

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

STUDENT,

Petitioner,

OAH NO. N 2005070042

Vs.

YUCAIPA-CALIMESA JOINT UNIFIED
SCHOOL DISTRICT,

Respondent.

NOTICE: This decision has
been **REMANDED** by the
United States District Court.
Click [here](#) to view the court's
decision.

DECISION

This matter came on regularly for hearing, before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at Yucaipa, California on October 25, 26, 27, 28, 31, and November 1, and 2, 2005.

Student (petitioner/student) was represented by Ralph O. Lewis, Jr., Esq.

Gail Lindberg, Program Manager for the East Valley Special Education Local Planning Area, represented the Yucaipa-Calimesa Joint Unified School District (respondent/district).

Oral and documentary evidence was received, the record was left open, and the matter was continued for good cause to allow the parties to submit written closing arguments/briefs. The parties' written arguments/briefs were received, read, and considered, and the matter was deemed submitted on December 19, 2005.

PROPOSED ISSUES

Petitioner articulated the issues for resolution as follows:

1. Has district offered a free, appropriate educational program (FAPE) for student since he turned three years of age, including, but not limited to the 2003-2004, 2004-2005, 2005-2006 school years?

2. Has district offered an appropriate educational program for student for the 2003, 2004, or 2005 extended school years?
3. Are student's parents (parents) entitled to reimbursement for the educational services they have provided to student from the time student turned three years old to the present?
4. Are parents entitled to reimbursement for costs and fees paid to implement student's Individualized Education Plan (IEP) from the time student turned three years of age to the present?
5. Did the district appropriately assess student to determine his then-current levels of functioning?
6. Did the district develop appropriate goals and objectives for student?
7. Did the IEP processes conform to statutory guidelines?
8. Is student entitled to an award of attorney's fees and costs for representation during the instant proceedings?
9. Is student entitled to damages under Federal and State Law?

INTRODUCTION

The reason the previous section is titled "proposed issues" is because all of student's "issues" boil down to a dispute concerning whether student was properly placed in a district special education class. Parents contend that student can not receive a Free, Appropriate Public Education (FAPE) in the district special education classroom setting. Rather, parents assert that student can only receive a FAPE in an intensive Applied Behavioral Analysis (ABA) program in a combination of in-home and general education environments. Student's contentions that respondent committed several procedural violations of the federal Individuals with Disabilities Education Act (IDEA), during the IEP processes, arise from parents' belief that he was not properly assessed before respondent attempted to set goals and objectives and recommend placement in the district special education setting.

ISSUES

1. Has district offered student an appropriate educational program since student turned three years of age?

- a. If not, what is an appropriate program to meet student's right to receive a FAPE?
- b. If not, are parents entitled to reimbursement of any costs and expenses they incurred in providing what they perceived to be an appropriate program for student?
- c. If not, is student entitled to compensatory education?

FACTUAL FINDINGS

1. Student, whose date of birth is April 10, 2001, is a four year-old male.
2. Student began receiving Early Start services from the Inland Counties Regional Center (IRC) in late 2003, early 2004, based on a diagnosis of autism.
3. On February 3, 2004, IRC notified the district that student, who would be turning three years old on April 10, 2004, would be transitioning from the Early Start Program into a district program. In preparation for the transition, district personnel reviewed the documentation concerning student, including his latest Individualized Family Service Plan (IFSP). No one from the district observed student, nor did the district conduct any of its own assessments.
4. On March 4, 2004, the district held an IEP meeting, at student's mother's request, to discuss student's placement. Goals and objectives were discussed; however, no specific program was offered to student at the March 4, 2004 IEP meeting. Instead, the IEP team decided to meet again to discuss specific placement.
5. As background, student had been transitioned into a "center-based" early intervention program at the Children's Center of Inland Counties in September, 2003. Student's mother (mother) was dissatisfied with the Children's Center program. According to mother the program was akin to a "day care" program. Student was not progressing in the "day care" program. The next IEP was not due to convene until April 27, 2004. Mother was concerned about student, so she began searching for an appropriate placement. On April 2, 2004, mother had student assessed by Playworks, a center for development and learning. The assessment focused on the areas of occupational and speech/language needs. After the evaluation student began receiving therapy services from Playworks.
6. On April 27, 2004, the district held another IEP meeting. During the IEP meeting, mother informed the district that student was attending Playworks. Mother asked for reimbursement for Playworks. Her request was denied. As a result of this IEP meeting, the district offered to place student in a preschool placement in a Special Day Class (SDC) at "either Crafton or Children's Learning Center and extended school year in immediate placement." (Student's Exhibit 34.) The district also informed mother that in August, 2004,

student could be placed in a SDC at Dunlap Elementary School or in a Regional Autism Class at Bryn Mawr Elementary School. Specific services were not decided upon during the April 27, 2004 IEP meeting.

7. On June 23, 2004, another IEP meeting was held. Student's parents requested an Applied Behavioral Analysis (ABA) program for student. The district denied the request because of the expense. Student's parents did not want to sign the IEP; however, the district told them that if they did not sign their son would not receive services and that signing did not mean they agreed with the IEP, it merely meant they were present. Student's parents signed the IEP; however, they indicated their disagreement with the provisions of the IEP by noting, "parents do not waive their right for due process." (Student's Exhibit 25.)

8. On September 7, 2004, student began attending Bryn Mawr. Student's parents sent student to Bryn Mawr because "we didn't have anything else." Although there was still no agreed-upon IEP, the district insisted that mother try the program at Bryn Mawr and if it did not work, "we'll discuss it." There were no further discussions concerning student's IEP goals and objectives or what student would be working on in the classroom. Student was the only preschooler in the classroom. The other students were from five, years-old to eight years-old. Student's mother observed the class and noted that student appeared overwhelmed by the other students. Student's parents remained dissatisfied with student's placement. Student was not making even "minimal progress," so parents continued their independent pursuit of appropriate services.

9. During their quest to obtain appropriate services for student, student's parents began focusing on an agency called the Behavioral and Educational Support Team (BEST), a certified non-public agency that provides ABA interventions for autistic children based on ABA principles developed by Dr. Lovaas and the Lovaas Institute for Early Intervention. The clinical director of BEST, Dr. Norah L. Wilson, Psy.D., assessed student on February 25, 2005. Based on this assessment, and several weeks of intervention, Dr. Wilson made the following recommendation:

Due to [student's] performance in the first few weeks of intervention it is recommended that [student] receive an intensive behavioral program. [Student] would benefit from a structured in-home program based on the principles of Applied Behavioral Analysis.

1. [Student] would benefit from a highly structured 1:1 Discrete Trial Training program focusing on teaching the skills necessary for a smooth transition to school at the appropriate time. [Student] would benefit from receiving 35 hours per week of 1:1 intervention focusing on the above outlined goals.

2. Supervision of [student's] program should be a total of 12 hours per month.

3. Clinic meetings should occur twice per month. The allowance should be 6 hours per month for clinic meetings.

4. Program recommendations and goals should be reviewed after six months of the intervention. (Student's Exhibit 4.)

10. During early April, 2005, student's parents removed student from the district program at Bryn Mawr and commenced services with BEST. On April 18, 2005 student began receiving 30 hours per week of intensive behavioral intervention services, ABA services, from BEST.

11. Student's parents also had student evaluated by Dr. Avazeh Chehrazi, Ph.D., a clinical psychologist. Dr. Chehrazi interviewed student's parents, observed student, spoke with student, administered numerous tests to student and conducted an extensive review of all prior assessments, Regional Center documents, and district documents concerning student as the basis for her ultimate assessment and recommendations for appropriate interventions. Based on her detailed assessment of student, Dr. Chehrazi agreed with Dr. Wilson's assessment and recommended, in pertinent part, that student receive one-to-one, in-home intensive behavioral intervention services, utilizing the scientific approach of behavior modification, the principles of operant conditioning, and the techniques of ABA. Dr. Cherazi states: "Given that [student's] behavioral repertoire presents with substantial delays across all areas of functioning it is recommended that [student] receive 35-40 hours per week of one-to-one intensive behavioral intervention. However, his weekly hours should slowly be increased from his current schedule of 30 hours per week as he acclimates to his new learning environment...." (Student's Exhibit 5.)

12. Currently, student is receiving the following services provided by BEST: 30 hours per week of Discrete Trial Training (DTT); two hours per week of supervision; and, one-hour clinic meetings, two times per month. Student is making excellent progress. He began attending a regular, general education, class at a Yucaipa Christian pre-school on September 15, 2005. Student attends the general education class three hours per day, three days per week for a total of nine hours per week. If the intensive ABA program works, as planned, student will fully transition into a general education setting within the next year or two.

13. Dr. Wilson and Dr. Chehrazi agree that student could not have made adequate progress toward transitioning into a general education setting in the district program even if the teacher and aides tried to use ABA techniques in the classroom. Student was not, and is not, ready to participate exclusively in a group classroom setting. Student needs intensive one-on-one intervention by personnel who are highly trained in ABA techniques. While the program offered by the district may be suitable for some children, it was not suitable for student. It did not meet student's unique needs and would not have provided student with a FAPE. The program offered by the district would not have allowed student to access the curriculum because, according to Dr. Wilson and Dr. Chehrazi, when student first began receiving services

from BEST he was not capable of making any educational progress in a group setting, even if it was a special education setting.

14. Student's parents have been required to make expenditures to the following agencies, and for the following services, in order to ensure student received appropriate interventions, thus allowing him to receive a FAPE:

- a. Payments to BEST;
- b. Speech and Language Therapy Services provided by Jennifer Scruba;
- c. A speech and Language assessment by Playworks;
- d. Speech and Language Therapy Services provided by Playworks;
- e. Monthly fees for student's general education preschool from September 15, 2005 to the present;
- f. An Independent educational evaluation by Dr. Avazeh Chehrazi;
- g. A neurological assessment by Dr. Margaret L. Bauman;
- h. An independent assessment by "Brain Cell;"
- i. \$2,220.00 for educational supplies; and
- j. \$1,848.00 for transportation to Bryn Mawr school.

LEGAL CONCLUSIONS

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 (FAPE). (20 U.S.C. § 1400; Educ. 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 state educational standards, and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specifically designed instruction at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) As set forth in Findings 7, 8, 9, 10, 11, 12, and 13, student's unique needs require that he receive intensive ABA intervention from BEST or an equivalent program; otherwise, student will not be able to access the curriculum and eventually mainstream into the general education system.

2. Title 34, Code of Federal Regulations, section 300.502 provides that parents of a child a disability have the right to obtain an independent educational evaluation of their child at public expense if the parents disagree with an evaluation obtained by the public agency. Pursuant to title 34, Code of Federal Regulations, section 300.502, once a parent requests an independent evaluation the public agency must either initiate a hearing under title 34, Code of Federal Regulations, section 300.507 to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under section 300.507 that the evaluation obtained by the parent did not meet agency criteria. In the present instance, student's parents expressed their disagreement with student's placement at each IEP meeting. They did not expressly "disagree" with any single assessment because the district did not conduct its own assessments; rather, it relied on past assessments and reports generated by the IRC. It was clear; however, that student's parents wanted further evaluations to be conducted. The district did not conduct further evaluations and it did not request a hearing to demonstrate that the evaluations upon which the district was relying were appropriate. Consequently, student's parents had no choice. They proceeded to obtain independent evaluations of student; evaluations which proved necessary for proper placement. Accordingly, the district shall reimburse parents for the costs and expenses of the evaluations

3. California Education Code section 56507, subdivision (d) requires that the extent to which each party prevailed on each issue heard and decided must be indicated in the hearing decision. In the present case, student prevailed on the controlling issue and all sub-issues.

4. There is not legal basis for an award of damages in these proceedings. Accordingly, student's request for "damages under Federal and State Law" is denied¹.

5. There was no evidence presented indicating that student would benefit from some form of compensatory education.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

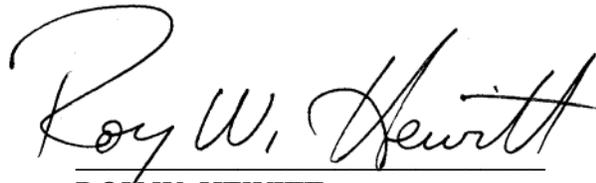
1. Student's petition is granted.
2. The district shall fund student's ABA program at BEST, not to exceed 40 hours per week, of one-to-one, intensive ABA intervention along with supervision, not to exceed 12 hours per month, and six hours per month of clinic meetings. The district, student's parents, and BEST shall arrange to have the general education component of student's services provided by the district, with appropriate BEST support. BEST shall provide reports to the district every

¹ Student raised the issue of damages in these proceedings to preserve his right to raise the issue in subsequent proceedings, if warranted.

six months indicating student's progress and describing any modifications to his program. The district, student's parents, and BEST shall cooperate in working toward student's full transition into the public regular education program and student's progress shall be assessed, as required, at his regularly scheduled IEP meetings.

2. Parents shall provide the district with proof of amounts paid for the expenses described in Finding 14, and the district shall reimburse student's parents for those expenses within sixty days from being provided the proofs of payments.

Dated: January 9, 2006

A handwritten signature in cursive script that reads "Roy W. Hewitt". The signature is written in black ink and is positioned above a horizontal line.

ROY W. HEWITT
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

Note: Pursuant to California Education Code section 56505, subdivision (k), the parties have a right to appeal this Decision to a court of competent jurisdiction within 90 days of receipt of this Decision.