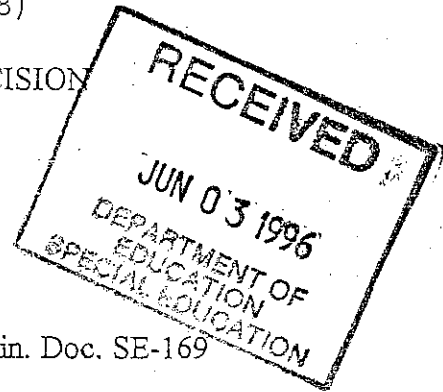


IOWA DEPARTMENT OF EDUCATION

(Cite as 13 D.o.E. App. Dec 218)

IN RE: Ruffin W. )  
 Mary Jane W., )  
 Appellant # 113 )  
 v. )  
 Allamakee Community School District )  
 and Keystone AEA 1, )  
 Appellees )

DECISION



Admin. Doc. SE-169

The above entitled matter was heard before Susan Etscheidt, Administrative Law Judge, on May 3, 6, 8 & 9, 1996 in Waukon, Iowa. The hearing was held pursuant to Iowa Code Section 256B.6 and 20 U.S.C. Section 1415 and rules found at Chapter 281-41 Iowa Administrative Code and 34 C.F.R. Part 300. The hearing was conducted pursuant to rules of the Iowa Department of Education found at Chapter 281-41 I.A.C. The hearing was evidentiary and witnesses were sequestered upon motion of the Appellant. The hearing was open to the public at the request of the Appellant.

The appellant, Mary Jane W., was present and represented by attorney Curt Sytsma of Iowa Protection and Advocacy. The Allamakee Community School District (hereinafter ACSD or District) was represented by attorney Beth Hansen. The Keystone Area Education Agency (hereinafter AEA) was represented by attorney Allan Carew. The superintendent for ACSD, Dr. Wayne Burke, was present throughout the hearing, as was the AEA Director, Mr. Eugene Pratt.

On March 28, 1996, the Department of Education received an affidavit of appeal from the appellant requesting a hearing regarding appropriate educational services for Ruffin W. The issues identified were:

1) Waukon Schools, and AEA 1, have failed to carry out their duty of addressing Ruffin's need for extended year services in a timely manner.

Because Ruffin, as a child with a disability, has a well documented need for these services, failing to address the issue in a timely manner denies FAPE (a free and appropriate education) to the child.

2) Waukon community schools have failed to implement integration opportunities which are written in Ruffin's IEP. This is a violation of the U.S. Code, which states that services must be provided "in conformity with the individualized education program." 20 U.S.C. 1410 (18) (d).

Because integration opportunities written in the IEP were not implemented, Ruffin is entitled to compensatory integration opportunities and services over the summer months.

On April 3, 1996, the Department of Education received a response to the request for Due Process Hearing regarding Ruffin W from Beth Hansen, representing the LEA. She advised that "the school district as not yet completed working on a proposed extended year program" and that the plan would be ready "for the parent's review by April 10, 1996." She requested that the Bureau of Special Education not schedule the hearing until after April 15, 1996 to allow the parties additional time to "consult and negotiate." On April 18, 1996, the Department of Education scheduled a due process hearing for May 3, 1996.

A pre-hearing telephone conference call was held on Friday, April 26 from 9:00-10:15 a.m. Three pre-hearing motions were presented and discussed and the ALJ issued a ruling on the motions April 26, 1996. The Motion to Clarify Issues was granted, and the appellant subsequently filed an "Amendment to the Due Process Request" indicating that the first issue was amended to say:

The Allamakee Community School District and Keystone AEA 1 have failed to offer an extended year or summer program which is reasonably calculated to meet Ruffin's current educational needs; the offering denies FAPE because a) it fails to provide critical integration opportunities, 2) it fails to provide sufficient hours of one on one therapy, and 3) it was not prepared in procedural compliance with the notice and related requirements of the IDEA.

The hearing was continued on May 6, 8 and 9, 1996. Numerous witnesses testified and voluminous educational records were received. The attorneys agreed to submit briefs on Monday, May 20, 1996. The decision was to be rendered by the Administrative Law Judge by May 31, 1996.

#### I.

#### Findings of Fact

The Administrative Law Judge finds that she and the Iowa Department of Education have jurisdiction over the parties and subject matter of the hearing.

Ruffin is a 5-year-old boy who lives with his mother in the District. Ruffin was originally referred to Keystone in July 1994. On July 13, 1994, the appellant contacted Mr. Eugene Pratt, the Keystone AEA Director of Special Education. She indicated Ruffin had been seen by Dr. Temple, a pediatric neurologist at Gundersen clinic, who had made a provisional diagnosis of Pervasive Developmental Disabilities and suggested she contact the AEA about services. The appellant indicated she wanted to proceed with having Ruffin evaluated by Keystone AEA with the possibility he would be enrolled in an Early Childhood Special Education (ECSE) class at the beginning of the 1994 school year. (See D/E Report 8/1/94). In a letter from the appellant to Mr. Pratt on July 15, 1994 the appellant advised that she had scheduled an evaluation of Ruffin at the Gundersen Clinic Ltd., in LaCross, Wisconsin. Ruffin would have a brief, summary evaluation by Dr. Cheryl Webb in the fall, followed by a full evaluation in January of 1995. The appellant indicated she would like Ruffin to begin school August 29, 1994 at West Side Elementary in the special education classroom.

Information was exchanged between the Keystone AEA Preschool Screening Evaluation Team and Gundersen Clinic. A staffing was held on 8/1/94 at the Waukon Field Office in Waukon, Iowa. In addition to the appellant, Jan Grimes (speech-language pathologist), Lois Henry (school Psychologist), Marcia Boberg (early childhood special education [ECSE] consultant), Linda Siegrist (special education nurse), Karen Steward (audiologist) and Tom Raulerson (assistant sector coordinator) were present. The *Diagnosis and Team Recommendations* indicated that Ruffin would benefit from receiving special education services because of delays in social, communication and concept development. The team recommended that Ruffin be enrolled in an ECSE center-based program and be provided direct speech services.

The Individualized Education Program (IEP) of 8/25/94 listed goals of increased social interactions with peers and other adults, increased use of functional and imaginative play, and increased expressive language skills. Ruffin was to be in the ECSE class five days per week with 30 minutes per week in the library with kindergartners for participation in regular education. Support and related services section indicated that Ruffin would receive speech and language services up to 80 minutes per week for the entire school year, and "portal to portal" transportation. The IEP cover sheet indicated the appellant requested review for Extended Year Special Education.

A letter from the appellant to Ms. Boberg and Ms. Henry dated 9/2/94 begins a series of correspondence concerning treatment approaches and methodology for Ruffin. The appellant indicated she would like a home visit/classroom visit from someone with the Autism Resource Team and that she "would like to see (the Lovaas method) tried with Ruffin." She included references supporting the use of the method. The appellant contacted Dr. Doreen Granpeesheh, who worked with Ivar Lovaas from 1978-1990, about services for Ruffin. Dr. Granpeesheh established the Center for Autism and Related Disorders (hereafter CARD) in 1990 and currently works with approximately 200 children across the country. She employs 70-80 therapists working across the country to supervise programs. She has participated in the evaluations of more than 100 children with autism and PDD. The program involves "behavior modification" to change behaviors that need to be decreased by reductive techniques (e.g., redirection, extinction, differential reinforcement) and to increase behaviors that are deficient (e.g., eye contact, language, social skills). Eighty percent of the program is 1:1 discrete trial instruction to teach the deficit behaviors through shaping and chaining procedures. The content is based on two basic components: a series of drill originally designed by Lovaas for children with developmental delays and additional drills from CARD. The program is intended to be a 40 hour/week program lasting approximately two - three years. The last year of the program involves social skill instruction and integration, moving from the discrete trials to loosely structured play activities. There is research supporting the efficacy of the Lovaas method which documents a 47% "recovery" from autism.

On 9/20/94 the appellant requested Dr. Thompson and Dr. Temple from Gundersen Clinics provide the Prudential Insurance company a statement showing Ruffin's "diagnosis (Pervasive Developmental Disorders, Not Otherwise Specified), type of therapy ordered and duration of the therapy . . . needed (intensive 40 hours one-on-one per week Lovaas training for a minimum

period of two years, and AIT)." The appellant provided a summary of her research regarding Ruffin's "best chance for improvement approaching recovery" that included (1) continuing special education at public expense, (2) supplement program with Lovaas, (3) computer programs, (4) continue megavitamin therapy and (5) try auditory integration training. The letter closed with a statement from the appellant: I hope you and Dr. Temple can be supportive of the treatments proposed above by providing the requested statements to Prudential, and prescriptions for Lovaas therapy and AIT."

The 10/5/95 summary evaluation from Dr. Webb at Gundersen listed *Team Impressions* to include "pervasive developmental disorder - Not otherwise specified, specific language disorders. Continue to monitor for Asperger's syndrome." The *Team Recommendations* include that "Ruffin continue with his current school program to include speech and language therapy" (see Report dated 10/5/94; received 11/4/94).

A joint letter to the ARC of Iowa and Office of Special Education Programs (OSEP) dated 11/2/95 from the appellant indicated that "Ruffin's present public education goes a long way, but not the complete distance, toward providing an education which would completely recover him. Ruffin will need year-round schooling, until his recovery is accomplished and secure." The appellant indicated that since October 15, 1994 she supplemented his public education by hiring three adults to assist "every waking hour."

On November 5-6, 1994 the appellant sponsored a Lovaas training weekend with Ms. Boberg and Pat Novak [early childhood special education (ECSE) teacher] attending. Dr. Doreen Granpeesheh of UCLA sent her senior therapist, Ms. Evelyn Kung, to Waukon for the training. The appellant, Ms. W. also asked to reconvene the IEP team to revise Ruffin's program with a view toward incorporating Lovaas and computer work. The appellant also indicated that the team needed to address Ruffin's education for the coming summer.

An IEP notification letter dated 11/21/94 was sent to the appellant inviting her to attend IEP conference on 12/8/94. In attendance at the meeting were Ann Hart Principal of West Elementary School, Ms. Henry, Ms. Novak, Donna Schmidt (Lovaas-trained therapist) Ms. Boberg, Sue Baker (Autism Resource Team consultant; by phone), Terri Kleinow (Speech-Language pathologist) and the appellant. The *Present Levels of Educational Performance* (PLEP) section indicated that Ruffin had greatly increased social interaction and language skills. The PLEP indicated that his fine and gross motor skills are within age range. Ruffin's needs were identified as increasing his ability to answer comprehension questions, take turns, and improve language skills (Iowa Severity Rating Scale: Articulation=0, Language=3 {0=no problem to 4=severe problem}). The six annual goals included: (1) increasing social interactions with peers and other adults including the initiation of interactions, (2) increasing his ability to answer comprehension questions, when a variety of question formats are used, including all "Wh" questions, (3) increasing his understanding and use of beginning quantitative concepts (making sets and telling how many), (4) improving expressive language skills, (5) improving receptive language skills, and (6) exhibit appropriate skills for bus transportation. The *Special Education*

*Support and Related Services* indicated Ruffin would receive up to 80 minutes per week of speech and language and portal to portal transportation. The *Extent of Participation in Regular Education* is listed as "Library" for 30 minutes and ECSE for five days per week. It is also noted on the cover page of the IEP that "(Extended Year) issues have not been resolved."

In a letter dated 12/9/94 Ms. W. expressed concern that during the 12/8/94 IEP meeting Ms. Boberg had indicated she was unauthorized to speak about public funding or EYSE. She made several requests including: (a) to include for Ruffin his Lovaas home programming as a component of his IEP, and to include as well Extended Year Special Education for him," (b) I request a prompt, written assessment and evaluation by a fully qualified multidisciplinary team to include Doreen Granpeesheh, Ph.D., O. Ivar Lovaas, Ph.D., Bernard Rimland, Ph.D., Professor David Bishop and University of Iowa hospitals and clinics and others whom you may designate to ascertain whether Ruffin is in need of: (1) EYSE, (2) Lovaas home programming, (3) coordination of interventions into IEP, (c) I request per the rules that Ruffin's critical skills be determined now; (d) I request that Donna Schmidt and Lisa Murphy be designated by the department of education to work with Ruffin...as support personnel and be designated as paraprofessional support and/or instructional aides; (e) I hereby request that the public education agencies make a prompt, coordinated assessment and evaluation of service availability and funding sources for EYSE and Lovaas home programming from (a) Research and Demonstration Funding, (b) Waukon School District, (c) Keystone AEA; (d) by contract for services form a public or private agency; or (e) by any combination above; (f) I request that the appropriate local and/or AEA officials make a prompt, formal written assessment and evaluation of Dr. Granpeesheh's CARD private agency with a view to whether her private agency shall be approved by the State Director of Special Education to provide Lovaas training and consulting services to children with diagnoses on the autistic spectrum in the State of Iowa. I further request that CARD and its personnel serving Ruffin, Dr. Doreen Granpeesheh and Evelyn Kung, work under the direction of the state director of special education as support personnel appropriately qualified to do applied research as consultants to Ruffin's IEP; (g) I request that the California State Education agency be contacted concerning its rules and CARD; and/or that CARD and Dr. Granpeesheh be contacted directly for all information necessary to appropriate CARD's services to Ruffin; (h) I hereby request a prompt continuation of Ruffin's IEP meeting with all those persons who are necessary to make a fully authorized decision about EYSE and Lovaas home programming.

In a letter dated 12/17/94 Ms. W requested several additional critical skills be added to the "two" expressive language skills identified by the team but "not provided to her." The appellant requested to pursue Ruffin's entitlement to EYSE as "rare and unusual circumstance which will result in loss or severe limitation of the pupil's capacity and potential to acquire a critical skill." She also requested Dr. Sallows' from the Wisconsin Early Autism Project in Madison, Wisconsin input be taken into account when making a decision regarding Ruffin's need for an EYSE. An *Individual Education Program-Continuation Sheet* dated 12/19/94 identified three critical skills for Ruffin: (1) Ruffin in response to a question will provide an appropriate answer rather than an echolalic response, (2) Ruffin will participate in the verbal turn-taking of conversation

with the appropriate voice for one turn, and (3) Ruffin will play interactively with peers at least once during each play session without adult guidance.

On 1/23/95 Ruffin was evaluated at the University of Iowa's Child Psychiatry Services. The report listed several recommendations including focusing on the preschool readiness curriculum for Ruffin and to expose him to and integrate him with more nonhandicapped preschoolers. Dr. Al Marshall, Educational Consultant for Child Psychiatry Services, coordinated the report. Dr. Glen Sallows from the Wisconsin Early Autism Project in Madison, Wisconsin provided a psychological consultation report dated 2/10/95. Dr. Sallows reported that Ruffin may be ready to increase exposure to normal peers since he has progressed more rapidly than others, according to Dr. Lovaas' typical schedule. He recommended that Ruffin's treatment should be "as close to year round as possible" since Dr. Lovaas had evidence to show that cessation of treatment for two weeks during the intensive phase can set a child back.

The IEP meeting held on 3/16/95 met with several points of disagreement. After several attempts at consensus regarding Ruffin's IEP, a pre-appeal mediation conference resulted in a completed IEP dated 8/18/95. Attending the meeting were Ms. Boberg, Mr. Raulerson, Ms. Hart, Curt Sytsma (Attorney with Iowa Protection and Advocacy Services, Inc.), Ms. Novak and the appellant. The *Present Levels of Educational Performance* (PLEP) section was gathered from Keystone personnel and from formal reports from the University of Iowa and Dr. Sallows. It noted increases in social interactions with both adults and peers, verbal responses, turn-taking or game activities, imaginative play, and word usage. Ruffin's needs included comprehension of time, counting skills, following complex directions and language skills. "Mother's comments" are also included in the PLEP. Some comments include "Having an adult present seems to be essential"; "Waits patiently, needs a cue for his turn"; "reads books by telling story shown by the pictures"; "labels all primary emotions"; "names ten colors and can count to 8"; and "knows all upper case letters." The *Annual Goals* included: (1) Ruffin will be mainstreamed with language developmentally appropriate children, in order to develop social interaction skills appropriate to the setting; (2) Ruffin will increase his social interactions with peers and other adults including the initiation of interactions; (3) Ruffin will increase his understanding and use of beginning quantitative concepts (e.g., making sets and telling how many); (4) Ruffin will improve his receptive language skills and basic concept development, to the normal range for his chronological age as measured by formal tests; (5) Ruffin will improve his expressive language skills to the normal range for his chronological age, as measured by formal tests results; (6) Ruffin will increase his ability to answer comprehension questions, when a variety of question formats are used, including all the "wh" questions; (7) Ruffin will participate in a kindergarten transition program; and (8) Ruffin will participate in drill activities as prescribed by CARD, and show generalization into classroom activities. For his *Extent of Participation in Regular Education*, Ruffin was to attend a private preschool 450 minutes per week and dual programming with Head Start for 180 minutes a week. Ruffin's *Special Education Instruction Program* consisted of ECSE for 23 hours per week. The *Modifications for Regular Education Participation and Description of Special Education instructional Program* indicated that Ruffin will be in a combination of programs including ECSE, private preschool and speech services. The 1:1

instruction was arranged by contracting with the appellant for a teacher associate. For *Special Education Support and Related Services* Ruffin was to receive speech language therapy 60 minutes per week and portal to portal transportation with intermediate stops to ECSE program and private preschool. The cover page included a statement that "EYSE issues are not yet resolved."

On August 29, 1995, Ruffin was seen at University of Iowa Child Psychiatry for an assessment of his communication skills. Ms. Becky Vilda's report highlighted the need for social communication opportunities. On September 22, 1995, Ruffin was evaluated at the Gundersen Clinic (see report dated 10/5/95). The evaluation included information from Dr. Temple (pediatric neurologist), Fran Kakuska (speech and language pathologist), Dr. Larsen (optometrist), Dr. Palm (audiologist), Dr. Kondrick (neuropsychologist), Dr. Goodlund (child psychiatrist), and Debbie Olufs (learning disabilities section). The *Recommendations* included (1) continue to offer Ruffin the strong educational program he has had in the past, (2) Ruffin is ready for kindergarten entry, (3) some integration with mainstream classroom is possible; teacher needs to be aware of nontraditional responses Ruffin makes in certain situations (4) educationally Ruffin appears to be receiving what he needs through the Lovaas program, and (5) Ruffin will need a "dual-pronged" approach including compensatory as well as a remedial focus. The compensatory focus might be of the "Montessori" type which allows children independence to work on things that interest them at their level; a highly hands-on program. Remedially, Ruffin will need help in dealing with the "language-laden" nature of the traditional classroom; attending and complying to verbal directives. The *Team Impressions* indicated "Pervasive Developmental Disorder - Asperger's subtype." The recommendations included a continuation of Ruffin's strong educational program in a "dual-pronged approach" (e.g., compensatory as well as remedial focus). The report indicated Ruffin is ready for kindergarten entry and integration appears highly possible and that "Ruffin appears to be receiving what he needs through the Lovaas program."

In a letter dated 10/3/95 to Ms. Hart captioned "Administrative Failure of Inclusion Placement proposed IEP Amendment," the appellant indicated she had been receiving correspondence from Ms. Novak suggesting the Head Start integration portion of Ruffin's program was in place. However at an October 2, 1995 meeting the appellant was informed that "the Head start Integration was not going to take place this semester as planned, and she (Mrs. Novak) proposed we draft and sign an IEP amendment." The appellant asserted to have "real concerns about Ruffin's continuing exposure to poor language and social behavior models in the ECSE and in 'specials' with severe and profoundly disabled students," and suggested the team explore a continuum of options which included (1) further integration into Waukon Preschool, (2) reverse integration from Waukon Preschoolers, (3) integration at West Elementary into kindergarten and first grade activities.

On 10/4/95, Ms. W. wrote to Mrs. Novak in Ruffin's Home-School Notebook with the request to "send Ruffin to Kindergarten and First Grade libraries and K-1 Recess on Thursday and Tuesday PM's" until the team explored the placement options. Mrs. Novak response was that she "cannot start a new integration program without an IEP amendment. A 10/5/95 letter from the

appellant noted that the agreed-upon integration of the 8/18/95 IEP had not been provided: "since school began 6 weeks ago, 18 hours of this agreed-upon regular education service has not been provided. The appellant suggested to "implement this interim agreement now, and move speedily to a solution that will service Ruffin's agreed-upon needs."

On 10/11/95, the appellant, Ms. Novak, Ms. Hart and Ms. Boberg met and designed an interim IEP. Ruffin's participation in general education included 120 minutes per week in shared reading, 30 minutes per week minimum in kindergarten lunch and 60 minutes per week in kindergarten library, 30 minutes per week in kindergarten recess and 180 minutes per week in the Head Start program.

Ms. Novak provided progress notes concerning Ruffin's educational program on 12/22/95. She indicated that "most of the integration is going very well." She commented that the ECSE staff does not have much time to work with Ruffin as he is "doing drill work or integration as per parent's request most of the time." She noted progress on IEP goals with some inattentiveness or "tuning out," especially when Ruffin is tired. Ruffin's therapist helped him during shared reading. In the nursery school, the teacher and children "enjoy having him." Ms. Novak summarized that "Ruffin continues to make progress in all areas of development."

Ms. Ann Hart testified that Ruffin's schedule was again changed following a training session with Evelyn Kung on January 14, 1996. Ms. Kung recommended that Ruffin's integration be increased to include time with the kindergarten PE. He also was to increase integration at lunch time and have an additional 15 minutes of recess with the kindergarten at West Elementary School. This change resulting in total integration time at West Elementary School of 455 minutes per week.

On January 16, 1996, Evelyn Kung submitted a *Program Update/Recommendations* report. She identified four general areas of "current weakness" for Ruffin: (1) following general directions within groups; she recommended that he join kindergartners in PE 2-3 times per week, he have a token economy for listening more attentively, and "if this still needs work during the summer, it is recommended that Ruffin become part of group organized activities such as swimming, dance classes or any such sport activities. However, I do understand that there are not sports offered to children at his age level in Waukon. With respect to these circumstances, having someone like Rogene who was his play group instructor last summer, organize some type of peer play group that revolved around physical sport activities might also be beneficial."; (2) recalling specific information from the past; recommended a pocket calendar, remnant book, frequenting questioning; (3) theory of mind drills "that involve the child in inferring about what others may be thinking"; and (4) getting him to ask questions. A drill update for "theory of minds" is dated 1/14/96.

The Waukon Nursery School teacher, Karen Perry, completed a report on 1/22/96 that indicated Ruffin was "ready for kindergarten in the fall. He fits very well in our class, is well like by all - he has a very pleasing personality. We really enjoy him."



A notice sent to the appellant dated 3/12/96 indicated a meeting for Ruffin's EYSE was scheduled for 3/25/96 and noted the IEP development for the 1996-97 school year would take place after the Iowa City evaluation in April. The notice indicated that "(y)our child, Ruffin, has been identified as potentially being eligible to receive certain special education services during the summer break. A meeting has been scheduled for Monday, March 25, 1996, at 3:20 p.m. in Room 5 at West Elementary. The purpose is to discuss/plan EYSE services for Ruffin."

The EYSE IEP meeting was held 3/25/96 as scheduled. In attendance were Ms. Hart, Ms. Bobert, Ms. Kleinow and Ms. Novak.

On April 8, 1996, A. Hart provided the appellant with a copy of Ruffin's EYSE IEP addendum as determined by team on March 25, 1996. This letter indicated that the team was recommending 11 hours/week of 1:1 drills: "We believe this is sufficient for maintaining and continued development of skills Ruffin will need to be successful in kindergarten next school year." It included three "critical goals/skill areas in which EYSE is recommended:

- #1: Ruffin will comply with an adult request 90% of the time on second request
- #2: Ruffin will demonstrate the ability to process directions
- #3: Ruffin will demonstrate the ability to recall specific information from the past, both short and long term (See Appellee Exhibit A).

## II. Conclusions of Law

### Procedural and Substantive Requirements for EYSE

The appellant asserts that the EYSE program offered by the school district denies Ruffin a FAPE and is procedurally and substantively invalid. Neither the IDEA statute nor federal regulations address EYSE specifically. Iowa law addresses EYSE, but primarily in terms of entitlement and eligibility requirements. Neither federal nor state laws specifically address procedural compliance nor substantive issues concerning EYSE. The legal basis including the procedural and substantive requirements for EYSE derive from the concept of FAPE. Eligibility is determined by individual need, guided by the criteria for an appropriate education. The extended program - which will allow the child to secure the benefits of a free and appropriate education - has the same procedural and substantive requirements as the IEP developed for the school year.

### Procedural Issue: Parental Notice and Participation

The appellant asserts that the EYSE program offered by the District denies Ruffin FAPE because "it was not prepared in procedural compliance with the notice and related requirements of the IDEA." The Appellees' position is that the appellant, with the advice of counsel, waived any alleged noncompliance when she refused to cooperate with the LEA/AEA and that there is no relationship between the procedural noncompliance and a FAPE for Ruffin.

The IDEA requires that parents be provided with written notice a reasonable time before an

agency "proposes to initiate or change the identification, evaluation or education placement of the child or the provision of FAPE to the child" 20 U.S.C. &1415(b) (1990); 34 C.F.R. § 300.504(a)(1) and that the content of the notice includes (1) a full explanation of all the procedural safeguards available to the parents, (2) a description of the actions proposed or refused by the agency, the reasons why and a description of any options the agency considered and the reasons why those options were rejected, (3) a description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and (4) a description of any other factors that are relevant to the agency's proposal or refusal. *Id.* At 300.505(a). Iowa Rules impose similar requirements at 41.104.

The federal regulations state the parents are to be "afforded the opportunity to participate" (34 C.F.R. § 300.345) by "notifying parents of the meeting early enough to ensure they have an opportunity to attend" *Id.* At (a)(1) and by advising parents of the "purpose, time and location of the meeting and who will be in attendance" *Id.* at (b)(1). These procedures are required to ensure that parents are "equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child." *Id.* at Appendix C to Part 300 - Notice of Interpretation, Question 26. The Iowa Rules of Special Education have the same requirements at 41.64(1), and both federal and state regulations specify that "if neither parent can attend, the agency shall use other methods to ensure parent participation, including individual or conference telephone calls. A meeting may be conducted without a parent in attendance if the agency is unable to convince the parents that they should attend. In this case the agency must have a record of its attempts to arrange a mutually agreed-on time and place..." *Id.* at 41.64(2); C.F.R. § 300.345(c).

Stressing the importance of the procedural aspect of the IDEA, the *Rowley* Court noted: "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard." 458 U.S. at 205-06.

Yet, federal courts do not favor substantive remedies based on technical violations of the IDEA and its implementing regulation. Several court decisions have found that if procedural flaws or process errors did not disadvantage a child in his receipt of a free appropriate public education, the child's rights under the IDEA have not been denied. *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990); *Hiller v. Board of Education of the Brunswick Central School District*, 748 F.Supp. 958 (N.D. NY 1990); *Doe V. Alabama State Department of Education*, 915 F.2d 651 (11th Cir. 1990); *In re: Council Rock School District*, 22 IDELR 397 (ALJ Pa 1995). Courts have rejected parents' attempts to employ the school district's technical violations of procedural safeguards as an alternate route to obtaining their preferred programs *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990). There must be "some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously

hampered the parents' opportunity to participate in the formulation process or caused a deprivation of educational benefits." *Roland M. V. Concord School Committee*, 910 F.2d 983, 994 (1st Cir 1990).

On February 20, 22, 27, 29, March 4, 5, 6, 8, 18, 21, 22 and 27 of 1996, the appellant requested information concerning EYSE via Ruffin's home/school notebook (See Appellant's Exhibit 3A). The school district was aware of these requests but no one responded to them. Mrs. Hart testified that she was aware that the appellant had requested information about critical skills several times in February and March, but did not respond to those requests. Mrs. Novak testified that she did receive several requests from Ms. W. About EYSE and her responses included a 2/20/96 comment "Marcia (Boberg) coming today--will try to set EYSE date then," a 3/4/96 comment "I am gathering and collecting EYSE data. Will send it as soon as I can.", and regarding the scheduled EYSE IEP meeting, a 3/19/96 comment "You should be getting notice today." (See Appellant's Exhibit 3A). Mrs. Novak testified that she was advised to respond only to classroom matters as "the home/school notebook was only to include Ruffin's progress and any procedural things were to be handled, as requested by (Ms. W.), by the attorneys." Marcia Boberg testified that she returned a phone call to the appellant on March 4, 1996. Ms. W. "brought her up to speed" about Ruffin's program. Ms. W was sending a letter to Mr. Sytsma, who would be sending it onto Ms. Hansen regarding her requests for summer. She "did not want to have a meeting. She wanted it handled between attorneys. A face to face meeting was not desirable due to the hostility of the IEP team." Ms. Boberg consulted with Mr. Moser, the assistant director of special education, as to whether this could be resolved without a meeting. He advised her that a meeting had to be held. Ms. Kleinow testified that she did not realize until one week before the EYSE meeting that the appellant had requested charting and only when M. Boberg told her it was for a staffing with CARD did she collect and send it, on Thursday, March 21, 1996.

On March 12, 1996, Ann Hart wrote a letter to Mrs. W. indicating "your child, Ruffin, has been identified as potentially being eligible to receive certain special education services during the summer break. A meeting has been scheduled for Monday, March 25, 1996 at 3:20 p.m. in Room 5 of West Elementary. The purpose is to discuss/plan EYSE services for Ruffin." Mrs. Hart testified that the notice routinely used for IEP meetings was not sent to the appellant. Mrs. Boberg testified that it is routine to list all prospective participants for an IEP meeting in the notice.

Conclusion: The LEA/AEA failed to provide the appellant with adequate notice concerning the EYSE IEP meeting. The notice included the time, date, location and purpose of the meeting but failed to inform Ms. W. of the prospective participants of the meeting. The notice did not provide the appellant with a full explanation of procedural safeguards, a description of the action proposed, a description of the evaluation procedures the agency uses as a basis for the proposal or a description of other relevant factors involved in the proposal.

The appellees contend that Ms. W. waived her right to a procedurally correct IEP meeting in the hope of obtaining her proposed EYSE through the review process (i.e., a means to an end rather

than a sincere concern that procedural matters resulted in denying Ruffin a FAPE). In *Cordrey v. Euckert* 917 F.2d 1460 (6th Cir. 1990), the Court of Appeals held that parents "voluntarily relinquished their right to a procedurally correct IEP meeting in the hope that they might win an EYS through the review process." *Id.* at 1466. The court reasoned that the parents had not shown that a future meeting would be futile nor that the ESY placement decision was final:

We emphasize today that the parents likewise are obligated to operate within the Act's procedural framework. Although we have some sympathy for the frustration of (Chance's) parents, we are unwilling to hold that the school district's initial failure to comply with its procedural obligations...was sufficient to entitle the (parents) to abort the IEP process. In effect, they seek to employ (District's) technical violation to transform the administrative review process into an alternative route to obtain an ESY for (Chance)." *Id.*

In her March 4, 1996 letter, the appellant indicated that she "doubted if a fact-to-face meeting between me, Donna Schmitz, Principal Hart, Teacher Novak, etc. would be fruitful or team-like." Her phone conversation the same day with Ms. Boberg similarly indicated that she did not want a face to face meeting due to the hostility between team members. These statements are insufficient to conclude the appellant waived her rights to a procedurally correct IEP meeting. Ms. W testified that she wanted to be prepared for the meeting with data. She requested information on the short term objectives and from Ms. Kleinow. She wanted to hear from Ms. Stock and Mrs. Perry since Ms. Novak did not have a lot of opportunity to observe Ruffin in his integrated settings. She wanted to present CARD's recommendations: "If I can't bring Dr. Granpeesheh to an EYSE meeting in Iowa, I can at least bring her written considered opinion." Ms. W testified that she prepared a summary of information that she intended to present at the EYSE meeting. She stated that the decision "whether or not to go" was discussed throughout the 3/4/96 to 3/25/96 period. She testified that she asked her attorney on 3/22/96 "Do I have to go?" and he advised "whether or not you go, (the team) must still consider your expert's information, they still must provide FAPE. The issues are the same." Ms. White testified that the decision not to attend the IEP meeting was made 3/25/96.

It is clear from the record and the testimony that EYSE was an ongoing and established concern for Ms. W. It had been an area of confusion and misunderstanding since Ruffin's first IEP was drafted. She wanted to prepare for the meeting in which Ruffin's need for an EYSE would be discussed and determined. Ms. W. wanted to know about the critical skills, progress reports and standards or procedures used to make that determination. She wanted the recommendations from CARD to be available to the team. She wanted her preferences and proposals available to the team. Ms. W. wanted to meaningfully participate in the EYSE determination for Ruffin.

The LEA/AEA had a duty to provide the appellant with appropriate notice, notwithstanding the numerous opportunities to respond to Mrs. W's requests for such information. These were not mere "technical" errors, but procedural inadequacies that "seriously hampered the parent's opportunity to participate in the formulation process." *Roland* at 992.

#### **Procedural Issue: The Appropriate Standard**

The substantive issues concerning the appropriateness of the program offered by the district can

only be addressed in terms of the standard against which the team determined Ruffin's need for an EYSE. The Appellant asserts that the application of an "improper standard" in determining Ruffin's need for an EYSE is a procedural error and precluded meaningful discussion of Ruffin's needs. An overview of applicable law is provided, followed by an analysis of the standard employed by Ruffin's IEP team.

#### A Free and Appropriate Education

The purpose of the Individuals with Disabilities Education Act (IDEA) is:

to assure that all children with disabilities have available to them . . . a free appropriate public education ["FAPE"] which emphasizes special education and related services designed to meet their unique needs.

20 U.S.C. § 1400(c) (Supp. 1994).

In *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court observed that neither the Act nor its legislative history establishes a substantive standard definition what level of education amounts to a "FAPE." 458 U.S. at 201, 102 S.Ct at 3042. The Court set forth the statutory definition by holding that a "FAPE" "consist of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id* at 3048. The Court concluded that "adequate compliance with the procedures prescribed would in most cases assure much if not all of what congress wished in the way of substantive content of an IEP." *Id* at 3050. The Court established a twofold inquiry for district courts to use in determining whether the Act's requirements have been met:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 202, 102 S.Ct. At 3049.

In *Rowley*, the Supreme Court explicitly held that administrative and court review may not limit analysis of the appropriateness of the IEP to any single criterion. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U. S. At 202, 102 S.Ct. At 3049.

Further, with regard to the substantive component of the Rowley test, federal appellate courts have warned that the "some educational benefit" prong will not be met by the provision of *de minimis*, trivial learning opportunities. *See Hall*, 774 F.2d at 636; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180-184 (3rd Cir. 1988) (holding "that congress intended to afford children with special needs an education that would confer meaningful benefits"). Nor can the sufficiency of the educational benefits offered be measured by any single, narrow standard. *See Hall*, 774 F. 2d at 635; 20 U.S.C. & 1412(5) (Supp. 1994) ("[N]o single procedure shall be the sole criterion for determining an appropriate educational program for a child.").

### Extended School Year

The Third, Fifth, Eighth and Eleventh Circuits have all held that, under the Act, states must provide a continuous educational experience through the summer under the child's IEP if that is the "appropriate" educational experience of the handicapped child's situation. *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1576 (11th Cir.1983); *Crawford*, 708 F.2d at 1034; *Yaris*, 558F. Supp. At 559; *Battle*, 629 F.2d at 281. These courts held that state-imposed limitations on the length of the school year - usually 180 days - precluded the proper determination of the content of "FAPE" and the proper formulation of appropriate educational goals:

We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180-day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit. *Battle v. Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980) at 280.

### Eligibility and Entitlement for Extended Year Special Education (EYSE)

As courts recognized that the right to an appropriate education might be abridged by a blanket limitation on the length of a school year (i.e., 180 days), they also recognized that not all children with disabilities would require an EYSE:

We therefore begin with the proposition that providing ESY is the exception and not the rule under the regulatory scheme.

*Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990) at 1473.

The courts advised that school districts must show that an EYSE was "necessary to permit [the child] to benefit from his instruction." *Rettig v. Kent City School Dist.*, 720 F.2d 463 (6th Cir 1983) at 466. Although this benefit must be more than "*de minimis*" [see *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3rd Cir. 1988)], it was not to be "optimal" or "maximum":

The requirement that the state provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley* at 3046.

The availability of EYSE was to ensure that a summer break would not bring the overall progress of students with disabilities "to a virtual standstill" (see *Battle* at 282) nor jeopardize the benefits accrued during the school year:

The some-educational benefit standard does not mean that the requirements of the Act are satisfied so long as the handicapped child's program, absent summer services, is not brought "to a virtual standstill." Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly

jeopardized if he is not provided an educational program during the summer months. *Alamo Heights Independent School District v. State Board of Education* 790 F.2d 1153 (5th Cir. 1986) at 1158.

A child is entitled to an extended school year if it would be not merely "beneficial but...a necessary component of an appropriate education for [the child]." *Rettig v. Kent City School Dist.*, 539 F.Supp.768, 778 (N.D. Ohio 1981). An ESY "would be appropriate if it would prevent significant regression of skills or knowledge retained by [the child] so as to seriously affect his progress toward self-sufficiency." *Id.* at 778-79.

The concept of regression-recoupment was recognized as fundamental to determination of the need for EYSE. Students were entitled to EYSE if critical skills would be lost during breaks in the school year and would require an extended period of recoupment. EYSE was denied if students could now show regression beyond levels experienced by nondisabled students or if the recoupment time was not significant [see *Bales v. Clark*, 523 F.Supp 1366 (E.D. Va. 1981); *Rettig*].

The Iowa Rules of Special Education include a regression-recoupment analysis as one of two requisite conditions for EYSE eligibility:

The determination of the need for EYSE for each eligible individual shall be based on empirical and qualitative data collected by the IEP team. An eligible individual shall be provided EYSE if, in the IEP's team's interpretation of the data, the denial of EYSE would significantly jeopardize the benefits accrued to the individual through the educational program provided during the regular school year, and either of the following conditions is present:

- a. Failure to maintain an acquired critical skill, as a result of an interruption of special education in a critical skill area, to the extent that a period of reteaching of nine or more weeks will be required to regain previous competence. In these cases, EYSE programming shall be designed to provide for maintenance rather than continued development of the skills identified.
- b. Rare and unusual circumstances which will result in the loss or a severe limitation of the eligible individual's capacity and potential to acquire a critical skill. In these cases, EYSE shall provide for the maintenance of the critical skill and may also provide for the continued development or acquisition of a critical skill to prevent the anticipated loss or limitation.

Under the standard of *Rettig*, a child must prove his need for an EYS empirically, based on evidence of prior regression and slow recoupment without summer programming. This criterion for eligibility created a dilemma. Parents were forced either to allow their child to regress without an ESY (thus empirically proving his need for one) or to provide on their own what they believe their child needs to make reasonable progress and is entitled to by the Act. (See *Polk*).

Several courts recognized that the basis for determining the appropriateness of an EYSE program

was the same as the basis for determining the appropriateness of the child's total program under the Act. Specifically, the Supreme Court in *Rowley* established a twofold inquiry concerning procedural compliance and whether or not the IEP was "reasonably calculated to enable the child to receive educational benefit" *Id.* At 3051. Most important, the court held that **review may not be limited analysis of the appropriateness of the IEP to any single criterion.** (Emphasis added).

The Third Circuit explicitly rejected using solely a regression analysis to determine the necessity of a summer program under the Act:

[A] serious problem...lies in defendants' implicit suggestion that a child must first show regression before his parents may challenge the appropriateness of his education...[We do not believe that congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress. *Polk*, 853 F.2d at 184.

The Tenth Circuit adopted a broad premise as to whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided a summer program:

"The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professional in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community. *Johnson v. Independent School District No. 4 of Bixby* 921 F.2d 1022 (10th Cir 1990) at 1030.

The 10th Circuit Court in *Johnson* held that a school system erred in converting what should have been a multifaceted inquiry regarding EYSE into a single, inflexible criterion. The court reasoned: this restraint (*Rowley* requirement not to limit analysis to a single criterion) is as applicable to a specific educational program element, such as whether a child should be provided a structured summer educational experience, as it is to a generalized issue such as the "adequacy of educational benefit conferred upon all children covered by the act" *Id.* at 1028, citing *Rowley* at 3049.

The court concluded:

While it would be easier for those involved in administrative review under the Act to have one and only one criterion for evaluating the appropriate of a handicapped child's IEP, the handicapping impediments which force individualization of the child's education program in the first place also mandate an individualized approach to review of the child's IEP. The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program. In the summer months (*Id.* at 1027) . . . the regression-recoupment analysis is not the only measure used to determine the necessity of a structured summer program. In addition to the degree of regression and the time



necessary for recoupment, courts have considered many factors important in their discussion of what constitutes an "appropriate" educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, [citing *Battle*, 629, F.2d at 280]; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs [citing *Yaris v. Special School Dist.*, 558 F.Supp. 545, 551 (E.D. Mo. 1983)]; and whether the requested service is "extraordinary" to the child's condition, as opposed to an integral part of a program for those with the child's condition [citing *Polk*, 853 F. 2d at 182]. *Id.* at 1027.

The *Johnson* court listed additional factors to include in EYSE eligibility determination, including the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. *Id.* at 1028.

The court concluded that an analysis of factors relevant to an individual child required investigation into many aspects of the child's educational, home and community life. *Id.* at 1030.

In *Cordrey*, the court counseled that the regression standard "is best interpreted not to required absolutely that a child demonstrate that he has regressed in the past to the serious detriment of his educational progress in order to prove his need for a summer program. Instead, where there is not such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment" *Id.* at 1472. The contrast between "hard empirical proof" and "softer" predictive data was addressed:

... absent hard empirical proof, a finding that child needs an ESY could be based only on generalized statements regarding children afflicted with such a handicap . . . Accordingly, to provide an ESY on such generalized rationale is to ignore the Supreme Court's emphasis on *Rowley* that an IEP must be based on an *individualized* assessment of the child . . . The advantages of a "hard empirical proof" rule are obvious. It is clearer and simpler to apply than reliance on conflicting non-empirical expert opinion. It gives parents the incentive to raise and resolve the ESY issue before independently providing one to the child, when the child's regression and recoupment without an ESY can be assessed. At the same time, a policy based upon discouraging parents from structuring a child's summer months solely to gain proof of the need for an ESY seems at best unfair . . . Clarity and ease of application therefore must give way. Resolution of conflicting expert opinion is hardly unique to this field of law and should not be unduly troubling.

*Id.* at 1470-1471.

A "guidance document" distributed by the Iowa Department of Education concerning EYSE instructed AEA Directors and District Designated Coordinators of Special Education to keep in mind "while 'empirical and qualitative data' as referenced in the rules is always desirable, the IEP team's determination need not be - **and should not be** - limited to a strict regression analysis. "More than one court case on this issue confirms the necessity of allowing for expert opinion or professional judgement which takes into account not only retrospective data but predictive data. Keep in mind that the question is whether a child needs services in the summer in order to secure the minimum benefits of a free and appropriate education. Regression-based statistics are a useful tool in answering this question but they are not designed to be the only tool at a team's disposal." (See Appellant's Exhibit 1; emphasis added).

This document may be viewed as an attempt to resolve some of the potential conflict between the Iowa Rule for Extended Year and federal requirements concerning appropriate programs for children with disabilities. The "critical skill" determination, the regression analysis focus, the arbitrary nine-week recoupment period criterion, and the two-condition (e.g., failure to maintain an acquired skill; rare and unusual circumstances) eligibility limit may - if interpreted rigidly - prevent a full, individualized determination of need. The question "whether a child needs services in the summer in order to secure the minimum benefits of a free and appropriate education" appears to be an attempt to encourage IEP teams to move away from a strict and narrow determination to a broader consideration of all relevant information concerning the unique needs of a child.

#### Application of an Appropriate Standard by Ruffin's IEP Team

The appellant asserts that an "illegal standard" was applied in determining Ruffin's need for an EYSE, precluding a meaningful discussion of Ruffin's needs. The required standard involves a) determination and identification of critical skills and b) determination of the appropriateness of an EYSE via a multifaceted analysis utilizing empirical and qualitative data in retrospective and predictive contexts.

#### **Determination and Identification of Critical Skills**

The cornerstone of the Iowa EYSE rule is the determination and identification of critical skills. The Iowa Rules of Special Education at 41.80(1) specify that critical skills are (a) determined at the time of the development or revision of the IEP, (b) appropriate for the eligible individuals, given this individual's ability to acquire the selected skill; and (c) a priority for developmental and age appropriate growth.

Interestingly, the word "skill" is not included in any description of special education and related services for eligible individuals. "Special education" is defined as "specially designed instruction, at no cost to the parents' to meet the unique needs of an eligible individual. (20 U.S.C. at 1401(a)(16); 34 C.F.R. at 300.17; Iowa Rules of Special Education at 41.5. "Instructional services" are the "specially designed instruction and accommodations provided by special education instructional personnel to eligible individuals." *Id.* at 41.84. "Support services" are the "specially designed instruction and activities which augment, supplement or support the

educational program of eligible individuals"...and include "special education consultant services, educational strategist services, audiology, occupational therapy, physical therapy, school psychology, school social work services, special education nursing services, speech-language services and work experience services provided by support personnel" *Id.* at 41.86. "Related services" mean "such developmental, corrective and other services as are required to assist an individual with a disability to benefit from special education"...and include recreation, counseling, rehabilitation counseling, medical services and parent counseling and training. The special education and related services are specified in the IEP *Id.* at 41.66

Implicit in the Iowa Rules is the association between critical skills and the child's school-year IEP. EYSE is to be provided to ensure that "the benefits accrued to the individual through the educational program provided during the regular school year" *Id.* at 41.80(3) would not be jeopardized. Yet, the term "skill" is not referenced in the requisite components of the IEP (see 20 U.S.C. 1401, 1412, 1414; 34 C.F.R. § 300.346; Iowa Rules at 41.67). The Present Level of Educational Performance is a statement of "the effect of the eligible individual's disability on the individual's performance in any area of education that is affected, including academic areas and nonacademic areas" *Id.* at 41.67(1)(a). This section specifies **current performance (i.e., where the child is)**. The annual goals are "statements that describe what an eligible individual can reasonably be expected to accomplish within a 12-month period in special education" *Id.* at 41.67(2)(c). This component specifies the **anticipated outcomes(i.e., where the child should be in 12 months for the areas affected by his disability)**. The short-term objectives are "measurable intermediate steps between PLEP and the annual goals for the individual" *Id.* at 41.67(2)(d). They include "appropriate objective criteria and evaluation procedures and schedules" to "evaluate progress" *Id.* at 41.67(6). They are the "mechanisms for determining whether the anticipated outcomes for the individual are being met and whether the placement and services are appropriate to the individual's special learning needs" *Id.* at 41.76(2)(a). The objectives specify the **skills (i.e., what the child should learn)** to achieve annual goals.

In this context, "skills" represent the intended outcomes of special education instructional and support services. They are the planned or calculated "benefits" of the child's educational program.

Members of Ruffin's IEP met on 8/18/95 and designed an IEP for the 1995-96 school year. There is a notation that "extended year issues have not yet been resolved" on the cover page of the IEP. Testimony from team members participating in that meeting indicated they were advised, by the attorney for the appellant, that the Iowa Department of Education would be issuing a set of guidelines concerning EYSE in January. He suggested that they wait until receipt of the guidelines before addressing the EYSE issue. Ms. Boberg testified that it was her understanding that not including critical skills on the 8/18/96 IEP was "OK" with the team, including Ms. W. and her attorney. The attorney had advised the team that he had "serious doubts about the legality of the method with which (the team) was interpreting the current Rule and that we would have in January a new interpretation from the Department of Education which would resolve some of (his) concerns and make it easier for us to proceed" with the EYSE question. Ms Boberg

testified that since Mr. Sytsma as the legal representative, the team was looking for guidance in the preparation of a legal IEP. Mrs. Hart testified that EYSE has always been "an area of confusion as we sit in our meetings because there is not place on the IEP to put critical skills. So sometimes we end up getting them marked; sometimes we don't." She testified that Ruffin qualified for EYSE because "he has some deficit areas that we want to maintain or continue to develop this summer." Ms. Hart testified that at the EYSE IEP meeting of 3/25/96 the teacher determined critical skills from the existing IEP goals. Ms. Hart testified that the three goals of the EYSE IEP represented a "summation"; the "common thread that goes through all his many goals."

Mrs. Novak testified that she "treated all the IEP goals as critical skills" and data were collected for each. She testified that "procedurally we did not identify the critical skills; we did not choose from the IEP goals a critical goal or skill." She testified that they did identify critical skills in the January 1995 meeting but in the August 1995 meeting "we missed doing that . . . restating that those would be (critical skills) or choosing new ones." Since the 8/18/95 IEP indicated that "EYSE issue has not yet been resolved," Ms. Novak "treated all Ruffin's IEP goals and objectives as critical skills."

Mrs. Kleinow testified that there was no charting of the speech/language goals and objectives available at the EYSE IEP meeting but that she came to the meeting with "clinical judgement" "in her head" and that "knowledge that I have about that child is the knowledge that went to that meeting those specific numbers (charting) did not go."

Conclusion: The IEP team did not determine any of the "intended outcomes of Ruffin's special education instructional and support services" (i.e., skills) were "a priority for developmental and age-appropriate growth" (i.e., critical) at the time his IEP was revised (i.e., 8/18/96). It is unfortunate that the attorney for the appellant advised this IEP team to "wait until January" to address EYSE, thus affecting a violation of Iowa Rule 41.80(1)(a) which requires critical skills to be "determined at the time of the development or revision of the IEP and identified in the IEP." It is also unfortunate they followed that advice.

#### **Determination of the Appropriateness of EYSE via Multifaceted Inquiry**

"(Sixty) calendar days prior to the interruption of special education," the team must determine if the special education instruction and support services must be continued through the summer to secure the benefits of a free and appropriate education. The Iowa regulations define two conditions under which this "security" may be jeopardized: 1) if the benefits will not be maintained as a result of interruption of special education, requiring significant reteaching (i.e., nine or more weeks to regain previous competence) and 2) if the benefits of continued development or skill acquisition may be lost or limited, due to rare and unusual circumstances. In deciding if an appropriate program for a student requires that special education instruction and support services for "prioritized" outcomes must be continued through the summer to secure the benefits of FAPE, the team is to use a multifaceted process and not limit the determination to a single criterion.

Ruffin's IEP team made a determination that Ruffin's special education instructional services

needed to be continued throughout the summer in order for him to secure the benefits of FAPE: "We believe Ruffin W. does quality for extended year programming. We are recommending 11 hours 15 minutes per week for a period of eight weeks of direct Lovaas dill. We include an additional 45 minutes per week of record charting and preparation time for the Lovaas therapist. We believe this is sufficient for maintaining and continuing to develop the skills Ruffin will need to be successful in kindergarten next school year."

From the testimony presented, the team did not use a single criterion to determine Ruffin's need for an EYSE. They considered the personal observations by professional educators, input from the parent, input from the Lovaas therapist and CARD, input from Waukon Nursery School, qualitative data, progress reports, predictive performance, and potential regression. They considered several of the factors referenced in *Johnson* in determining if Ruffin required an EYSE to secure the benefits of FAPE and deciding how to structure that program. The potential for regression in compliance if not provided an EYSE was discussed; the ability of the parent to provide "typical family experiences" to address social interaction maintenance was discussed; the student's progress rate and ongoing needs were discussed (e.g., processing directions); Ruffin's ability to interact with non-handicapped children at Waukon preschool was included in the determination; and areas of the curriculum (e.g., recalling past information) that needed continuous attention were analyzed. There was not evidence that the team employed an "illegal" standard or a "single criterion" (e.g., regression analysis statistics) in determining Ruffin's need for an EYSE.

Conclusion: Ruffin's team used a multifaceted inquiry to determine Ruffin's need for an EYSE to secure the benefits of FAPE.

#### **Procedural Issue: Information Used for EYSE Decision Making**

The appellant asserts that Ruffin's IEP team's failure to consider vital information concerning Ruffin's needs prejudiced the EYSE determination process.

Mrs. Hart testified that the materials available to participants at the meeting included the IEP, faxed recommendations from Dr. Doreen Granpeesheh for the 1996-97 academic year, information from Ms. Boberg that she had received from the appellant regarding her preference for summer programming, and Ruffin's cumulative folder. The team reviewed all objectives and quarterly progress reports. These reports indicated that Ruffin had mastered some of his goals and some remained unmet. Ruffin demonstrated progressive improvement at each point of the evaluation schedule. This IEP was an important and appropriate basis for determining his need for EYSE.

The appellant asserts that the team failed to consider Ruffin's unmet goals and objectives (i.e., following multi part directions and theory of mind drills). The members of the IEP team testified that all Ruffin's goals and objectives were "treated like critical skills" and discussed. Further, the team "based some of our thoughts" on the 1/16/96 recommendations from Evelyn Kung, which included theory of mind drills.

A more compelling contention is that the team failed to consider "the independent evaluation and recommendation made by Dr. Granpeesheh." Through a clerical error, Dr. Granpeesheh's recommendations for the summer program were not available at the time of the EYSE IEP meeting. After receipt of the recommendations and Dr. Granpeesheh's letter responding to Ms. Hart's inquiry concerning those recommendations, the team did not reconvene.

Dr. Granpeesheh's proposal is similar to the appellant's proposal considered and discussed by the team (the appellant described the proposal to Ms. Boberg in a March 4, 1996 telephone conversation) and the team also had an earlier indication of this recommendation from Evelyn Kung. On January 16, 1996, she had recommended "if this (following directions within groups) still needs work during the summer, it is recommended that Ruffin become part of group organized activities such as swimming, dance classes or any such sport activities. However, I do understand that there are not sports offered to children at his age level in Waukon. With respect to these circumstances, having someone like Rogene who was his play group instructor last summer, organize some type of peer play group that resolved around physical sport activities might also be beneficial."

However, determining Ruffin's need for an EYSE absent Dr. Granpeesheh's recommendations **and rationale for those recommendations** would be suspect for two reasons. First, Ruffin's need for an EYSE is based on instructional services that must be continued over the summer to secure the benefits of FAPE. The team must have information on goals and objectives, including progress reports and/or charting. Dr. Granpeesheh's rationale for her recommendations would have provided the team information concerning Ruffin's needs. Second, the team has a duty to consider Dr. Granpeesheh's recommendations. This ALJ is less persuaded by the "expert" claim (that no one on the team had expertise in this methodology and could not, therefore, make recommendations concerning skills to be targeted and the hours to be assigned) than by the need for this team to consider all relevant information concerning Ruffin's need for an EYSE. This team is not required to accept and implement the recommendations, only to consider them. *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, 757 F.Supp. 606,622 (E.D. Pa. 1991).

It is unfortunate that the "marriage" of Lovaas experts and methodology to Ruffin's IEP team resulted in "hostility." Ms. Kleinow must work hand-in-hand with Ms. Schmitz and Ms. Kung. She must have input into Ruffin's language program. She must have conversations with Dr. Granpeesheh. She must receive progress reports. She must be part of "CARD staffings." Similarly, Ms. Novak must be involved in decisions concerning Ruffin's integration. She must provide data concerning Ruffin's social interactions. She must receive progress reports from "integration shadowing." Ms. Schmitz must provide progress reports to the team. Ms. Kung must visit classrooms frequently and talk with teachers. This is the type of collaboration and cooperation envisioned in the IDEA; it is the collaboration and cooperation that should have characterized Ruffin's EYSE IEP meeting.

Additionally, since integration was an integral component of Ruffin's IEP, the absence of Mrs. Stock and Mrs. Perry at the EYSE IEP meeting is significant. Although Mrs. Perry had provided

a Kindergarten Readiness Report in January, the team needed an opportunity to discuss Ruffin's integration and his social interaction on March 26, 1996. This input would be important to a determination of Ruffin's needs.

Conclusion: Ruffin's IEP team failed to consider vital information concerning Ruffin's needs in the EYSE determination process.

### **Substantive Issue: Intensity of the Program and Integration Options**

The appellant asserts that the EYSE program offered to Ruffin was substantively flawed in that "1) it fails to provide critical integration opportunities," and "2) it fails to provide sufficient hours of one on one therapy."

There was no dispute of Ruffin's need for 1:1 discrete trial therapy. The proposed IEP indicated the provision of Lovaas drills, and all members of the IEP team testified that they thought the discrete trial therapy was necessary for "maintenance and continued skill development." Mrs. Novak testified that the team selected 1:1 Lovaas due to its intensity and directness necessary to develop and maintain Ruffin's critical skills. Mrs. Kleinow testified the Lovaas 1:1 drills were recommended since the appellant wanted this and the team felt this method could adequately meet goals that were set as critical.

#### Areas of Dispute

There is disagreement concerning the amount of the discrete trial therapy. Appellants assert that the EYSE program proposed by the district "fails to provide sufficient hours of 1:1 therapy." There is also disagreement about the need to provide a "supervised play group" and an "unstructured play group," both monitored by a Lovaas therapist. The appellant asserts that the EYSE offered by the district fails to provide critical integration opportunities for Ruffin.

#### Amount of 1:1 Discrete Trial Therapy

The LEA/AEA proposal recommends 2 1/4 hours per day, five days per week of Lovaas drills. The EYSE IEP Addendum corresponds to this proposal, specifying 45 minutes per day for each of 3 Lovaas drills over a five day per week period. The proposed IEP indicates "parents will be notified of EXACT service dates prior to the end of school year."

The amount of 1:1 therapy must be based on Ruffin's needs and guided by the criteria for an appropriate education. The continuation of Ruffin's special education instructional services through the summer must secure the benefits of FAPE. These benefits must be more than trivial or minor - but not optimal or maximum.

On March 22, 1996, Dr. Granpeesheh stated "It is imperative that Ruffin receive services throughout the summer months without interruption. It is appropriate that Ruffin receive the following: (1) Four hours per day, five days per week of 1:1 discrete trial therapy with a trained

'Lovaas' interventionist; (2) three hours per day, three days per week of a supervised play group led by a trained 'Lovaas' interventionist; and (3) two afternoons per week in an unstructured play group with normal peers which is monitored by a trained 'Lovaas' interventions." This represented a total of 20 hours/ week of drill, 9 hours/week of supervised play and 6 hours/week of unstructured monitored play. She summarized that "any interruption of these services may lead to loss of presently acquired skills and as a result could be extremely detrimental to the progress that Ruffin has made in the past 17 months."

In a letter to Ann Hart dated April 4, 1996 and faxed April 15, 1996 Dr. Granpeesheh provides a rationale for her proposal:

The twenty hours per week of 1:1 discrete trial therapy is recommended to assist Ruffin with his difficulty to recall events and activities, process appropriate information and learn specific ways that will aid him in being successful within various social situations...As discussed during Ms. Evelyn Kung's previous visit, he also displays a delay in the pragmatic use of time sequencing reflected in his use of today, tomorrow, yesterday...Ruffin also exhibits difficulty in focusing on an appropriate goal or direction due to the overstimulation that may be present in his environment...I have also recommended this 1:1 time to assist Ruffin in building Ruffin's "Theory of Mind" as well as any socialization techniques that are necessary...

The three days a week of interaction in a supervised play group will implement these theory of mind and social skills acquired in the 1:1 time into a structured play group. Ruffin's nursery and preschool teacher both indicate that Ruffin still has difficulty in processing directions especially when the directions are given in a group setting...Overall Ruffin still displays significant problems with understanding oral directions given to a group and it has been noted that this is the time in which Ruffin will begin to drop back into old self-stimulatory behaviors. I have recommended that a Lovaas trained therapist monitor this play group because Ruffin will need to be specifically directed in areas where he displays identified weaknesses and in turn, change those times into learning situations...

The other two days that I have recommended in an unstructured monitored play group will then be useful for the generalization of the above learned skills in his interaction with typical children in peer play... (See Appellee's Exhibit A).

Dr. Granpeesheh testified that Ruffin is at the end of the discrete trial section and in the middle of the integration year. She indicated that she was basing her recommendations on Evelyn Kung's two school observations of Ruffin. She testified that additional observation and information would be needed if there were conflicting data concerning Ruffin's performance in social settings.

Rather than basing his EYSE program on a certain number of hours of therapy, Ruffin's IEP team is to determine what special education instructional services are necessary to maintain or develop critical skills - thereby ensuring the benefits of FAPE. The team first identifies which skills are priorities and then calculates what instructional services are required to maintain or develop those skills.

The Lovaas discrete trial therapy is not an intended outcome, not a critical skill, not an



educational objective. It represents a method for achieving outcomes, skills and objectives. Just as the 180 day rule imposed "with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives" *Battle* at 280, a set number of therapy hours may be inappropriate. The team must ascertain "reasonable educational needs of the child in light of reasonable educational goals and establish a reasonable program to attain those goals" *Id.*

The EYSE IEP includes three "critical goals/skill areas in which EYSE is recommended":

- #1: Ruffin will comply with an adult request 90% of the time on second request.
- #2: Ruffin will demonstrate the ability to process directions.
- #3: Ruffin will demonstrate the ability to recall specific information from the past, both short and long term. (See Appellee Exhibit A).

The team included a compliance objective - an earlier component of Ruffin's drill therapy - to be maintained. Ms. Schmitz testified that compliance was lower in Ruffin's kindergarten integration than in music integration due to the skill demands. She also noted that compliance was better at school than at home. Mrs. Novak testified that since "compliance is a prerequisite to just about every thing else in kindergarten," the team did not want Ruffin to lose that skill over the summer. Mrs. Boberg also testified that the team "thought there was a danger of regression on this skill" due to the "inconsistencies" between environments. Mrs. Kleinow testified that the team "wanted to keep compliance going through the summer for when he begins school."

The second goal of the proposed IEP is processing directions. In her testimony, Ms. Kleinow indicated that Ruffin's attentional ability seems to greatly affect his ability to process directions, more than memory deficits or auditory processing difficulties. Mrs. Novak testified that the ability to follow directions was a problem in a variety of settings. The appropriateness of a goal to maintain Ruffin's ability to process directions does not appear to be disputed. The representatives from CARD emphasize the importance of generalizing this skill into a group situation. As Dr. Granpeesheh noted: "Ruffin still has difficulty in processing directions *especially* when the directions are given in a group setting." (Emphasis added).

The third objective of the proposed EYSE IEP is recalling specific information related to the past, short and long term. This was an objective in Ruffin's current IEP and was also identified as an area of "weakness" for Ruffin by Evelyn Kung and incorporated into his drills. There does not seem to be any dispute concerning the need to include this skill in Ruffin's EYSE IEP.

The members of Ruffin's IEP team who were present recommended that 45 minutes per skill per day 5 days per week of Lovaas therapy to maintain and/or develop these "critical" skills (i.e., 2 1/4 hours per week, 5 days per week). Mrs. Boberg testified that the number of hours recommended were "roughly equivalent to what he gets in the mornings (at school)...we thought it was enough to maintain what he has." Mrs. Hart testified that the recommended number of hours was "based on what Ruffin currently has in school."

Ruffin's current IEP includes an objective related to the Lovaas 1:1 discrete trial therapy:

#8: Ruffin will participate in drill activities as prescribed by C.A.R.D., and show generalization into classroom activities. Objectives included a) masters 15 drills per quarter and b) demonstrates generalization of 15 skills per quarter into classroom.

The drill activities were selected during a training session held January 14, 1996 with Evelyn Kung. They included: (1) following directions within groups, (2) recalling specific information from the past, (3) theory of mind drills and (4) getting him to ask questions. A drill update for the "theory of mind" drills is dated 1/14/96. The Daily Treatment Notes from March 11, 1996 - March 24, 1996 indicate that the 1:1 discrete trial drills did involve theory of mind (3/12/96), recall of past events (3/3/13/96) and asking questions (4/23/96). Ruffin's current schedule (see Appellant's Exhibit 4) provides the following amount of drill time:

Monday 9:20-10:00; Tuesday 9:00-10:00 & 10:15-10:30; Wednesday 9:00-9:20 and 9:45-10:00; Thursday 9:00-10:00 & 10:15-10:30 for an average of 45 minutes per day.

Conclusion: The EYSE IEP includes skills from Ruffin's current IEP and from drill activities recommended by Evelyn Kung. These skills are "appropriate" for Ruffin and a "priority for developmental and age appropriate growth." These skills address the needs identified by the members of Ruffin's IEP team and Dr. Granpeesheh and must be continued through the summer for Ruffin to secure the benefits of a FAPE. The team has recommended 2 1/4 hours per day 5 days per week of 1:1 discrete trial Lovaas therapy to maintain and/or develop these skills. This recommendation is reasonable calculated to enable Ruffin to secure the benefits of a FAPE.

#### Critical Integration Opportunities

The appellant asserts the proposed EYSE program "fails to provide critical integration opportunities." They maintain that the provision for supervised and unstructured playgroups in Ruffin's EYSE IEP will provide those opportunities while addressing the need to develop and generalize critical social skills.

Dr. Granpeesheh testified that her recommendations for Ruffin's summer program included structured play (i.e., a play group environment where someone can prompt him and teach him how to do social activities like taking turns, sharing, etc.) in addition to the discrete trials. She testified that there was "no way he could learn (social skills) unless he is emersed in a structured play group" with a therapist. She stated that the therapist must be highly skilled (i.e., she must know when to prompt in a social situation, the child's developmental level, and how to get the child to interact with other children). She testified that this type of therapy is more difficult than the 1:1 training, and "ideally" only senior therapists are utilized for this component of the training. "(L)acking that, you do with what there is, basically. If there is somebody who has already worked with the child for over a year and has picked up good behavioral skills, then you have to go with that" rather than having the child wait.

After the child has mastered the concrete developmental goals, he begins a series of social tasks. These tasks include the "theory of mind" or perspective-taking skills. These are considered to be advanced, critical skills without which a child "would be very concrete in their thinking." Dr. Granpeesheh testified it would be inappropriate not to provide structured play session over the summer, as Ruffin will not maintain and generalize skills without the structured play

opportunities. She described Ruffin's current needs to be skill generalization: he needs to extend his learning beyond 1:1 into group situations.

Dr. Granpeesheh testified that the number of hours per week of therapy ranged from a minimum of 6-10 hours per week to the recommended 40 hours per week. She stated that the criterion for assigning hours was based on funding: "if we start with a case where the family basically cannot afford to have more than 10 hours, that's all that we can do, that's all we do." Also, the hours decrease for children who are finishing the program. Dr. Granpeesheh indicated that the schedule for decreasing hours is very specific to the child, but is usually over a one-year period: "the hours can go from 40 to 20- gradually decrease 20 hours - without hurting the child." The final phase gradually reduces the 20 hours to none. She testified that the program is individualized by the hours prescribed (i.e., if the child speeds through the first part of the program, they move to structured play) and by the content (i.e., the drills are specific to the individual child's needs). Dr. Granpeesheh based her recommendations on two classroom observations by Ms. Kung and the integration shadowing notes from Ms. Schmitz. She testified that she might change her recommendations if additional observation and information concerning Ruffin's social interactions was contradictory.

Mrs. Novak testified that she felt "typical family experiences in the summer" would provide the social and group experiences Ruffin would need to maintain social skills. She indicated that he does very well in the mainstream situation without extra supervision. She stated that she did not think he needed extra help with his social skills in order to enter kindergarten this fall: "he does not need a structured playgroup to maintain or develop social skills: they are ingrained and will not be lost over the summer." Mrs. Kleinow testified that socialization was discussed but determined to be unnecessary as he was socializing quite well with adults and classmates in various integration settings. Mrs. Perry, Waukon Nursery School teacher, testified that Ruffin's integration has been successful and that he's just "one of the kids." She completed a kindergarten Readiness Skill Report on January 23, 1996 which indicates "Ruffin is ready for kindergarten in the fall. He fits very well in our class, is well liked by all - he has a very pleasing personality. We really enjoy him." In the *Social Development* section of the report, she indicates that Ruffin "plays cooperatively with friends, obeys rules, shares toys, communicates feelings and ideas, waits for turn, accepts routine and shows self-confidence." Mrs. Schmitz's "kindergarten integration shadowing" observation notes indicate days with appropriate social interaction and days without peer interaction. Ms. Kung testified that Ruffin has good imitation skills and will learn social skills from other peers. Ms. W. testified that she has observed her son be "spectacularly unsuccessful" in his approaches to other children in his integrated settings. She stated that although he may be "swimming with the fish," his interactions are not satisfactory.

Ruffin's IEP of 8/25/94 listed goals of increased social interaction with peers and adults, increased use of functional and imaginative play, and increased expressive language skills. An IEP update meeting scheduled for 12/8/94 indicated that Ruffin had greatly increased social interaction but still included a goal of "increasing social interactions with peers and other adults including the initiation of interactions." The IEP- Continuation Sheet dated 12/19/94 identified three critical skills for Ruffin, including "Ruffin will play interactively with peers at least once during each play

session without adult guidance." Ruffin's current IEP of 8/18/95 also includes a social interaction goal: "Ruffin will increase his social interactions with peers and other adults including the imitation of interactions." The quarterly progress reports of Mrs. Novak indicate 80% mastery in taking turns, "OK" for spontaneous sharing and OK for imitating social play with an adult.

Conclusion: Ruffin's EYSE IEP should include opportunities for social interaction for two reasons. First, although the evidence indicates that Ruffin's social skills have improved "remarkably" to the point he is "one of the gang" in the Waukon Nursery School, social interaction has been a priority in his special education program. Social interaction has been an educational goal for all of Ruffin's IEP's and an identified "critical skill" the last time the IEP team made such a determination. Through concerted efforts in instruction and extensive integration opportunities, Ruffin's social skills have emerged and enabled him to interact with peers and adults. The development of social skills for Ruffin has required direct instruction and sufficient opportunities to observe social models. Ruffin's special education program - including instruction in his ECSE class, 1:1 Lovaas drills, generalization of drills into group activities, integration with shadowing at west Elementary kindergarten and unsupervised integration at Waukon Nursery School - and the independent efforts of Ms. W. have resulted in significant improvement in Ruffin's social competence. It would be impossible to determine the relative contributions of any one component of Ruffin's program to his social skill development. However, the continuation of certain services seems essential if Ruffin is to maintain social competency and secure the benefits of a FAPE. Second, the mainstreaming requirements of the IDEA are fully applicable to EYSE programs: "If the participants on the IEP team determine that the child requires an extended school year program in order to receive FAPE, that program must be provided to the child in the least restrictive educational setting that is appropriate to educate the child." *Response to Sikba*, 18 IDELR 592, 594 (U.S. Department of Ed. 1991). When EYSE is appropriate, the Office of Special Education Programs has determined that least restrictive environment ("LRE") requirements apply. *Response to Meyers*, 213 EHLR 255, 256 (OSEP 1989).

Although the provision of a supervised playgroup led by a Lovaas interventionist and the provision of an unstructured play group monitored by a Lovaas interventionist would be "ideal," it would seem reasonable to combine and achieve the objectives of both in a single, integrated setting. The nature and intensity of the socialization component are based on Ruffin's needs. It is "specialized instruction" "individually designed" to secure the benefits of FAPE. Since the teachers' reports indicate Ruffin is socializing "quite well" with peers and adults, a setting should be designed in which Ruffin's 1:1 social skill instruction (i.e., theory of mind drills) can be immediately generalized to a peer group. **Consistent with his current program**, the Lovaas therapist could assist in "implementing" and "generalizing" skills learned in the 1:1 into an integrated setting. Similarly, the therapist could partition some of the allotted time to teach the "theory of mind" and social skills, then monitor Ruffin and "specifically direct" him in areas "where he displays identified weaknesses." Ms. W testified that she could and would successfully implement "theory of mind drills" to supplement the program offered by the therapist. The selection of the setting should meet the following criteria: a) include same-age peers b) provide daily opportunities for social interaction throughout the summer and c) be no or lowcost. This

setting should be available in the community, such as swimming, library programs, recreation programs, etc. (See *Reusch* for community-based preference rather than artificial LRE summer settings for EYS). Any cost associated with the setting will be assumed by the district.

Dr. Granpeesheh's 3 hour per day 3 days per week for 10 weeks proposal for implementing the skills acquired in the 1:1 into social settings seems reasonable considering the partitioning of 1:1 and monitored integration. This provision is also sufficient to compensate for the delay of Head Start integration planned in the 8/18/95 IEP.

This provision is required since social skills are "appropriate" for Ruffin and a "priority for developmental and age appropriate growth." Ruffin's social skill instruction and his integration opportunities must be continued throughout the summer for him to secure the benefits of FAPE.

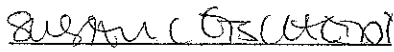
### III. Decision

The appellant has prevailed on the significant issues concerning Ruffin's EYSE. The EYSE program offered by the District denied Ruffin a FAPE because "it was not prepared in procedural compliance with the notice and related requirements of the IDEA." Specifically, (1) the LEA/AEA failed to provide the appellant with adequate notice concerning the EYSE IEP meeting which seriously hampered her opportunity to participate in the formulation of the EYSE IEP; (2) the IEP team did not determine Ruffin's critical skills at the time his IEP was revised, and (3) Ruffin's IEP team failed to consider vital information concerning Ruffin's needs in the EYSE determination process. Although the hours of one-on-one therapy are sufficient, the EYSE program "fails to provide critical integration opportunities."

The IEP team is ordered to reconvene before June 10, 1996 to:

- 1) modify Ruffin's EYSE to include a current level of performance, goal/skill area and data collection plan for social interaction, and
- 2) make arrangements for the provision of instructional service for the socialization goal according to the criteria in the conclusion section.

All motions and objections not previously ruled upon, if any, are hereby overruled.

  
Susan L. Etscheidt, PhD  
Administrative Law Judge