

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

In the Matter of:

STUDENT,

Petitioner,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005100636

DECISION

Administrative Law Judge Susan A. Ruff of the Office of Administrative Hearings, Special Education Division, State of California, heard this matter on March 14, 15, 16 and 17, 2006, in Costa Mesa, California.

Petitioner (Student) was represented at the hearing by his attorneys Roberts, Adams and Jewell, by Timothy Adams, Esq. The Student's mother and father were present at various times during the hearing. The Student was not present.

Respondent Newport-Mesa Unified School District (District) was represented by its attorneys Parker & Covert, LLP, by Nancy Finch-Heuerman, Esq. Also present at the hearing on behalf of the District at various times were Diana Hernandez, SELPA Director, Laura Rydell, and Maureen Cottrell.

ISSUES

The following issues were identified in the Prehearing Conference Order issued by Administrative Law Judge Darrell L. Lepkowsky on March 6, 2006:

Has the District denied Student a FAPE by:

- a. Failing to implement Student's IFSP as his last agreed-upon placement and services?

b. Failing to implement Speech and Language and Occupational Therapy services agreed to on or about August 25, 2005?

c. Failing to provide Student ABA Direct Instruction and ABA Clinical Supervision as outlined by Coyne in its reports that is appropriate as to level, frequency and quality?

d. Failing to offer Student a placement in the Least Restrictive Environment?"

PROCEDURAL BACKGROUND

The Student filed his request for a due process hearing on October 19, 2005. The thirty-day time period for the resolution session ended on November 18, 2005. On December 2, 2005, the parties agreed to take the matter off calendar to pursue mediation. A mediation conference was held on December 19, 2005, but did not resolve the matter. The parties agreed to continue the hearing until March 14, 2006.

The hearing was held on March 14, 15, 16 and 17, 2006.¹ At the parties' request, both parties were given time to submit written closing arguments. Simultaneous briefs were filed by mail on March 31, 2006. The Student filed a reply brief by mail on April 7, 2006. In order to give the Office of Administrative Hearings time to receive the briefs through the mail, the matter was deemed submitted as of close of business on Monday, April 10, 2006.

FINDINGS OF FACT

1. The Student is a three-year-old boy born on August 29, 2002. He is eligible for special education services based on a disability of autism.

2. The Student is an affectionate, loveable and well-behaved child. When he had not started talking by 18 months of age, his parents became concerned about him. The Student began to receive services from the Regional Center of Orange County (Regional Center) under the California Early Intervention Services Act (Gov. Code §§ 95000 et seq.) when he was approximately 2 years and 1 month old. He was found to be eligible for services on the basis of developmental delay. His first Individualized Family Service Plan (IFSP) meeting was held on October 12, 2004. After that first IFSP meeting, the Student began receiving Applied Behavior Analysis (ABA) instruction from Coyne & Associates paid for by the Regional Center. These ABA services consisted of individual, "one-to-one" instruction and were provided in the Student's home.

¹ At the outset of the hearing, the Student made a motion to consolidate the case with a second due process hearing request filed by the Student on March 13, 2006, the day before the hearing. That request was denied on the basis that it was untimely and would be prejudicial to the District.

3. By the time the Student reached his third birthday, he was receiving ABA individual, home instruction from Coyne & Associates in the amount of 72 hours per month along with eight hours per month instruction in a social skills group at the Learning Village in Tustin, for a total of 80 hours per month.

4. On June 20, 2005, the District held a transition meeting with the Student's parents and Regional Center representatives to discuss the student's transition from his IFSP program to a special education program through the District. On June 20, 2005, the Student's mother signed a form giving the District permission to conduct an assessment of the Student. The District thereafter conducted an assessment of the Student, including an evaluation of the Student's cognitive ability, academic and pre-academic skills, social and adaptive behavior, perceptual development, and speech and language development.

5. In July 2005, the Student's mother received a recommendation from Len Levin, Ph.D., Clinical Director of Coyne & Associates, regarding placement for the Student after the Student turned three years old. Dr. Levin recommended that the Student increase his individual, home ABA instruction to 20 - 30 hours per week and that the Student attend a regular preschool class containing typically developing children with a one-to-one aide provided to help the Student in the class for 25 percent of his educational time. Dr. Levin also recommended two hours per week of supervision by senior clinical staff.

6. Around the middle of July 2005, the Student's mother visited the Rainbow Kids Achievement Center (Rainbow Kids), a private preschool. There were nine children in the class she visited. Five of the children were autistic and four were typically developing children. She saw the children engaging in make believe play and the typically developing children soliciting the autistic children to play with them. There was one teacher in the class and two aids.

7. Approximately a week later, around the end of July, the Student's mother took a tour of the Harper Preschool, a preschool operated by the District that has both special education and general education classes. The tour was given by Alexis Reichert, a special education teacher assigned to the Harper Preschool.

8. Because it was the summer, the regular school year had not begun at Harper Preschool. Instead, the classes in session on the day of the tour were part of the extended school year (ESY) program. Only special education students were present at that time. There is no general education preschool at Harper during the summer. The ESY program is designed to help special education students maintain the skills they learned during the regular school year, not to teach new skills, and it is a more relaxed program. During the tour Reichert explained to the Student's mother the difference between the summer ESY program and a normal school year.

9. The student's mother visited two classes at Harper and watched a third class of students outside at play on the playground. The student's mother believed the Harper classrooms were dark and depressing. She did not see any joy in the classrooms. She felt

that Rainbow Kids was a much happier environment. She was also concerned because she did not see the staff at Harper foster interactions between the students during recess.

10. The District first noticed an IEP team meeting for the Student on Friday, July 22, 2005, but the date was subsequently changed to August 25, 2005.

11. On July 22, 2005, the Student's parents paid a \$500 "sign up fee" to Rainbow Kids. The parents thereafter paid tuition to Rainbow Kids in the amount of \$500 on September 12, 2005 and \$825 per month beginning on October 3, 2005.

12. On August 19, 2005, the District assessment team issued a multidisciplinary psycho-educational report setting forth the results of the various assessments, tests and observations of the Student done by District employees and non-public employees who were under contract with the District.

The IEP Meeting

13. On August 25, 2005, four days before the Student's third birthday, the District held the first IEP team meeting for the Student. In attendance at that meeting were both of the Student's parents and the Student's attorney Timothy Adams, Esq.

14. The IEP team determined that the Student was eligible for special education services from the District due to autistic-like behaviors. The IEP team recommended that the Student be placed in a Special Day Class in the Harper Preschool, receive ABA services at home and receive speech/language and occupational therapy services. The IEP called for a minimum of 10 percent of Student's time to be spent with typically developing peers, during lunch, recess, passing periods and small group speech therapy.

15. The District's proposed plan started with a greater number of hours of ABA home instruction which would gradually taper off as the Student transitioned into the Harper Preschool setting. At the beginning of the school year on September 6, 2005, the Student would receive fifteen hours of home ABA instruction per week provided by an outside vendor under contract with the District and would attend the special day class for autistic students at Harper Preschool for five days a week, two and one-half hours per day.

16. The District's proposal also called for the Student to receive the following services for the entire 2005-2006 school year: 1) two hours per week in social skills group instruction provided by a nonpublic agency vendor contracted with the District; 2) individual speech/language instruction four times per week for 30 minutes per session; 3) group speech/language instruction two times per week at 30 minutes per session in a small group that would contain no more than three children including the Student, and would contain at least one child to act as a higher functioning language model; and 4) individual occupational therapy instruction two times per week for 45 minutes per session. The IEP also proposed two sessions per week at twenty minutes per session for the occupational therapist to consult with the special education teacher.

The IEP included time for program supervision services by the outside vendor who would provide the ABA services in the amount of ten hours per month from September 6, 2005, to October 28, 2005, and eight hours per month thereafter until the end of the school year on June 23, 2006.

17. The IEP report did not include the name of the outside vendor who would provide the ABA services at the Student's home. The District does not include a specific vendor name in an IEP when outside services are offered, because the District wishes to maintain flexibility in meeting the requirements of the IEP. If a specific vendor was named, then the District would be required to use only that vendor, even if that vendor was unavailable or if the parents wished to change vendors at some point while the IEP was in effect.

18. Even though there was no vendor named in the IEP to provide the ABA home instruction, the District anticipated that those services would be provided by a company known as ACES. Prior to the IEP meeting, Rebecca Duarte of ACES informed Lori Williams, a program specialist for the District, that ACES would have sufficient staffing to meet the range of hours for home ABA instruction that was anticipated for the Student's IEP. The District did not contact the current provider of services under the IFSP, Coyne & Associates, to provide the home ABA services under the IEP because the Student's parents were not happy with Coyne & Associates.

19. The class at Harper Preschool that the IEP team recommended for the Student's placement is a special day preschool class designed for children on the autism spectrum. It is taught by a special education teacher trained in ABA methodologies and incorporates ABA methods of teaching throughout the day. It usually has about six to eight students and runs for five and one-half hours per day, five days per week. In addition to the teacher, the class has two instructional aides who also have ABA training.

The class is run in collaboration with Autism Partnership, a consulting company retained by the District to assist the District with improving its educational program for autistic students. The class is supervised by the District's autism specialist, Dr. Elizabeth DelPizzo-Cheng.

There are no typically developing students in the class, but the school follows a program known as "reverse mainstreaming" in which typically developing preschool students from the general preschool classes are brought into the classroom at various times to participate in activities with the students in the special day class. That allows the children in the special day class to stay in the familiar, structured environment but still participate in activities with typically developing peers.

20. Disabled children benefit from interaction with typical peers, because they can use the typically developing children as role models. The time an autistic student spends with typical peers gives the autistic student a chance to "generalize" skills learned in other

settings. Autistic students do not tend to imitate or learn from peers as readily as typically developing children, so their time with typical peers is most beneficial to them if they can apply skills that they have learned in other settings when dealing with the typical peers. Autistic children must be taught to imitate and learn from the behaviors of other children. Imitation does not come naturally to them.

21. The special day autism class offered by the District in the IEP differs from a typical preschool class. In a typical preschool class at Harper Preschool there are over twenty students. Children are expected to follow multi-step directions, and there are many cognitive demands. The class is very stimulating, both on a visual and auditory basis, and could be overwhelming to an autistic child.

22. The Student's parents did not consent to any of the services during the IEP meeting. They believed that the District should have followed the July 2005 recommendation made by Dr. Len Levin of Coyne & Associates. The parents' attorney said that he would take the IEP report with him and discuss it with the parents after the meeting. After the meeting, on August 25, 2005, the attorney wrote a letter to the school district in which he stated that the parents consented to only the following services offered by the District:

Speech and Language Therapy: One 60 minute small group session per week; and 2 individual sessions per week, 60 minutes per session...

Occupational Therapy: 2 individual sessions per week, 45 minutes per session.

The letter stated that the parents did not consent to any other services and requested that the District: "continue to implement [Student's] last agreed upon Regional Center Individualized Family Service Plan ("IFSP"), specifically 80 hours per month of Applied Behavioral Analysis ("ABA") and social skills programming until such time as the parties are able to agree regarding an appropriate educational program for [Student], or otherwise resolve this matter. We will expect the Speech and Language, Occupational Therapy, ABA and social skills services to be implemented no later than Monday, August 29, 2005." (Emphasis in original)

The Continuation of the IFSP Services (“Stay Put”)

23. As of the Student’s third birthday on August 29, 2005, the Regional Center stopped providing services to the Student under the IFSP.

24. During the hearing, the parties stipulated that, once the parents refused to agree to the August 25, 2005 IEP, the IFSP services became the last agreed upon and implemented placement:²

The parties agree that stay put (last agreed upon and implemented placement) included the IFSP’s ABA services – 72 hours per month one-to-one and 8 hours per month social skills group. Parties dispute whether speech/language and occupational therapy services outlined in August 25 IEP are included in the stay put.

25. When the parents refused to sign the IEP, the District staff anticipated that ACES would be able to provide the “stay put” ABA services. However, after the IEP meeting, ACES informed the District that ACES wanted to meet with District representatives to make some revisions to their contract. The first date that all the District and ACES representatives could meet to resolve the contractual issues was September 13, 2005. Until those issues were resolved, ACES would not take on new assignments for the District and would not provide ABA services to the Student.

26. As of September 6, 2005, the first day of school, the District did not have a vendor to provide the ABA home services to the Student. Maureen Cottrell contacted other agencies to see if they could provide the ABA home hours to the Student in case ACES did not resolve its contractual issues with the District.

27. It usually takes about two weeks after the beginning of the school year for the District to implement services through outside vendors. When the District does not have a vendor available to provide services at the beginning of the school year, the District’s typical practice is to try to get a vendor in place as soon as possible and then pay the agency for make-up educational hours for the child. The District is not able to contract with vendors that are not approved non-public agencies (NPA).

28. On September 6, 2005, the Student’s attorney sent a letter to the District’s counsel giving notice that the Student’s parents would be contracting with their own providers for the “stay put” services since the District did not have a provider for the ABA home instruction hours. On September 8, 2005, the attorney for the District sent a letter to the attorney for the Student explaining that the District was attempting to find an NPA to provide the ABA services.

² The last agreed upon and implemented placement will be referred to hereinafter as “stay put.”

29. The Student's mother started her own search to find a provider for the "stay put" ABA services after her attorney sent the September 6 letter. She was greatly concerned because she was watching the Student regress without his ABA instruction. Around September 7 or 8, 2005, she spoke with Nyansa Learning Corporation (Nyansa) and learned that Nyansa could provide the "stay put" ABA services. At that time the Student's mother believed she had a verbal contract with Nyansa, but she did not enter into a written contract with Nyansa until later, shortly before Nyansa started providing services.

30. Nyansa is private company that provides ABA instructional services to preschool students. Usually these services are provided to children under the age of three in connection with an IFSP from a Regional Center. In September 2005, Nyansa was not a certified NPA, and the District could not have contracted with Nyansa to provide any ABA services for the Student. On November 10, 2005, the California Department of Education issued a Notice of Nonpublic Agency Certification for Nyansa, effective September 30, 2005, through December 31, 2006.

31. On September 13, 2005, the District personnel had a meeting with representatives from ACES and agreed to contract terms under which ACES would provide services for the District. The contract was not formally approved until a date subsequent to this meeting, but the District personnel are permitted to use vendors once there is an agreement, even though the formal approval of that agreement is still pending.

32. On September 15 or 16, 2005, ACES conducted an evaluation of the Student in the Student's home for the purpose of establishing a program to provide ABA instruction. At that point, the District believed that the parents had accepted the services from ACES and that ACES would be fulfilling the requirements of the "stay put" ABA home instruction.

33. The Student's mother chose not to accept the District's offer of services through ACES. She felt she had a moral obligation to use Nyansa instead, because of the verbal contract with Nyansa, and because Nyansa had hired an individual who was going to start working with the Student in two weeks. In addition, Nyansa told her that they could provide the full amount of "stay put" ABA instruction within two weeks. When she spoke with ACES, ACES could not give her that same assurance that they would provide the full "stay put" ABA hours within two weeks.

34. Nyansa did an intake assessment of the Student on Monday, September 19, 2005, and started providing services the following day.

35. The Student began progressing very well once the Nyansa ABA instruction began. The Student currently attends Rainbow Kids from 9:00 a.m. until noon on weekdays. On Mondays and Wednesdays, he receives ABA home therapy between 1:00 and 5:30 p.m. On Tuesdays and Thursdays he receives ABA home therapy from 2:30 to 5:30 p.m. On Fridays, he receives ABA home therapy between 12:30 p.m. and 5:30 p.m. He has speech/language therapy taught in his home by an instructor hired by his parents on Mondays from 6:30 to 7:00 p.m., and on Thursdays from 6:00 to 7:00 p.m. He is not currently involved in the social skills group called for in his ISFP. He does not receive any occupational therapy services.

36. The Student and his brother share an instructional aide during their time in the Rainbow Kids classroom. They would not be able to function in the Rainbow Kids class without the assistance of an aide. The Student's parents have paid and continue to pay for the services of the women who work as aides for the boys. The aides are not employees of Nyansa and do not provide one-to-one ABA instruction to the boys. Instead, they are "shadow" aides who assist the boys during the preschool class by prompting and similar tasks.

37. The Student's family has been under a severe financial strain to pay for the Rainbow Kids class, the Nyansa program, the instructional aides and the speech/language services. They took out a line of credit on their home in order to fund the education, and they are afraid to spend any money at all on other things besides their children's education.

38. During the hearing, the parties stipulated that the District would reimburse the Student's parents for the money paid to Nyansa for the "stay put" services provided by Nyansa:³

1. The District agrees to reimburse [the Student's parents] for the stay put placement of not to exceed 72 hours of individual ABA therapy per month and not to exceed 8 hours per month social skills group for [Student] beginning September 6, 2005, through March 31, 2006, upon provision of invoices from Nyansa indicating social skills group and one-to-one ABA services and cancelled checks from the parents. The term "social skills group" is defined as three or more students including [Student].

2. The District agrees to contract with Nyansa beginning April 1, 2006, for the services outlined in stipulation number 1 above until receipt of a decision.

³ Even though this stipulation makes any issue of compensation for "stay put" ABA services moot, the Student's attorney stated that the Student still wishes to have a determination made on the legal issue of whether the District failed to provide FAPE by failing to implement the IFSP as stay put.

Speech/Language and Occupational Therapy

39. On September 2, 2005, Tracy Luth, a speech-language pathologist working for the District telephoned the Student's family to try to set up a schedule for speech/language services for the Student and his brother (who was also a special education student with the District). She left a message on the parents' voice mail.

40. After an exchange of telephone messages, Luth and the Student's mother spoke on September 8, 2005. Luth explained to the Student's mother that a speech/language schedule had been set up. Both the Student and his brother would have individual speech/language from 2:15 to 3:15 p.m. on Mondays, group speech language on Thursdays at the same time and individual speech/language on Fridays at the same time. In order to minimize the driving time for the Student's mother to and from the school, the District would make two speech/language therapists available on the days of the Student's individual speech/language sessions, so that both boys could receive the services at the same time.

41. The District arranged for 60-minute speech/language sessions, rather than the 30-minute sessions called for in the IEP, based on the August 25 letter of the Student's attorney in which the parents accepted the speech/language services.

42. The Student's mother did not agree to the schedule proposed by Luth because it would interfere with the Student's one-to-one ABA therapy in the afternoon. At that point, the Student was attending preschool in the morning at Rainbow Kids from 9:00 a.m. to noon on Monday through Thursday. The Student had not yet started ABA home instruction with Nyansa, but was scheduled to start in the near future. The Student's mother believes that the Student's one-to-one ABA home instruction is the Student's most important priority and nothing else takes precedence. She did not want to cancel any of his ABA instruction, so she agreed to only one speech/language session on the following day (Friday, September 9, 2005).

43. On Friday, September 9, 2005, the Student's mother took the Student to a speech/language session at Harper Preschool. According to the Student's schedule, this was supposed to be an individual, one-to-one speech/language session. However, instead it was a combined session for the Student and his brother conducted by Luth, because the District did not have another speech/language pathologist available that day. The Student's mother was unhappy with the session, because Luth received two telephone calls during the session which took her time away from the boys.

44. Luth testified that the initial therapy session was intended as a "meet and greet" and probing session, to see what the Student could do in a variety of settings. The District expected to add a third child to the group sessions in the future, but that would be determined once the speech/language pathologist saw the functional level of the two boys.

45. On the day of the speech/language session, Stephanie Baars, a District occupational therapist, gave the Student's mother a card that contained a schedule for occupational therapy for the Student. It was proposed that the Student would have individual occupational therapy sessions on Mondays and Thursdays from 1:30 to 2:15 p.m. These times were designed to mesh with the speech/language schedule to save the Student's mother from making extra trips to the school for various services. The Student's mother told Baars that there were conflicts with the proposed schedule and Baars offered to work out mutually agreeable times.⁴

46. Later that day the Student's mother received a call from Maureen Cottrell, a special education coordinator for the District. Cottrell told her that the District had done everything it could but was unable to accommodate the Student's schedule. The Student's mother did not attempt to contact the school about scheduling the Student's occupational therapy after that. She testified that the school told her to "take it or leave it," and she took them at their word.⁵

47. On October 20, 2005, the Student's attorney sent a letter to the District's counsel stating that, because the Student was attending Rainbow Kids four days a week and participating in 20 hours of ABA instruction per week, the only time that the Student would be available for the speech/language and occupational therapy was on Fridays between 8:00 a.m. and 9:00 a.m., Fridays between 11:00 a.m. and 1:00 p.m., after 5:00 p.m. on weekdays or any time on the weekends. The Student's mother testified that her attorney's letter was in error and that the Student was available on Friday mornings from 9:00 a.m. until noon in addition to the times stated in the letter.

⁴ A September 8 letter from the District's counsel to the Student's counsel was introduced into evidence at hearing. The letter stated that the occupational therapy schedule for the Student included "group" therapy on Mondays instead of individual therapy. However, the evidence supports a finding that the mention of "group therapy" in this letter was in error. Both Stephanie Baars and the Student's mother testified that the Student's occupational therapy sessions would be individual sessions. The card given by Baars to the Student's mother gave the names of different occupational therapists who would be providing services to the Student and his brother concurrently on Mondays.

⁵ At hearing, Cottrell denied that she used the words "take it or leave it." The evidence does not support a finding that she used those words. However, no matter what words she used, she still informed the mother that no changes could be made to the schedule.

48. On October 24, 2005, Kathleen Murphy, a speech/language pathologist who began working for the District on October 21, 2005, telephoned the Student's mother to try to set up speech/language therapy sessions with the Student. Murphy was hired by the District to work three days a week. She called the Student's mother first before she called any of the other parents in her caseload. Murphy told the Student's mother that she could schedule speech/language therapy sessions with the Student at any time between 8:00 a.m. and 4:00 p.m. on Monday, Wednesday or Thursday. (Those were the three days that Murphy worked each week.) The Student's mother told Murphy that the Student's schedule was full during those days and times so she could not schedule speech/language services for the Student. The Student's mother said the Student was available on Fridays. Murphy explained that she did not work on Fridays.

49. On February 1, 2006, the Student's parents began paying a private speech/language pathologist to provide speech/language services to the Student. They had to wait until then, because they could not afford to pay for the services until the Student's father got a bonus check in January. The speech/language pathologist comes to the Student's home three times per week. On one day, she provides 1 hour of speech/language services to the Student. On a different day she provides 1 hour of services to the Student's brother. On a third day, she provides 30 minutes of therapy each to the two boys.

LEGAL CONCLUSIONS

Applicable Federal and State Laws

1. Under both state law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9).)

2. In *Board of Education of the Henrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of IDEA. The Court determined that the student's IEP must be reasonably calculated to provide the student with some educational benefit, but that IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at 198-200.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

3. The burden of proof in this proceeding is on the party seeking relief, in this case the Student. (*Schaffer v. Weast* (2005) ____ U.S. ____; [126 S. Ct. 528].)

Did the District Fail to Offer the Student FAPE Because it Failed to Follow the Coyne & Associates Recommendation for ABA Instruction?

4. The Student contends that the District's offer of placement made during the August 25 IEP meeting did not offer the Student FAPE because the District did not offer the Student appropriate ABA services. The Student believes that the District should have provided the Student with 20-30 hours per week of direct, one-to-one ABA home instruction and two hours per week clinical supervision as outlined in the Coyne & Associates Report.

5. The evidence does not support the Student's contention. Instead, the evidence supports a finding that the ABA instructional and supervision services offered by the District at the August 25 IEP were designed to provide the Student with educational benefit to meet the Student's unique needs.

6. Every witness at the hearing agreed that ABA methodologies should be employed to teach the Student the basic skills he needs to be successful in a regular education classroom. The experts disagreed as to the nature of those services and where those services should take place.

Len Levin, Ph.D., the clinical psychologist who made the recommendation on behalf of Coyne & Associates, testified that the Student required intensive, one-to-one ABA instruction because the Student had not yet demonstrated that he could acquire new skills in a small group setting. The ABA instruction could take place on a school campus, rather than the Student's home, provided the proper level of one-to-one instruction was maintained.

Ginger Wilson, Ph.D., the second expert called by the Student, is the clinical director of Nyansa Learning Corporation, the company currently providing ABA services to the Student. In her opinion, the Student needs a minimum of 30 hours per week of intensive, one-to-one ABA home instruction. Nyansa is currently working with the Student to help him to develop the skills necessary to interact with his peers in a typical preschool setting. She does not foresee any lessening of his need for individual ABA instruction in the near future. She believed that his ABA instruction should take place in his home, not on a school campus.

Elizabeth DePizzo-Cheng, Ph.D., a Board Certified Behavior Analyst and Nationally Certified School Psychologist, testified as an expert on behalf of the District. She is employed by the District as a psychologist and autism specialist and oversees the autism classes provided at the Harper preschool. She tested the Student, conducted observations of him, and provided input for the District's Multidisciplinary Psycho-Educational Report for the Student. She testified that the District's special day class could provide ABA instruction sufficient to meet the Student's needs. The special day class is a small class with a high adult-to-student ratio, and both the teacher and the instructional aides are trained in ABA methodologies. In her opinion, the special day class offered by the District is the proper

placement for the Student. Alexis Reichert, a special education teacher for the District who has a background in ABA methodologies, shared Dr. DelPizzo-Cheng's opinion that the Harper special day class would meet the Student's unique needs.

The testimony of Dr. DelPizzo-Cheng and Ms. Reichert is persuasive on this issue. There is no dispute that the District's proposed special day class for the Student used ABA methodologies almost exclusively throughout the instructional day. While not every minute of that educational day involved the intensive, one-to-one ABA instruction that Dr. Levin and Dr. Wilson preferred, the evidence established that the combination of group, individual, and two-to-one ABA instruction in the District's proposed special day class would provide the Student with educational benefit designed to address his unique needs as a child with autism-like behaviors.

There was no evidence whatsoever that the Student would fail to derive educational benefit from the District's classroom-based ABA program. As the District's experts testified, in many ways, the District's proposal of ABA taught in a special day class would be more beneficial to the Student than a home-based ABA 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.

Even if Dr. Levin and Dr. Wilson's opinions are correct that the Student would derive optimal educational benefit from an intensive, one-to-one program, the District is not required to optimize the Student's education, but instead to provide a basic floor of educational opportunity. The District's proposal went well beyond that basic floor.

7. Based on her testimony, it is clear that the Student's mother did not like the Harper Preschool. However her opinion that the school was dark and depressing when compared to Rainbow Kids, does not change the fact that it was the appropriate placement for the Student. Likewise, her concerns about how the staff acted during her tour of the school do not change this. Even if her concerns about the staff's conduct had continued into the regular school year (rather than the ESY program that she observed), there were many avenues she could have taken to remedy that conduct short of placing her child in a private school. A simple complaint about the conduct might have been sufficient to change it.

8. The evidence also does not establish that the District failed to provide adequate clinical supervision for the ABA services. The District's proposal called for ten hours of clinical supervision for the ABA instruction per month at first and eight hours per month after that. That is equivalent to the two hours per week proposed by Coyne & Associates.

9. The District's ABA program was tailored to meet the Student's unique needs and to provide him with educational benefit. The evidence does not establish that the District denied the Student a FAPE by "Failing to provide Student ABA Direct Instruction and ABA Clinical Supervision as outlined by Coyne in its reports that is appropriate as to level, frequency and quality."

Did the District's Offer Involve Placement in the Least Restrictive Environment?

10. The next issue is whether the District's placement offer constituted a placement in the "least restrictive environment" appropriate for the Student.

Title 20 United States Code section 1412, subdivision (a)(5) provides that to the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, and that special classes or removal of children with disabilities from the regular educational environment should occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

11. Every expert in this case agrees that it would not be appropriate to place the Student in a typical preschool classroom without any other type of education. Even if the Student had a one-to-one instructional aide, placing him in a typical classroom for 100 percent of his educational day, without his corresponding ABA instruction would not provide the Student with educational benefit. Even the Student's experts believe that only 25 percent of the Student's instruction should be in a classroom with typically developing peers.

12. The dispute arises as to whether the District's offered placement of a special day class with ten percent of the Student's day spent with typically developing peers during lunch, recess and small group speech therapy is sufficient to constitute a placement in the least restrictive environment.

13. The Ninth Circuit in *Sacramento City Unified School District v. Rachel H.* (1994) 14 F.3d 1398, 1404, set forth a four-part test that provides guidance on the question of whether a placement is in the least restrictive environment. The four factors are: 1) the educational benefits of placement full time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the child will have on the teacher and other students in the class; and 4) the cost of mainstreaming the child. Although the Ninth Circuit's decision dealt with an issue of full mainstreaming, not a difference between 10 percent mainstreaming and 25 percent mainstreaming, it is still helpful to consider the *Rachel H.* factors in analyzing whether the District offered a placement in the least restrictive environment appropriate for the Student.

14. The third and fourth factors set forth in the *Rachel H.* case are not at issue in the instant case. The Student has never demonstrated disruptive behavior, and, as long as he is provided with a full-time one-to-one aide, he will not disturb the teacher or the other students in the class. In addition, the cost of mainstreaming is not significant. Neither side is suggesting the typical preschool class be modified to present ABA instruction during class hours. Instead, the only cost to the District would be the one-to-one aide to assist the Student in the typical preschool class with teacher instructions and other matters.

15. The key issues here are the first two factors – the educational benefit and the non-academic benefits of placement in the typical preschool class. The evidence supports a finding that, at the time of the IEP meeting, there would have been no educational benefit from placing the Student in a typical preschool class with an instructional aide. The expert testimony was overwhelming that the Student does not possess the necessary pre-academic skills to benefit academically from mainstream placement. Dr. DelPizzo-Cheng, during her testing and observation of the Student found that the Student was not able to follow two or three step instructions. He could not spontaneously generate three or four word phrases. He was not toilet trained or eating with utensils. He did not always respond to his name and was not able to independently follow teacher instructions. In her opinion, he did not have the cognitive abilities, language abilities or adaptive functioning abilities to be able to learn academically in a typical preschool setting. When she observed him in a small group setting, he needed constant prompting in order to follow teacher instructions.

16. Alexis Reichert was of a similar opinion. Based on the testing she performed, she did not believe the Student possessed the skills necessary to gain educational benefit from placement in a typical preschool classroom.

17. Even the Student's experts indirectly supported this conclusion. Dr. Levin's July 2005 report stated that the Student needed one-to-one ABA instruction for 75 percent of his educational time because he "has not yet demonstrated that he can acquire new skills in a small group setting."

18. Dr. Wilson's testimony stressed that the Student required one-to-one ABA therapy in order to develop the skills necessary to be successful in a typical preschool class, and she did not believe that any lessening of the ABA one-to-one instruction hours would be appropriate as of the time of the hearing.

19. The real dispute is whether the Student would have gained any non-academic benefits by being in a typical preschool class with a full time one-to-one instructional aide. This is the subject on which the experts most sharply disagreed.

20. Before discussing the expert opinions, it is important to note that the Student is not now, nor has he ever attended a typical preschool class. A typical preschool class in the District has over twenty students and does not have a high ratio of instructional aides to students.

The Rainbow Kids class that the Student currently attends is not a typical preschool class. It is much more akin to a “blended” special day class. It has only nine students and a very high teacher/aide to student ratio. Of the students in the class, five have disabilities and four are typically developing students. It does not have the visual and auditory stimuli of a fluid, typical preschool class with twenty or more students. Dr. Wilson testified that when she visited the Rainbow Kids class the week before the hearing, the Student looked at his typical peers when they spoke to him and that there appeared to be some “joint attention” occurring. However, her observation took place six months after the IEP meeting and is not sufficient to prove that the Student should have been placed in a typical preschool class (with twenty or more students) at the time of the IEP meeting.

Dr. Levin’s opinion at the time of the IEP meeting was that the Student needed “supported inclusion” in a typical preschool class for 25 percent of his educational time because certain classroom and social skills can only be learned in a typical school setting. Those skills include being able to participate independently in classroom routines such as circle time, small group instruction, cooperative learning centers, transitions, and waiting in line, as well as social skills including playing with peers, responding to peers, initiating to peers and imitating peers. He believes that these skills are better taught in a typical preschool setting rather than a special day class, because the dynamic of a typical preschool is very different than a special day class.

Dr. Wilson shares his opinion. She testified that the District’s offer of 10 percent of the Student’s educational day with typical peers during recess and lunch is not sufficient, and that the Student instead should have been placed in a typical preschool class with a one-to-one aide during part of his educational time in order for him to engage in imitation of and observational learning from his peers.

The District’s experts do not believe that it would have been appropriate to place the Student into a typical preschool class. Based on the assessment conducted by the District and the testing which was done, the District personnel did not believe that the Student possessed the prerequisite social behaviors, awareness of his environment, ability to take teacher direction and similar skills necessary to benefit from placement in a typical preschool class, even with the use of a one-to-one instructional aide.

Alexis Reichert testified that to gain benefit from a typical preschool class, a child must be able to comprehend what people are saying and interpret their body language. The child must be able to monitor eye gaze and use intentional communication to determine if he or she is being heard. The child must have play skills and an ability to regulate his or her own behavior. In the opinion of the Dr. DelPizzo-Cheng and Ms. Reichert, the Student did not possess those skills at the time of the IEP meeting. Without those essential skills, the Student’s attendance in a typical class with a “shadow” aide would be more restrictive than a special day class without a “shadow” aide. Having an adult around the child at all times can make a child “prompt dependent,” and typical peers are less likely to approach the child for play if a grownup is always present. A teacher in a special day class can foster a setting in which the child learns independence instead of becoming dependent on an adult. In a typical

preschool class, the Student would be overwhelmed by the unstructured nature of the class and be unable to function in the classroom without the aide. Instead of having the aide “fade into the background” as the aide would do in a more structured, smaller class, the Student would become dependent on the adult aide for his classroom survival. In their opinion, the Harper Preschool special day class was the proper placement for the Student.

The Student’s experts disagreed that the Student would become “prompt dependent, and testified that “shadow” aides can be trained to interact with a child in such a way as to prevent the child from becoming prompt dependent.

21. The evidence supports a finding that the Student would not have gained non-academic benefit from inclusion in a typical preschool class with an instructional aide at the time of the August 2005 IEP meeting. The District’s experts’ opinions are persuasive in this matter. They had conducted a full assessment of the Student, and the District personnel have experience working with autistic children in a multitude of classroom settings. Neither Dr. Levin nor Dr. Wilson was a credentialed teacher or had any personal knowledge of the classes at the Harper Preschool. Both worked for private companies that typically provide home ABA instruction, so their primary focus is on that type of instruction. Nyansa, the company where Dr. Wilson works, has only two students receiving ABA services who are older than three years old – the Student and his brother. In her testimony at hearing, Dr. Wilson did not even seem to fully understand the nature of school IEP goals and objectives. She criticized the District’s IEP, but had difficulty giving specific examples of what the District should have done to correct the problems she saw.

When Dr. Levin was asked whether his recommendation constituted the least restrictive environment for the Student, he twice avoided answering the question directly and when the Student’s attorney asked him a third time, he hesitated before he finally answered, “Yes.” Dr. Levin admitted that he never conducted a comprehensive assessment of the Student and it was not within his expertise to do so. His recommendation for the Student was based on his ongoing assessment of the Student during the time Coyne & Associates provided services under the IFSP. His testimony does not carry the weight of the unequivocal testimony of the District’s experts.

22. Because the Student did not have the pre-academic, adaptive or social skills necessary to imitate peers and learn from peers, the same problems -- lack of educational benefit, lack of non-academic benefit and “prompt dependence” -- could also have arisen if he was placed in one of the District’s “blended” classes, which contained both disabled and typically developing students.

The District's special day autism class, with opportunities for typical peer interaction at lunch, recess, small group speech/language sessions and occasional "reverse mainstreaming" was the appropriate placement for the Student given his level of development at the time of the August 25 IEP meeting. It was the least restrictive environment appropriate to meet the Student's needs.⁶

23. The Student raises concerns about the District's "readiness philosophy" as discussed by Dr. DelPizzo-Cheng at the IEP meeting and during the hearing. Under this "readiness philosophy" the District considers a list of pre-academic, social and adaptive skills that a child needs to be successful in a typical kindergarten class. Depending on which of these skills a preschool child possesses when the child first enters the District, the child may be placed in a special day class at first and then moved to less restrictive classes (such as a blended class) as the child acquires the necessary skills.

If this "readiness philosophy" was used by District personnel to deprive autistic students of opportunities to be taught with typical peers instead of evaluating each child's unique needs, that would be of great concern. If, as the Student's reply papers claim, autistic children have to "earn" their right to placement in a typical preschool class in the District, that might very well constitute a denial of FAPE.

However, notwithstanding any general philosophy that the District might have, in this particular case, the evidence supports a finding that the District personnel looked at the Student's unique needs in making a recommendation for his placement. They did not categorize him solely based on a general "readiness philosophy" or his status as an autistic student. A full assessment was conducted with the input of many different District personnel and even non-District personnel. The recommended placement was based on the Student's unique needs and deficits.

24. The weight of the evidence supports a finding that at the time of the IEP meeting in August 2005, the Student was not socially, cognitively or adaptively ready for placement in a typical preschool class, nor would he have gained any academic or non-academic benefit from his placement in that class. The special day class offered by the District, with its ABA methodologies, small, structured environment, and opportunity for mainstreaming during ten percent of the day was the least restrictive environment that would lead to educational and non-academic benefit for the Student.

25. The evidence does not support a finding that the District failed to offer the Student a FAPE by failing to offer the Student a placement in the least restrictive environment.

⁶ The Student's Reply Closing Brief objects to consideration of the reverse mainstreaming because it was not memorialized in the Student's IEP. Even if the reverse mainstreaming is not considered, the IEP still called for the Student to spend lunch, recess and small group speech/language with typical peers. That is sufficient to make the special day autism class the least restrictive placement appropriate for the Student. The practice of reverse mainstreaming within the special day autism class is not essential to this decision.

Implementation of the Last Agreed-Upon Placement

26. The Student claims that the District failed to implement the Student's IFSP as his last agreed upon placement and services.

27. Because of the stipulation of the parties, it is undisputed that the ABA and social skills group services from the IFSP were included in the "stay put." The parties dispute whether the speech/language and occupational therapy services are included within the "stay put," but it is not necessary to decide those issues because, as discussed below in Legal Conclusions 35 – 46 below, the District offered to implement those services in good faith but the Student chose not to participate in the services as offered.

28. The evidence is undisputed that the District was unable to provide the ABA services as called for in the Student's "stay put" IFSP placement as of the beginning of the school year, September 6, 2005. This was through no fault of the District personnel. The District personnel could not have foreseen that ACES would have a contractual dispute with the District and refuse to provide the ABA hours that ACES had agreed to provide as of the date of the Student's IEP meeting.

29. However, even in a situation where there is no "fault" by the District, the District is still responsible for providing the services needed by the Student. In this case, there is no dispute that the District had an obligation to provide the "stay put" services and that the District was unable to do so until after September 13, 2005, when the meeting with ACES took place.

30. After that meeting, the District acted promptly, and ACES went to the Student's home to conduct an evaluation of the student for the purpose of beginning services around September 15 or 16, within only 2 or 3 days after the ACES meeting. Assuming that the services should have started on the first day of school, then the Student was without services for 9 or 10 days.⁷

31. The evidence is undisputed that the Student did not receive any services from Nyansa until September 19, 2005, the Monday after ACES had gone to the Student's home to evaluate the Student. At that point the Student's parents knew that ACES was available to fulfill the District's obligation to provide the "stay put" services. However, the parents chose not to use those services and instead contracted with Nyansa to provide the services.

32. At hearing the Student's mother testified that she chose to use Nyansa instead of ACES in part, because of her verbal contract with Nyansa. However, the evidence does not support a finding that the Student's parents had a contract with Nyansa as of September

⁷ Because of the stipulations of the parties, there is no dispute that the District's obligation to provide the "stay put" services began on the first day of school, September 6, 2005. However, even if the District was obligated to provide the "stay put" services beginning on August 29, 2005, when the Regional Center stopped providing those services, at most it would add an additional 8 days to the amount of time that the District should have provided IFSP "stay put" services and does not change the outcome of this decision.

15, 2005. No written contract had been signed, no services had been provided and no money had been paid. The Student's mother testified that Nyansa had hired a new employee to help provide the services, but that employee was not even due to start working until two weeks later. The Student's mother might have felt a certain loyalty to Nyansa because Nyansa agreed to help her when she was worried about the District's inability to provide services, but that does not change the fact that the District had a provider ready, willing, and able to perform services prior to the time that the Student's parents contracted with Nyansa.

33. The Student's mother also testified that Nyansa informed her that they would have been staffed and able to provide the full amount of ABA hours within two weeks, but ACES could not give her that same assurance. However, speculation about what might or might not have been provided by ACES is not sufficient justification to refuse the District's offer of services and choose a non certified vendor to provide services instead. The testimony of District personnel was clear that compensatory services could have been provided by the District through ACES to make up for any time lost. The Student's mother testified that once the Student started receiving his ABA services again, he started to progress once more.

34. The next issue is whether any compensatory education services are necessary to make up for the gap in the "stay put" IFSP services. Dr. Wilson testified at hearing that the Student regressed during the time that he was without his ABA services. Because of the District's stipulation to reimburse the parents for all the Nyansa services called for in the "stay put," any obligation that the District might have had to pay for compensatory education has been met. The District has gone far beyond that obligation for compensatory education, by agreeing to pay for all services provided by Nyansa. Now that Nyansa has become an approved NPA, it was perfectly legitimate for the District to enter into that agreement to comply with its "stay put" obligations.

Speech Language and Occupational Therapy Services

35. The Student claims that the District failed "to implement Speech and Language and Occupational Therapy services agreed to on or about August 25, 2005." The evidence does not support the Student's claim.

36. Despite what the Student's attorney wrote in his August 25, 2005 letter, the Student did not, in fact, consent to the District's offer of speech language services as proposed in the IEP. In the attorney's letter, the Student consented to three 60- minute speech/language sessions per week (two individual sessions and one group session). The IEP, however, offered four 30-minute individual sessions per week and two 30-minute group sessions.

37. In addition, even though the District's IEP proposed that the speech/language services would commence on September 6, 2005, the start of the school year, the Student's attorney's letter stated that his clients "expect the Speech and Language...services to be implemented no later than Monday, August 29, 2005." The evidence does not establish that the Student agreed to the speech language services offered by the District in the IEP.

38. Even if the District had an obligation to implement services which differed from the District's offer in the IEP, the evidence establishes that the District did attempt to implement these services in good faith. When the District made the original offer, it was contemplated that the speech/language services would be provided in connection with the school's weekly program at Harper Preschool. However, even when the parents did not agree to that program, the District still made District personnel available to provide these services.

39. The District went out of its way to make the schedule for services as convenient for the Student's mother as possible – first by agreeing to combine the 30 minutes sessions into 60 minute sessions as the Student's attorney had requested. Then the District arranged to have individual services provided to both the Student and his brother during the same hour by two different therapists in order to save the Student's mother extra trips to and from the school.

40. The Student's mother claims that she was given a schedule by the District without any chance for input. The District personnel dispute this, but even if it is true, it is not significant to the outcome of this case. Given the Student's inflexible schedule, it does not appear that any input by the Student's mother would have made a difference. Between the Student's attendance at Rainbow Kids and his one-to-one ABA in the afternoon, there was no block of two hours on three days a week that would have accommodated the student's speech/language and occupational therapy schedule.

41. The dilemma is exemplified by Kathleen Murphy's testimony. In October, when Murphy started to work for the District as a speech/language pathologist she contacted the Student's mother *first* before any other students' parents and offered the Student speech/language therapy during any working hours on the three days a week that Murphy worked. The Student's mother did not agree to services on any of those days and times.

42. As stated in the October 20, 2005 letter from the Student's attorney, the Student was only available for services on Fridays for one hour early in the morning and two hours at lunch time, after 5:00 p.m. on weeknights or on weekends. This was not a reasonable attempt to schedule services with a school district. The Student's mother testified that her attorney's letter was not correct, and that the Student was available from 9:00 a.m. to noon on Friday mornings. However, that still was not a reasonable effort to schedule services with the school. The services were supposed to be provided on three different days and times during the week, not all at once on Friday. As Luth testified, it would not be beneficial for the Student to sit through three sessions of speech/language therapy on one day and have nothing for the rest of the week.

43. The Student's mother's concern about Luth taking telephone calls during the first (and only) speech/language session does not change this. There are many remedies she could have taken to make certain the conduct did not occur again, including something as simple as voicing her concerns to Luth or other District personnel about it. The Student was represented by an attorney who could easily have straightened out the situation.

44. As the Student's mother testified, the one-to-one ABA therapy was her main priority for the Student. However, the mother's preference for one service over another does not obligate a school district to provide services outside of reasonable school hours. The Student did not establish that the District failed to implement speech and language services agreed to on or about August 25, 2005. Instead the evidence establishes that the District was ready, willing and able to offer those services, but the Student's parents chose to fund a different type of educational program during the hours that those services were offered.

45. For the same reasons, the evidence also establishes that the District offered OT services as called for by the IEP. Although the Student's mother was unhappy that the schedule was presented to her without her input as to dates and times, the District's actions were still reasonable. The school's proposed OT schedule was designed to mesh with the speech-language schedule and minimize the amount of time the Student's mother would have to drive the Student and his brother to the school. It is not important whether the Student's mother was told to "take it or leave it" (or words to that effect), because it does not appear that there were any times that would have satisfied the Student's mother except her narrow window of times on Fridays and after school or weekend hours. Even the Student's mother admitted during her testimony that she did not think the school could provide services after hours or on weekends.⁸

46. The Student has not met his burden of showing that the District failed to implement the OT services called for in the IEP. To the contrary, the evidence establishes that the District did offer those services in accordance with the terms that the Student had agreed to, but the Student chose not to take advantage of those services. There has been no procedural or substantive denial of FAPE to the Student with respect to these issues.

⁸The Student's parents' decision to choose individual ABA therapy as a priority over the speech/language services may have been influenced by the opinions of Dr. Levin and Dr. Wilson that separate speech/ language services were unnecessary while the Student was receiving one-to-one, home ABA instruction during the "stay put."

ORDER

1. In accordance with the stipulation of the parties, the District shall reimburse the Student's parents for the stay put placement of not to exceed 72 hours of individual ABA therapy per month and not to exceed 8 hours per month social skills group for the Student beginning September 6, 2005, through March 31, 2006, upon provision of invoices from Nyansa indicating social skills group and one-to-one ABA services and cancelled checks from the parents. The term "social skills group" is defined as three or more students including the Student.

2. In all other respects, the Student's request for relief against the District is denied.

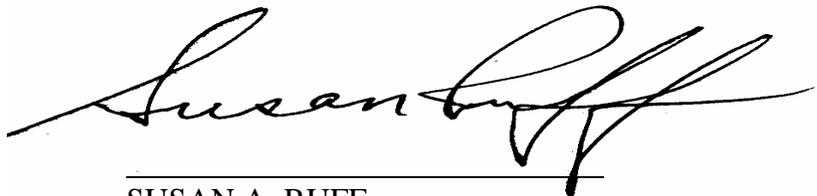
PREVAILING PARTY

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. The following findings are made in accordance with this statute: The District prevailed on all issues except the failure to implement Student's IFSP as his last agreed-upon placement and services between September 6, 2005, and September 15, 2005.

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 ninety days of receipt of this Decision in accordance with California Education Code section 56505, subdivision (k).

Dated: May 8, 2006



SUSAN A. RUFF
Administrative Law Judge
Special Education Division
Office of Administrative Hearings