

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

STUDENT,

Petitioner,

OAH CASE NO. N2005070042

V.

**CLARIFICATION OF DECISION
AFTER REMAND**

YUCAIPA-CALIMESA JOINT UNIFIED
SCHOOL DISTRICT,

Respondent.

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.

Petitioner/student was represented by Ralph O. Lewis, Jr.

Gail Lindberg, Program Manager for the East Valley Special Education Local Planning Area (SELPA), 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.

By order of the United States District Court, Central District of California, dated December 21, 2006, this matter was remanded to Administrative Law Judge Roy W. Hewitt to address the issues delineated in the remand order.

The remanded matter, including the exhibits, transcripts and recordings of the administrative hearing, was received by Administrative Law Judge Roy W. Hewitt on February 13, 2007.

A telephonic status conference was conducted on March 9, 2007. Attorney Jack B. Clarke, Jr. represented the district and Attorney Ralph O. Lewis represented student. After a brief discussion, it was determined that Administrative Law Judge would prepare a response to the remand on or before April 9, 2007.

ISSUES ON REMAND

1. Did the Administrative Law Judge consider the district’s evidence concerning whether student was provided an appropriate education and whether student had made progress in the public school program?

2. If the Administrative Law Judge considered the district’s evidence and found that student was not provided an appropriate education and did not make progress, why did the Administrative Law Judge discount the contrary testimony of district witnesses Franklin, Chaves—Dybicz, and Gayle Wray who “lauded the program and its results?” (Remand order at p. 2.)

3. Did the Administrative Law Judge consider the district’s Multi-disciplinary Assessment Report and Occupational Therapy Report in concluding that the district did not conduct its own assessment of student, “a factor that apparently led the [Administrative Law Judge] to award costs associated with the parent’s assessment?” (Remand order, at p. 2.)

ISSUE 1

Did the Administrative Law Judge consider the district’s evidence concerning whether student was provided an appropriate education and whether student had made progress in the public school program?

Yes, during the seven days of hearing and after the matter was submitted, the Administrative Law Judge (ALJ) carefully and painstakingly listened to all of the testimony, carefully observed the witnesses’ demeanors, took copious notes, reviewed the exhibits, and carefully analyzed all of the evidence presented.

ISSUE 2

If the ALJ found that student was not provided an appropriate education and did not make progress, why did the Administrative Law Judge discount the contrary testimony of district witnesses Wendy Franklin (Franklin), Natalie Chaves—Dybicz (Caves—Dybicz), and Gayle Wray (Wray) who “lauded the program and its results?” (Remand order at p. 2.)

As revealed in Factual Findings 7, 8, 9, 10, 11, 12, and 13, and Legal Conclusion 1, the ALJ found, and concluded that student was not provided an appropriate education by the district and did not make progress in the district’s program. The Findings and Conclusion were based on the expert testimony of Dr. Wilson and Dr. Chehrazi that 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 Applied Behavioral Analysis (ABA) techniques. The contrary evidence, presented by district witnesses was discounted because the district’s witnesses had no base-line data to establish whether student could and

did derive even minimal benefit(s) from the district's "proposed" program(s). The lack of necessary knowledge of the student, his previous assessments, the district's failure(s) to establish agreed-upon goals and objectives for student and the witnesses' lack of data to establish a base-line against which to measure progress, shall be discussed on a witness-by-witness basis under the following headings: Witness Franklin; Witness Chaves-Dybic; and Witness Gayle Wray.

WITNESS FRANKLIN

1. Witness Franklin was student's special education teacher while student was in the district's special education program/class at Bryn Mawr. Franklin had a credential for teaching a severely handicapped special day class and held a master's degree in special education. While Franklin may have held the credentials and had the expertise to teach severely handicapped children, she did not have any expertise in the area of ABA. At the time of the administrative hearing, Franklin's most recent ABA training consisted of a four-hour training session in the spring of 2005 (RT1¹ at p. 112.) Additionally, Franklin did not have agreed-upon goals and objectives for student at the time student began attending Franklin's class.

2. On March 4, 2004, the district held its first Individualized Education Program (IEP) meeting concerning student. Franklin did not attend that IEP meeting. Although goals and objectives were discussed at that IEP meeting, no specific program was offered to student; instead, the IEP team decided to meet again, on April 27, 2004, to discuss a specific placement for student. Franklin attended the April 27, 2004 IEP meeting, as the special education teacher, to provide student's parents with information about her special education class. Franklin had very little information about student. She had not seen any reports or assessments concerning student and attended the meeting merely to answer questions about her program. (RT1 at pp. 121-123.) No decisions were made concerning student's services as a result of the April 27, 2004 IEP meeting. (student's exhibit 34.)

3. On September 7, 2004, student was placed in Franklin's class at Bryn Mawr. Franklin was not present at the IEP meeting where the decision was made to place student in her class. (RT1 at p. 125.) On September 7, 2004, when Franklin first began teaching student there were no agreed upon IEP goals and objectives in place for student to work on. (RT1 at p. 126.) Franklin had not discussed student's current level of functioning with anyone so she began "acclimating" student to the classroom setting².

4. It was not until September 14, 2004, one week after student was unilaterally placed in Franklin's class³, that another IEP meeting was convened. Franklin attended that IEP meeting. No agreed upon goals, objectives or services resulted from the September 14,

¹ "RT 1" refers to the Reporter's Transcript of the administrative hearing, dated October 25, 2005.

² Student was only three years old at the time, the other students ranged in age from five to seven years old.

³ Student's mother was told by the district that if Franklin's program did not work they would "discuss it."

2004 IEP meeting. According to Franklin, there were no specific discussions about student's current level(s) of functioning. During the September 14, 2004 IEP meeting the IEP team discussed "general, overall things." (RT1 at p. 128.) Student's mother requested an In-Home ABA program. (RT1 at p. 129.) Notwithstanding the lack of established goals and objectives, and the failure to establish any base-line levels of student's current abilities, Franklin expressed her opinion that her classroom could meet student's needs. (RT1 at p. 129.) After the September 14, 2004 IEP meeting, Franklin continued providing services for student as she had been doing when student first entered her classroom on September 7, 2004. (RT1 at p. 135.)

5. The last written goals and objectives for student were set forth in the documents pertaining to a March 4, 2004 IEP meeting. Those goals and objectives were not agreed to by student's parents and student's parents had not signed the addendum form dated September 1, 2004, authorizing any services at the time student was placed in Franklin's class. Consequently, counsel for student questioned Franklin about the program she was implementing concerning student. The following exchange occurred:

Q Did you do anything as a result of this [the September 14, 2004] IEP?

A I continued providing services for [student] as I was doing when he first entered my program.

Q So were you operating still on the goals and objectives on [the] March 4th 2004 IEP?

A Well, those were the only goals that had been written, but Mom and Dad had written a letter stating that they weren't in agreement with those goals.

Q So you weren't working on those goals?

A So technically I didn't have goals that had been – that Mom and Dad were in agreement with at that time.

Q So what were you working on?

A A variety of different skills; finding what level [student] was at and where he'd be able to start progress with him and to be able to make recommendations for goals with Mom and Dad.

Q I'm just trying to understand how – if you didn't have any goals and objectives, how did you know what to work on?

A My experience of being a teacher, of knowing age-wise what types of things a three year old should be working on and learning to do, as well as talking with Mom when she brought him to school, the things that were important to her and Dad. (RT1 at pp.135-136.)

6. Franklin’s testimony consistently indicated that student was placed in her program and received the same type services being received by all the other students in her class. Even though Franklin never had established goals and objectives and never established base-line performance levels for student, she expressed her unsubstantiated conclusion that student was “making really good progress in our program.” (RT4⁴ at p. 64.)

7. Franklin’s testimony, considered in its entirety, revealed that she lacked the requisite knowledge about student to express the opinion that he was making progress in her program. She did not have any established base-line performance levels for student against which to measure “progress.” Franklin had no agreed-upon goals and objectives, nor did she have any agreed-upon program(s) to implement for student. Thus, Franklin’s testimony was not credible and was given no weight by the ALJ.

WITNESS CHAVES-DYBICZ

8. Chaves—Dybicz did not “laud” the district’s program. In fact she lacked any direct knowledge of the district’s program and its results. Chaves—Dybicz was the speech and language therapist who delivered speech and language services (S&L) to student during July of 2004. Chaves—Dybicz provided S&L to student on July 6, 7, 8, 14, 15, 16, 21, 22, 23, 28, 29, and 30, 2004. (RT4 at p. 91.)

9. Chaves—Dybicz did attend student’s March 4, 2004 transitional IEP meeting. Based on her testimony, it is clear that the tentative IEP documents drafted in preparation for the meeting were developed based upon discussions with student’s current teacher, student’s occupational therapist (OT), and student’s mother. (RT 4 at p. 83.) When asked if the district had done any “formal testing” of student prior to the March 4, 2004 IEP meeting the following exchange occurred:

A We did testing.

Q Was [that] prior to the March 4th 2004 IEP meeting?

A Yes.

Q What testing did you do?

⁴ “RT4” refers to the Reporter’s Transcript of the administrative hearing dated October 28, 2005.

A We did a record review, parent interview, spoke with his teacher at the Riverside Children's Center. We spoke with the OT.

Q And in your opinion, is that testing?

A Yes, it is.

Q Okay, did you do any formal – did you use any formal assessment tools to assess [student] prior to the March 4th 2004 IEP meeting?

A When you say formal, do you mean standardized testing?

Q Okay.

A I did not do standardized testing. (RT4 at pp. 105-106.)

This exchange between counsel and the witness reflects the witness's lack of candor. The witness knew, or reasonably should have known, that counsel wanted information concerning any standardized testing instruments that were used to objectively test student's current levels and needs. Instead of conceding the fact that no such testing was done prior to the March 4, 2004 IEP meeting, the witness elected to engage in a cat-and-mouse game with counsel.

10. Chaves—Dybicz was not aware of the fact that student's parents disagreed with the proposed IEP until April 27, 2004. On that date, the IEP team reconvened to continue discussing student's case. The parents attended the meeting with an "advocate" and expressed their disagreement with the way the district was handling student's assessments and with the district's offer of placement. (RT4 at pp. 85-86.)

11. Chaves – Dybicz testified that on June 23, 2004, it was decided that S&L would be provided to student "60 minutes three times per week" during student's July 6 through July 30, 2004 summer program. (RT4 at p. 110) Then, on July 15, 2004, during student's continued IEP meeting, student's S&L services were changed from 60 minutes per day, three days per week to 90 minutes per day, five days per week. (RT4 at pp. 111-112.) Chaves—Dybicz attended the June 23, 2004 continuation of student's IEP meeting, however, she was unable to adequately explain the reason(s) student's S&L level and intensity was changed. (RT4 at pp. 112-121.) Once again, for nine pages of transcript, Chaves – Dybicz tried to dodge the questions asked by both counsel for student and the ALJ, trying to get some clarification of the reason(s) student's S&L service level was changed. (RT4 at pp. 112-121.) Additionally, student's S&L delivery model changed from small group on June 23, 2004 to individual speech therapy on July 15, 2004. (RT4 at p. 126.) Again, Chaves – Dybicz could not explain the reason(s) for this significant change. (RT4 at p. 127.)

12. Chaves – Dybicz was asked, “when you stopped working with [student] in July of 2004, what was his expressive language level?” The following exchange resulted:

A It was – It was similar to what we found on his assessment. He had made some progress in attending.

Q So, if you looked at his assessment, we would be able to assume that based on what – his data that was the level he was at when you were finished in July?

A Well, in terms of the overall language level, yes. However, he did make progress in the finer points of communication development such as attending, showing attention. (RT4 at p. 123.)

This exchange again revealed Chaves – Dybicz lack of candor. She kept trying to redefine almost every question posed her by counsel and the ALJ concerning student’s assessments, testing and progress. Her demeanor on the stand indicated she was very uncomfortable testifying in the presence of those who employ her services and she appeared to be attempting, as best she could, to gloss over facts unfavorable to the district.

13. Chaves – Dybics only worked with student for a very brief time during the month of July 2004. She did not observe nor participate in student’s regular session special day class. Chaves – Dybics’s only knowledge about student’s program came from a casual conversation with Franklin in the fall of 2004. Chaves – Dybics encountered Franklin at a conference/seminar and, in passing, asked Franklin how student was doing in her (Franklin’s) class. Franklin told Chaves – Dybics something to the effect, “fine, he’s doing really well.” (RT4 at p. 95.)

14. As can be seen by a review of Chaves – Dybics’s testimony, she did not “laud” student’s program with the district. Chaves – Dybics had no first-hand, percipient knowledge of student’s program with the district. Consequently, her testimony was not helpful in establishing the success or failure of student’s program.

WITNESS WRAY

15. Wray is an OT employed by the East Valley SELPA. She worked as an OT for the district during the time period relevant to student’s case. Wray testified that she assessed student on May 21, 2004, and that she attended student’s September 14, 2004 IEP meeting. Wray testified that student made progress in his program in the areas of being able to sit and complete his work. (RT5⁵ at p. 61.) Wray was then asked, “And how do you determine whether he’s made progress?” (RT5 at p. 62.) Wray responded: “Through the

⁵ “RT5” refers to the Reporter’s Transcript of the administrative proceedings, dated October 31, 2005.

consultations that we do weekly with the classroom teacher.” (RT5 at p. 62.) In other words, Wray determined student’s progress based mainly on reports from Franklin.

16. Wray was critical of ABA; however, when questioned about her training in ABA home programs she admitted that her training was not in ABA, it was in OT and children with autism. (RT5 at pp. 70-71.)

17. Wray testified that students’ needs do not determine placement; rather, placement determines a particular student’s needs. When asked, “you don’t believe that the services drive the educational placement?” Wray responded: “I believe that first the educational placement must be determined to – in order to determine what services are going to be required to help the child succeed in the educational environment that they’re placed in.” (RT5 at p. 75.)

18. Wray was then questioned about her May 21, 2004 assessment of student and the resulting recommendations for student. Specifically, counsel for student asked Wray, “As a result of your assessment, did you recommend occupational therapy services for [student]?” (RT5 at p. 81.) As a result of this question the following, rather lengthy, exchange occurred:

Q So you could never make an independent determination of a need for occupational therapy until you knew what the placement was.

A Typically, yes.

Q And did you – when you did the assessment, did you know what the placement would be?

A No, we did not.

Q Were you provided with any information – strike that. Were you provided with the IEPs prior to your assessment of [student]?

A When we are given our assessment packet we do have the IEP information in the referral packet.

Q Let me have you take a look at student’s exhibit number 37. Did you have this IEP in your referral packet? And (indiscernible) dated 3/4/04.

A Again, Misty Fairchild was really the one following this case and I’m sure that she did have this – access to this IEP for the referral.

Q But you don't recall this IEP yourself?

A I don't, no, because Misty was assigned to him.

Q If Ms. Fairchild was assigned to him, why were you participating in the assessment?

A Because she asked me to go with her.

Q And did she conduct the assessment or did you?

A She did.

Q Let me have you take a look at student's exhibit number 34. Did you have access to this IEP when you and Ms. Fairchild did your assessment – when Ms. Fairchild did her assessment?

A I would assume yes, she did.

Q But you don't know.

A I can't answer that for sure, but I'm sure that it was in the referral packet because it was prior to the date of the assessment.

Q Did you have any discussions with Ms. Fairchild about [student's] placement?

A Prior to the assessment?

Q Or during the assessment.

A No, we did not discuss his placement.

Q Well, if you need to know what the educational placement is prior to making a recommendation, how can you do the assessment if you don't know what the educational placement's going to be?

A Because we do the assessment and then our recommendation, as you can see from our recommendation, it wasn't a specific recommendation. It was that a recommendation would be made once educational placement is determined and that – you're right, that typically doesn't happen because most assessments we do, the educational placement has

already been determined, so we're already looking at what the classroom placement is. (RT5 at pp. 82-83.)

19. The witness continued to vacillate. She bobbed and weaved in her attempt to provide answers that would bolster the district's case (See RT5 at pp. 81-91), however, she failed in that attempt. In her attempt to provide testimony favorable to the district, Wray established that she did not actually assess student, Misty Fairchild (Fairchild) did. Knowing a student's placement is essential to determining appropriate services, however, neither Wray nor Fairchild had that information at the time Fairchild assessed student and recommended services. Finally, Wray's information concerning student was gained mainly from hearsay information provided by Franklin and assumptions about what Fairchild may have known about student. Consequently, Wray's testimony, like that of Franklin and Chaves – Dybicz was not credible and was given no weight.

ISSUE 3

Did the Administrative Law Judge consider the district's Multi-disciplinary Assessment Report and Occupational Therapy Report in concluding that the district did not conduct its own assessment of student, "a factor that apparently led the [Administrative Law Judge] to award costs associated with the parent's assessment?" (Remand order, at p. 2.)

20. The Administrative Law Judge did consider the district's Multi-disciplinary Assessment Report and Occupational Therapy Report in concluding that the district did not conduct its own, adequate and appropriate assessment(s) of student. A review of the testimony reveals that the district's reports were based on subjective observations of student by personnel who had an interest in fitting student into an existing district program. For example, the previously quoted excerpts from the testimony of Franklin, Chaves – Dybicz and Wray reveal that the district's Multi-disciplinary Assessment Report and Occupational Therapy Report were developed based on anecdotal information, speculation and assumptions, and without adequate information (such as the nature of student's placement) to even make an appropriate OT recommendation.

CONCLUSION

21. A review of the evidence reveals that the district attempted to place student in a cookie-cutter, one-size-fits-all, type program. Student was placed in a group classroom setting when, the district should have known, due to student's sensory sensitivities he could not learn in a group setting; especially the setting in which student was actually placed. Student, a three-year-old autistic child with sensory and processing problems was placed in a group classroom setting with other students who ranged in age from five years old to seven years old. According to student's mother, student was overwhelmed in that setting; and, given student's condition; mother's testimony is very credible.

22. In contrast to the district, student presented testimony by highly qualified experts who used objective, standardized testing instruments in addition to their subjective observations of student to determine an appropriate ABA program for student. Hence, the ALJ's order for services and for reimbursement for the assessments/testing parents obtained; assessments and testing necessary for student to obtain a FAPE. (See the Decision issued by the ALJ as a result of the administrative hearing.)

Dated: April 2, 2007

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

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