participate in a group setting. In Student v. Newport-Mesa Unified School District, the district offered Student, a three-year-old boy with autism, placement in its special day preschool class designed for students on the autism spectrum. The class, which was composed of six to eight students, was taught by a special education teacher trained in ABA methodologies and included two instructional aides who were also trained in ABA. Throughout the five and one-half hour school day, the teacher facilitated a combination of individual, group, and two-to-one ABA instruction. The district proposed a plan for Student's transition to the preschool program in which Student would receive a greater amount of ABA home instruction hours in the beginning of the school year that would gradually taper off as he transitioned to the preschool setting. Specifically, Student would initially receive 15 hours of ABA home instruction and would attend the preschool placement for five days a week, but for only two and one-half hours per day. Student disagreed with the proposed placement, contending that the district should have offered 20 to 30 hours of one-to-one home-based ABA instruction



because he had not yet demonstrated that he could acquire new skills in a small group setting. The ALJ, however, credited the testimony of the district's experts, finding that the district's offer "would be more beneficial to Student than a home-based program, because it would get him used to a school environment in a setting that was small enough and structured enough to meet his needs." (Student v. Newport-Mesa Unified School District (OAH 2006) Case No. 2005100636.)

A combination home-based/school-based program for a student with autism may also be unnecessary where the school district can appropriately address the student's needs at school. In Corona-Norco Unified School District v. Student, a middle school student with autism asserted that he continued to require home-based ABA instruction through an NPA to make progress in behavior management and the generalization and maintenance of his skills. At hearing, however, the district demonstrated that Student required very minimal support during the school day, his maladaptive behaviors had decreased in frequency, his social skills had improved, and he had achieved or made progress on all of his IEP goals. The ALJ found in favor of the district, concluding that Student's placement in the general education setting with an instructional aide for a portion of the school day, an after-school social skills program, and other supports and related services, were less restrictive than Student's in-home ABA program. (Corona-Norco Unified School Dist. v. Student (OAH 2009) Case No. 2009010538.)

C. Question 17: When might a general education program be inappropriate for a student with Asperger's Syndrome?

Answer: The educational needs of students with Asperger's Syndrome can be far-ranging. While students with Asperger's Syndrome typically possess average to high average intelligence, their disability can manifest in such a way as to create a host of challenges, including problems with social, emotional, and communication skills, and unusual interests and behaviors. Depending on the severity of the student's



needs, a high functioning student with Asperger's Syndrome may require a more restrictive placement than the general education classroom.

In Student v. Acalanes Union High School District, Student, a fourteen-year-old boy with Asperger's Syndrome, was intellectually gifted and excelled academically. However, he presented with significant social and communication deficits, depression, and difficulty concentrating due to his Attention Deficit Hyperactivity Disorder ("ADHD"). Parents disputed the district's offer of placement in a general education classroom with one period per week of social skills training and one period per day of pull-out instruction in its Instructional Support Program ("ISP") to assist in study skills, time management, writing, and organization. Parents instead requested that the district fund an NPS placement composed entirely of high average students with Asperger's Syndrome. Though noting that the IDEA "does not entitle a student to education only among people like himself," the ALJ found that the district's proposed educational program was not appropriate to meet Student's needs because it "was not reasonably calculated to allow Student to benefit from the social aspects of his education." The ALJ explained that the district's offer was inadequate because the evidence demonstrated that Student required structured, programmatic, individualized social skills training, which was not available in the general education setting or ISP class. The ALJ concluded that the NPS placement was a "proper alternative placement" for Student, evidenced in part by the fact that he was on the Honors List, his social skills had improved, and he had made friends. Thus, the ALJ ordered the district to reimburse Parents for the tuition costs of the NPS. (Student v. Acalanes Union High School Dist. (OAH 2008) Case No. 2007100455.)

A general education placement, however, may be appropriate for a student with Asperger's Syndrome whose needs can be met with the use of supplementary aids and services.



In Student v. Dublin Unified School Dist., Student, a 14-year-old boy with Asperger's Syndrome, excelled academically, volunteered in class, was accepted by his peers, and successfully participated in sports activities. However, Student required additional support to address his slower processing speed, attention, organization, and social skills deficits. The district offered Student placement in the general education setting for all academic subjects, P.E., lunch, recess, and passing periods. The district also offered a 55-minute RSP class once a day, behavior management services, social skills instruction, and accommodations and modifications. Student believed that the district's offer was inappropriate, claiming that he required placement in a small, structured classroom setting, such as an NPS, to receive educational benefit. The ALJ disagreed with Student, finding that the nature of his disability was not so severe that he could not be properly educated in the general education environment with the use of supplementary aids and services. The ALJ reasoned that placement in an NPS "devoted solely to children with [a]utism, Asperger's, and other disabilities" would represent a more restrictive educational environment for Student. The ALJ concluded that had the district offered such a placement, the district would have violated its obligation to educate Student in the LRE. (Student v. Dublin Unified School Dist. (OAH 2008) Case No. 2007100454.)

D. Question 18: Is a general education placement with full-time one-to-one aide support less restrictive than a special day class or nonpublic school placement for a student with autism?

Answer: No, not if the student is actually receiving one-to-one instruction and a different curriculum from his classmates. The law requires school districts to educate students with disabilities in the least restrictive environment ("LRE"). This means that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability



is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (b).)

General Education with aide not LRE. A student’s need for special education instruction for a portion of the school day may outweigh his or her need to socially interact with general education peers. In B.S. v. Placentia-Yorba Linda Unified School District, the district offered to place Student, a fourth grade boy with autism, in a blended language arts program to address his difficulties with language and reading comprehension. The program included pull-out instruction in an SDC setting and resource specialist program (“RSP”) services for a total of 90 minutes per day. Parents, however, refused to consent to the district’s offer, alleging that it violated the LRE requirement of the IDEA because Student would be removed from his general education peers for a portion of the school day. At the administrative hearing, Student’s fourth grade teacher testified that, due to his language difficulties, Student was unable to participate in the same language arts curriculum as his general education peers. Instead, Student worked one-to-one with his aide, using a lower level curriculum. The ALJ held in favor of the district, concluding that the district’s proposed blended program for language arts instruction offered Student a FAPE in the LRE. On appeal, the district court agreed with the ALJ and found that the district “presented evidence that this program would be less restrictive and more socially beneficial than staying in his general [education] class, where his language arts instruction was done exclusively one-to-one with his aide.” (B.S. v. Placentia-Yorba Linda Unified School Dist. (D.C. Cal., July 31, 2007, No. SACV 06-847 CJC (MLGx) 109 LRP 44924.))



In an unpublished decision, the Ninth Circuit affirmed the district court's ruling, finding that the district's blended language arts program provided Student a FAPE in the LRE. (See B.S. v. Placentia-Yorba Linda Unified School Dist. (9th Cir., Jan. 5, 2009, No. 07-56477) 2009 WL 20958, 51 IDELR 237.)

Special Day Class/Non-Public School not LRE.

Conversely, a specialized, self-contained setting, such as an NPS placement, may not be appropriate to foster social and emotional skills for a student with autism. In R.V., et al. v. Simi Valley School District, et al., Parents contended that the district denied Student a FAPE by failing to place her in a self-contained program for students with autism, such as the NPS program they preferred, where social and emotional skills would be incorporated into the curriculum. Student, an adolescent with average intelligence, participated in a general education classroom with RSP services, a one-to-one aide for the majority of the school day, inclusion support, social skills instruction, and speech and language services. The evidence demonstrated that Student tended to be distractible, was resistant to completing her homework, and lacked social skills. The district, however, presented evidence that Student had made progress in her ability to socialize with her peers by initiating conversations and eating regularly with a group of girls, had improved in her ability to work in small groups, and had successfully participated in extracurricular activities, including drawing club and drama club. The court agreed with the ALJ's findings that the NPS placement Parents' requested was inappropriate for Student because almost all of her classmates would be diagnosed with autism, there were very few female students, and Student would be deprived of the opportunity to emulate her nondisabled peers. Thus, the court upheld the administrative decision, concluding that the general education environment, coupled with services, aids, and supports, represented Student's LRE. (R.V., et al. v. Simi Valley School Dist., et al. (D.C. Cal., April 10, 2008, No. CV 05-8949-GHK (VBKx)) 109 LRP 44928.)



V. Services, Aids, and Supports.

A. **Question 19: Can placement in a language-rich classroom eliminate the need for additional speech and language services?**

Answer: The answer depends on the nature of the language-based curriculum, and the student's needs. The following two cases illustrate the factually-sensitive nature of this issue.

Language-rich placement *without* speech and language services deemed appropriate.

In Student v. Alhambra Unified School District, Student, a three-year-old boy with autism, had speech and language needs in the areas of expressive and receptive language and articulation. The district offered placement in the Severe Language Disorders/Aphasia Special Day Class ("SLDA SDC"). The SLDA SDC was a language-rich environment taught by a licensed speech and language pathologist. Specific speech and language skills were taught to the students throughout the day using a variety of strategies to build a strong foundation of functional speech and language skills. Student's IEP included speech and language goals addressing pre-academic/academic reading, following directions, sentence formulation, answering/asking questions, articulation, and vocabulary development. The district did not include speech and language services in its offer of FAPE. Student contended that the district denied him a FAPE by failing to offer individualized speech and language therapy.

The district's speech and language pathologist opined that individualized speech and language services were not appropriate for Student given his deficits in social skills. Instead, Student required more intensive intervention in a naturalistic classroom environment, which was available in the SLDA SDC. The ALJ agreed, finding that the district's offer of FAPE was appropriate to meet Student's speech and language needs.



(Student v. Alhambra Unified School Dist. (OAH 2006) Case No. 2006020312.)

Language-rich placement with speech and language services deemed appropriate.

In Los Angeles Unified School District v. Student, an ALJ found that a 13-year-old student with autism required both a language-intensive curriculum and speech and language therapy to access her education. Student presented with moderate receptive and expressive language delays characterized by difficulties in following directions, identifying and using age-appropriate vocabulary, and creating age-appropriate syntax. Student also required cues and prompting in most modes of communication and demonstrated difficulty in initiating and maintaining conversations, role playing, and sequencing her actions. To address her speech and language needs, the district offered placement in a language-intensive NPS autism program, with language embedded in the curriculum, along with speech and language services one to five times per week for a total of 90 minutes. The team also developed annual speech and language goals to address each area of need. Parent contested the appropriateness of the district's offer, contending that Student required more speech and language therapy, among other things. The ALJ, however, concluded that the combination of Student's language-embedded program, goals, and speech and language services were sufficient and provided her a FAPE. (Los Angeles Unified School Dist. v. Student (OAH 2008) Case No. 2008030616.)

B. Question 20: When does a student require an aide trained in a particular methodology rather than an academic or classroom aide?

Answer: It depends. Some students with autism may require individualized assistance from a one-to-one aide to access the general education curriculum while others may not. Once an IEP team determines that a student needs a one-to-one aide, the student's needs should drive the IEP team's determination of what type of aide



is appropriate, which may be an academic aide or an aide certified or trained in a particular autism methodology, such as ABA.

In Student v. Garvey Elementary School District, the district offered to provide Student an academic aide for three hours daily in the general education classroom and playground to assist him with breaking down and modifying assignments, redirection, prompting, and facilitating communication. Student contended that only a certified ABA-trained aide was qualified to provide appropriate intervention in the classroom and on the playground. The district disagreed, emphasizing that most of these functions could be performed by a trained academic aide. The ALJ agreed with the district, finding that while it “is true that Student has attention problems and needs to be prompted and redirected . . . Student’s challenges with attention and social interaction could be addressed by the classroom general education teacher with the assistance of the academic aide.” The ALJ concluded that a behavioral aide was also unnecessary because Student “wasn’t a behavioral problem and, like his peers, he could easily be redirected.” The evidence further established that the ABA-trained aide Student requested did not have the necessary credentials to provide academic instruction in the classroom.

Of particular note, the evidence demonstrated that Student could be adequately monitored and effectively prompted and redirected in a group of four students or less. The district’s offer included three hours of daily support from an academic aide; however, the aide would have to serve up to 20 students daily. Consequently, the ALJ concluded that the district’s offer was inappropriate to address Student’s required level of individualized support and ordered the district to select an appropriate academic aide who would be assigned to no more than four students, including Student. (Student v. Garvey Elementary School Dist. (OAH 2008) Case No. 2007080433.)



C. Question 21: When are extended school year services necessary for a student with autism?

Answer: Extended school year (“ESY”) services are available to students with disabilities when necessary to receive a FAPE. (34 C.F.R. § 300.106(a)(1); Ed. Code, § 56345, subd. (b)(3); see Letter to Given (OSEP 2003) 39 IDELR 129.) A student is eligible for ESY services if his or her disability will likely continue indefinitely, or for a prolonged period of time, and an interruption of the student’s educational programming could cause regression. (Cal. Code Regs., tit. 5, § 3043.) The special education and related services offered during ESY must be “comparable in standards, scope and quality to the special education program offered during the regular academic year.” (Id. at subd. (g)(2).)

OAH has consistently applied the “regression-recoupment” analysis for determining a student’s need for ESY, including cases involving students with autism. For example, in Student v. Dublin Unified School District, the ALJ found that even though Student’s disability of Asperger’s Syndrome was likely to continue indefinitely, his educational needs resulting from his disability were mild and he had made educational progress during the school year. According to the ALJ, “the evidence did not establish that the interruption of Student’s education over the summer would cause regression attributable to his limited recoupment capacity.” Student was therefore unable to sustain his burden to demonstrate that he qualified for ESY services. (Student v. Dublin Unified School Dist. (OAH 2008) Case No. 2007100454.)

If the IEP team does not have sufficient evidence to determine whether a student with autism (or any disability) might regress during a break and/or have difficulty recouping lost skills without ESY services, the lack of such information is not necessarily a basis for denying eligibility. To assist in making this determination, the team should collect and analyze new and existing data (e.g., whether the student regressed and recouped after previous breaks, progress towards goals and objectives, behavior logs, private reports, etc.)



from a variety of resources (e.g., general education and special education teachers, instructional/classroom aides, service providers, parents, private assessors, etc.). Utilizing a systematic, individualized approach for collecting data and evaluating the student's likelihood of regression and recoupment will also strengthen the school district's position in the event of a dispute over eligibility for ESY services.

D. Question 22: When must a school district provide counseling and/or training to a parent of a student with autism?

Answer: A school district is responsible for providing parent counseling or training if the student's IEP team determines it is necessary for the student to receive a FAPE. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46573 (August 14, 2006).) For example, if a student's parents are included in the IEP to assist in its implementation, this could trigger a school district's obligation to provide parent training.

In 1999, parent counseling and training was added to the federal regulations as a related service to "recognize the more active role of parents as participants in the education of their children." (*Id.*) Though there is very limited guidance interpreting the parent training requirement, OSEP has opined that "[a]ny related service provided for parents must assist the child in developing skills needed to benefit from special education or correct conditions which interfere with the child's progress toward the goals and objectives in the IEP." (*Letter to Dagley* (OSEP 1991) 17 IDELR 1107.)

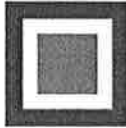
Parent counseling and training includes, among other things, assisting parents in acquiring skills to support the implementation of their child's educational program. (*Id.*) With respect to parents of students with autism, the following types of training and/or counseling may be appropriate:



1. Parent counseling and training to assist parents in understanding the special needs of their child, providing parents with information about child development, and helping parents acquire necessary skills to support the implementation of their child's education program. (34 C.F.R. § 300.34(c)(8)(i)-(iii).)
2. Planning and managing a program for psychological counseling. (34 C.F.R. § 300.34(c)(10)(v).)
3. Group and individual counseling with the child and family. (34 C.F.R. § 300.34(c)(14)(ii).)
4. Counseling and guidance regarding the child's speech and language impairments and the provision of speech and language services. (34 C.F.R. § 300.34(c)(15)(v).)

School districts should carefully consider whether parent training and/or counseling is necessary for implementing a student's educational program. If appropriate, this related service should be properly documented in the IEP.

In Student v. Pajaro Valley Unified School District, an ALJ determined that a district denied the parents meaningful participation in their child's IEP by failing to offer parent training. Student, who was eligible for special education and related services under the category of "autistic-like behaviors," participated in an early intervention preschool program and received home instruction. Student's IEP team developed annual goals and specified in his IEP that the parents would participate in the implementation of his social, cognitive, pre-academic, self-help, and behavior goals in the home setting. The district, however, did not provide a written offer for parent training despite the parents' involvement in the implementation of Student's goals. The district asserted that its preschool program had "built in training" and that additional training was available upon parent request. The ALJ found that the parents required



training to promote the consistency of Student's instruction in the preschool and home settings and to ensure that Student could generalize what he learned at school in other environments with his parents. The ALJ held that by failing to provide the parents with a clear, written offer regarding parent training, the district denied them meaningful participation in the educational decision-making process. (Student v. Pajaro Valley Unified School Dist. (OAH 2007) Case No. 2006110472.)

PRACTICE POINTER. In addition to offering individualized parent training, school districts may also consider providing group training sessions for parents on a weekly, monthly, or quarterly basis. These training sessions can address general topics such as implementing ABA techniques at home, data collection, or how to address maladaptive behaviors, among others. Personally identifiable student information, of course, cannot be shared.

E. Question 23: Must a student's IEP specify the exact amount of time on a per session basis that the student will receive a particular related service, or can the IEP include the total amount of time on a weekly/monthly basis?

Answer: Documentation of the frequency and duration of a related service typically needs to include the number of days per week/month and the amount of time per session that the student will receive a particular service. (20 U.S.C. § 1414(d)(1)(A)(i)(VII).) However, there may be instances where flexibility is appropriate (at least with respect to the frequency of services) if it is clear that the school district's reason for this arrangement is to address the student's needs and not for the convenience of his or her service providers.

In Los Angeles Unified School District v. Student, the district offered Student, a 13-year-old girl with autism, placement in a language-intensive NPS autism program with language embedded in the curriculum. As a related service, the district also offered speech and language services "one to five times a week, for a total of 90

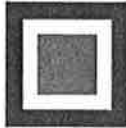


minutes per week, consisting of no more than 60 minutes of direct pull-out services, along with collaborative services involving the special education teacher and aides.” Student contested the level of speech and language services offered. However, the ALJ found the district’s offer to be appropriate under the circumstances. The ALJ explained that Student would consistently receive speech and language assistance throughout the school day. In addition, the ALJ noted that “by leaving the exact amount of time flexible (one to five times a week of pull-out services), the [speech and language pathologist] could determine the amount of time Student would actually need for each [speech and language] session, or how much direct service Student could tolerate per session.” Thus, the district’s offer of speech and language services was sufficient for Student to access her education. (Los Angeles Unified School Dist. (OAH 2008) Case No. 2008030616.)

F. Question 24: When might mental health services be necessary for a student with autism?

Answer: Autism may result in significant challenges in the areas of social skills, communication, and behavior. Consequently, many students with autism require social skills training, counseling, behavioral interventions, and/or mental health services to help them access their education. An IEP team may refer a student to a community mental health service for a mental health assessment if it suspects the student needs such services and he or she meets all of the eligibility criteria. (See Cal. Code Regs., tit. 2, § 60040 for list of eligibility criteria.)

In San Diego Unified School District v. Student, a thirteen-year-old student with autism contended that the district denied him a FAPE because the counseling services available through his special education program were insufficient to meet his social, emotional, and behavioral needs. Student further asserted that the district should have made a referral to County Mental Health (“CMH”) for a mental health assessment and services pursuant to AB 2726.



The ALJ, however, disagreed, finding that the district's offer of counseling and other behavioral supports, including a behavior support plan, were appropriate to address his needs. The special education program included a full-time credentialed counselor who delivered group social skills training to students in the program, worked directly with students requiring individualized counseling, consulted regularly with staff, and was available throughout the school day. (San Diego Unified School Dist. v. Student (OAH 2009) Case No. 2008100578.)

A student's social, emotional, and/or behavioral deficits may, however, be sufficiently pervasive to necessitate a referral for mental health services. In Student v. Acalanes Union High School District, a high school student with Asperger's Syndrome had severe deficits in communication and socialization. Based on recent assessment, Student had trouble making friends, preferred to be alone, sometimes refused to join group activities, engaged in suicidal ideation, and failed to comprehend how his inappropriate behaviors negatively affected others. While enrolled in his previous school district, Student was deemed eligible for AB 3632 services. In addition to the mental health component of his IEP, Student received social skills training five days per week to address his socialization and communication needs. However, following his enrollment in the current district, the district reduced Student's social skills training to one day per week and failed take the necessary steps (e.g., notifying CMH of his transfer, convening an IEP meeting within 30 days to determine future services, etc.) to ensure Student's continued receipt of mental health services. The ALJ concluded that the district denied Student a FAPE by failing to discharge its mental health obligations and ordered the district to provide Student with therapy equivalent to what he lost as a result of its failure. (Student v. Acalanes Union High School Dist. (OAH 2008) Case No. 2007100455.)



G. **Question 25: How should a school district address requests for unusual services, such as service animals or music therapy?**

Answer: Service Animals. School districts are beginning to receive increasing requests from students with disabilities, including students with autism, vision and hearing impairments, and seizure disorders, to be accompanied to school by a service animal. With respect to students with autism, service animals are typically trained to redirect the student's focus and can serve as a calming influence. However, peer-reviewed research does not exist to support a view that such a service is required.

School districts must be adequately prepared to respond to service animal requests and should approach each request in an individualized manner. Specifically, the IEP team should determine whether the particular student needs to be accompanied by a service animal at school to receive a FAPE and whether the service animal is properly trained and certified to address the student's disability-related needs.

Failure to engage in an individualized analysis of a student's need for a service animal could violate Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and/or the IDEA. For example, the Office for Civil Rights ("OCR") found that a school district violated Title II and Section 504 by failing to make an individualized determination regarding a student's request to bring a service dog to school to address his safety, behavioral, and educational needs. Without first consulting Student's IEP team, district administrators had informed Parents that the dog could not accompany Student on school property. OCR concluded that the district should have considered whether the dog's presence was necessary to receive a FAPE. By failing to make this inquiry, the district deprived Student of his procedural safeguards. (Bakersfield (CA) City School Dist. (OCR 2008) 50 IDELR 169; *but see* Student v. Bakersfield City School Dist. (OAH 2008) Case No. 2008070167, where



the school district found that the student did not require a service dog to receive a FAPE.)

We note that neither the OCR decision nor its companion OAH decision address the circumstances in which a school district may be obligated to actually provide a student with a service animal as part of the provision of a FAPE. However, as service animal requests become more frequent among students with disabilities, we anticipate that this issue may become a subject of litigation.

Music Therapy. Music therapy is sometimes used in special education to facilitate a student's mastery of non-musical educational goals. It can also serve as a motivational technique to increase the student's learning potential. (Student v. San Diego Unified School Dist. (OAH 2006) Case No. 2005100882.) Music therapy can be utilized for students with autism or other disabilities to address sensory, motor, and processing skills including attention, following directions, hand-eye coordination, motor planning, and visual tracking. (Student v. San Francisco Unified School Dist. (OAH 2007) Case No. 2006100345.) Whether a school district is obligated to provide music therapy to students with autism will depend on whether their unique needs can be addressed using alternative interventions or supports.

For example, in San Diego, Student contended that the district denied him a FAPE by failing to provide him with direct music therapy services. The district had contracted with an NPA specializing in music therapy to conduct a music therapy assessment of Student. Based on the assessment results, the district determined that Student did not require music therapy to benefit from his education because: (1) he had met or was making steady progress on his IEP goals; (2) his aggressive behaviors were decreasing; (3) direct music therapy would be less relevant to his education than an integrated approach (e.g., listening to music or participating in group music activities); and (4) the district had already incorporated the NPA's recommended approaches into Student's program by providing him with



opportunities to listen to music, dance, and play musical instruments. The ALJ concluded that Student had failed to present evidence showing a specific need for direct music therapy and found the district's program to be appropriate to address his needs.