IOWA DEPARTMENT OF EDUCATION
(Cite 22 D.o.E. App. Dec. 88)

In re Lev B.	)	
	)	
Michael & Anna B., Appellants	)	Decision
	)	
v.	)	
	)	
Sioux City Community School District, and Western Hills Area Education Agency (AEA 12),	)	Doc. # SE-272
	)	
	)	
Appellees	)	

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on July 21, 22, 23 and 24, 2003 in Sioux City, Iowa. The hearing was held pursuant to Section 256B.6, Code of Iowa and Chapter 281-41, Iowa Administrative Code (I.A.C.) as well as the applicable requirements of the Individuals with Disabilities Education Act (IDEA). The Appellants were represented by Curt L. Sytsma, Legal Director for The Legal Center for Special Education. The Appellees were represented by Ronald L. Peeler, of Ahlers and Cooney, P.C.

On May 30, 2003, the Appellants, Michael and Anna B., filed a request for a due process hearing alleging that the Sioux City Community School District (SCCSD) and the Western Hills Area Education Agency 12 (WHAEA 12) denied a free and appropriate education (FAPE) to Lev B. in one or more of the following ways: failing to comply with the provisions of his IEP, recriminating against his one-on-one aide for advocating on the child's behalf, and/or failing to offer the parents credible assurances that the IEP will be fairly and fully enforced in the classroom. On July 14, 2003 the Appellants submitted an amended and substituted request for a due process hearing, addressing the failure of the Appellees to provide a FAPE by (1) changing a material provision of his program without the prior written notice to the parents mandated by the IDEA (to wit, the prior IEP's assurance that Lev's aide would not be changed until both the IEP team and Dr. Koegel determined that a new aide could meet his needs), failing to comply with the provision of his IEP concerning the replacement of his aide, failing to monitor and enforce the provisions of this IEP concerning the intervention techniques and supports in the classroom, recriminating against his one-one-one aide for advocating on the child's behalf, and failing to offer the parents credible assurances that the IEP will be fairly and fully enforced in the classroom. Post-hearing briefs were scheduled for submission by August 8, 2003.

Finding of Fact

The Administrative Law Judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter involved in this appeal.

Lev B. is a 7-year-old child living with his parents and sister, Katrina, in Sioux City, Iowa. At age two, Lev was referred for a comprehensive evaluation by his parents because of concerns regarding his language development and to determine if he would qualify for special education services. The results of a full and individualized evaluation for Lev reported 10/8/97 indicated significant problems in verbal and nonverbal communication, social interaction and consistency of intellectual responding. The evaluation team, consisting of school psychologist John Vermilyea, speech pathologist Terri Porter, and audiologist Dan Dailey, recommended that Lev participate in the WHAEA TOT class and homebound instruction for the 1997-1998 school year. A structured teaching program and a total communication system involving sign language, picture boards and assistive technology were recommended. Lev's 1997-1998 Individualized Family Service Plan (IFSP) was developed with the assistance of Jan Turbes, an educational consultant with expertise in autism. Three outcomes were identified: improving social play, improving communication by using single word utterances to develop a vocabulary of 100 words, and improving imitative behavior. The IFSP called for 60 minutes of home instruction and 105 minutes of instruction in the TOT program per week as well as 60 minutes per week of speech and language services. Nancy Anderson, early childhood teacher, and Terri Porter, speech pathologist, provided the services (School Record at 12-28).

The Appellants were dissatisfied with Lev's progress, and requested that the AEA begin using a 40 hour-per-week discrete trial training (DTT) method with Lev (Parents' Statement of the Case & Parents' Documents at 1-2). An IEP developed 2/2/98 indicated that Lev would be placed in the Riverside School Intensive Early Childhood Special Education program, which incorporated a structured, discrete trial, visually-based approach. Lev was to attend the program 15 hours per week, as well as 40-minutes-per-week of speech and language services. Goals and objectives were identified for receptive and expressive communication skills, imitation skills and self-help skills (School Record at 30-40). The Appellants were concerned that the Riverside program would not provide the intensity of services that Lev required and requested an independent educational evaluation on 3/19/98. The WHAEA supervisor for early childhood services, Jane Happe, recommended Dr. Annette Groen. A consultation report for 4/24/98 – 4/25/98 by Dr. Groen recommended Lev receive 30-40 hours per week of one-to-one discrete trial training (DTT) behavioral therapy. Mrs. B. and Lev's teachers attended a 3-day training workshop conducted by Dr. Groen and were to provide 2-3 hour sessions of DTT behavioral therapy, two or three times per day. In a subsequent IEP meeting held 5/28/98, it was decided to provide 30 hours-per week of extended school year services to Lev, and that he would continue in the Riverside program in the fall. However, on 6/11/98 the Appellants met with AEA staff to request a full-time home-based program. In a Notice of Change in Identification, Program or Services, the change to a full day home program was documented.

The home-based program for 1998-1999 was successful for Lev. On 2/2/99, the IEP team met to discuss Lev's progress. Dr. Groen was invited to provide consultation. Goals for self-help, social play, and expressive/receptive language were developed. It was also

recommended that Lev soon be integrated successfully into a regular preschool program. The IEP listed 30 hours-per-week of the DTT program, 1 hour-per-week of speech services and one consultation with the autism consultant per month – all to be provided in the home setting. The home program for 1999-2000 was also successful. Mrs. B. testified that the DTT required that Lev be engaged all waking hours. In addition to the one-on-one training, she arranged "play dates" to improve Lev's social interaction (for example, see Parent Video Exhibit G: Lev's Home Program During the 2002-2003 Year). The IEP developed 3/1/00 recommended that up to 25 hours-per-week of the home program be continued, and that Lev begin sensory integration training (School Record at 93-100). This recommendation was based on an evaluation by Dr. Serena Weider and Dr. Greenspan conducted in January, 2000. The training, known as the "Floor Time Method" was provided by Mrs. B., who attended the 3-day training by Dr. Groen. Lev received extended school year services during the summer of 2000 which focused on sensorimotor activities.

The IEP meeting held 9/8/00 resulted in a decision for Lev to attend an early childhood special education Headstart program four days-per-week with a shadow aide. He was also to continue the home-based program for 17.5 hours-per-week, and received speech and consultant services. Mr. B. testified that the Headstart program was not appropriate and presented a videotape of Lev's experiences in that setting (Parents' Video Exhibit A, Riverside Head Start Program, October, 2000). Later that fall, the Appellants attended a training program at the University of California at Santa Barbara on November 6 – 10, 2000. The clinical director of the Autism Research and Training Center, Dr. Lynn Koegel, recommended that Lev's expressive language be targeted using a "pivotal response motivational procedures" or pivotal response training (PRT). The PRT model uses applied behavior analysis (ABA) procedures that are positive, self-reinforcing, and family centered. Focusing interventions on a few core pivotal areas - such as increasing motivation - will improve performance in peripheral areas - such as language development (Parents' Statement of the Case & Parents' Documents at 50 - 74). Dr. Koegel provided specific recommendation for Lev's program in the preschool setting, including the use of PRT by Lev's teachers and therapist.

Mrs. B was trained to use the procedure. Also attending the Santa Barbara training as observers were Mr. B., autism consultant Jan Turbes, speech-language pathologist Barb Lyle, and Joy Ruess, Lev's home program provider. Mrs. Peters also testified that upon return, Mr. and Mrs. B. were upset by Joy Ruess' behavior during the training and insisted that she not be Lev's aide. A reevaluation that same fall of 2000 suggested that Lev continue in the Riverside preschool program with an instructional assistant for the remainder of the 2000-2001 school year, and that he attend kindergarten in the fall 2001 with an instructional assistant. Suggestions for his curriculum included a "blended approach using best practices such as visual schedules, ABA and Pivotal Response". Speech and occupational therapy services were to be provided in the integrated, kindergarten setting. The IEP developed on 12/20/00 verified that instructional arrangement (School Record at 132-147). Yet Mr. B. testified that the school program at Riverside did not follow the recommendations of Dr. Koegel and that Lev's autistic behaviors were becoming more intense. Lev did not continue in the Riverside Program,

but was unilaterally enrolled in a preschool program affiliated with Briar Cliff College. Lev was successful in that program, according to testimony by Mr. B and a submitted videotape (Parents' Video Exhibit B, Private Preschool Affiliated with Briar Cliff College, April 24, 2001).

An IEP meeting was held 5/14/01 to determine the aide who would be trained to assist Lev in the fall as he began kindergarten. Susie Adam was interested in training to be Lev's aide. According to the testimony of Mrs. Peters, a training program was planned which involved Susie training first in Lev's home program and then accompanying Mrs. B to the preschool setting to continue training there. Susie Adam was taped once in the preschool setting. According to testimony by Mr. and Mrs. B., Susie could not work effectively with Lev, his behavior intensified, and it took the following two days to reestablish Lev's behavioral control. Dr. Koegel reviewed a videotape of the Susie Adam's interaction with Lev and concluded that the aide would need more extensive training before she could facilitate an appropriate program for Lev. Mr. B reported these concerns to Donna Dwyer, the kindergarten teacher. Subsequently Susan Adam decided not to apply for the position as Lev's assistant, and Mrs. B decided to apply for the position. Mrs. B's decision marks the beginning of a series of disputes concerning Lev's aide.

According to the school records, Mrs. Jean Peters, Director of Special Education for the SCCSD met with Mr. B. on June 5, 2001. He asked that Mrs. B be assigned as Lev's aide in kindergarten. They discussed the advantages and disadvantages of Mrs. B's assignment as Lev's aide. Mrs. Peters testified that the advantages they identified included that Mrs. B was trained in PRT, devoted to her son, and available and willing to serve as the aide. The disadvantages were the difficulty in separating the role of parent from instructional assistant as well as a concern for Mrs. B. to implement both the "constant home therapy" and also serve as Lev's aide at school. On June 11, 2001, the Appellants met with Mrs. Peters, Mr. B., Mr. Roger Hess, WHAEA director, and Mr. Steve Crary, Human Resources Director for the Sioux City Community School District. Mr. B was informed that the school district had found someone to train and that Mrs. B could not apply for the aide position (Parents' Statement of the Case & Parents' Documents, p. 8). Mrs. Peters testified that Mr. Crary explained employment issues and practices concerning the hiring of "displaced" district employees (former employees laid off from positions) and that the school district had an obligation to follow these policies. One such employee, Julie Bell, had experience working with students with autism and had already expressed an interest in this job. Mrs. Peters explained to Mr. B.:

> We discussed the option of Lev going to a summer preschool and (Mrs. B.) and an aide going along for training purposes. (Mrs. B.) would also be allowed to go into the classroom with Lev at the beginning of the year for additional training. She would phase out of the picture as quickly as possible. We called Dr. Lynn Kagle (sic). She felt this was an acceptable plan. She thought the phase out should happen when we saw a positive trend line for Lev concerning his attending to tasks. We all agreed to go ahead with this plan. After our discussion with (Dr. Koegel), (Mr. B.) told Roger and I he wanted to help in the selection on the aide who would work with Lev. I explained to him that we would be glad introduce

> him to the potential candidate we had discussed earlier and that we would welcome his input concerning the progress of the training and the work being done with the aide but the ultimate selection would lie with district employees. (Mr. B) agreed to have (Mrs. B) call me so we could find a preschool for Lev for this summer. We could contact potential candidates for the job, choose one and begin the training" (School Record at 583-584).

Mrs. Peters testified that Dr. Koegel had agreed to watch and critique a video of the aide "shadowing" Mrs. B.

In a letter dated 6/12/2001 to Mrs. Peters, Mr. B expressed concerns about insufficient time to train an aide for Lev (e.g., "What if this person will not be a match for my child? What if this person will not learn quick enough before the school year starts? What if we can not find the appropriate classroom conditions for the training?...How long will this training last? Who will guarantee that this will be properly and timely done? What about (Mrs. B.)? Why does she need to spend her time and efforts, change her plans to train someone else for the job she is the most qualified and strongly recommended by Lev's consultant?") and posed questions concerning equal opportunity employment and AEA policy regarding the employment of parents for children with special needs (School Record at 354). Mrs. Peters responded in a 6/18/2001 letter, assuring that Mrs. B would be involved in the training of the aide, that Dr. Koegel would "aid us in determining the length of the training" and that AEA 12 "does not have any policy preventing parents from working with their children" (School Record at 355).

On June 19, 2001 Mrs. Peters called Mr. B. to "outline our training option for Julie Bell" (School Record at 585). Lev was to attend the Children's Center preschool on a schedule set by the district and Mr. and Mrs. B. The district would pay the tuition and Julie Bell and Mrs. B. would attend. Mrs. B. would train Julie and videotapes would be sent to Dr. Koegel: "if the aide learned quickly and a positive trend line was established in the areas of time on task (Mrs. B.) would begin to fade. If not (Mrs. B.) would stay". When school started in the fall Mrs. B. would accompany Julie Bell and Lev to kindergarten, and stay until a positive trend line was established. Mrs. Peters noted that Mr. B. had many concerns. On June 20, 2001 Mr. B met with Richard Bathurst, Assistant Superintendent for SCCSD, to discuss Mrs. B application for the aide position. Mr. Bathurst did not see any problem with Mrs. B's serving as Lev's aide (Parents' Statement of the Case & Parents' Documents at 8). A few days later on 6/25/2001 the Appellants met with Mr. Bathurst, Mrs. Peters, then-principal Bartek and Mr.Crary, four options concerning Lev's aide were outlined. The first option was to hire Julie Bell, who would receive training from Mrs. B in the summer and in the kindergarten setting as school started. The second option would be to hire Julie Bell, and have Mrs. B. train her through the first semester of the fall. The IEP with consultation from Dr. Koegel would determine when the trainer was not longer needed. The third option was to put Mrs. B. in the classroom as an aide on a volunteer basis. The fourth option was to put Mrs. B. in the classroom as a paid aide assigned temporarily as a one-on-one aide. Mr. B. presented a fifth option: have Julie Bell train with Mrs. B. during the summer with no promise or commitment of hiring her in the fall. Although some discussion of the detriment of hiring a parent as an aide was

offered, the district agreed to option four. Mrs. B would work as Lev's aide at Clark school for his kindergarten year.

Lev's 2001-2002 IEP listed goals of attending, responding to teacher questions, and interacting with peers. This IEP, developed 9/26/01 with a duration through 9/26/02, included the following statements in the Present Level of Educational Performance (PLEP) section: "Lev's academic skills are well-above his peers. He can read sentences and do simple math – addition. Lev has significant delay with communication, both expressive and receptive. He is also experiencing delays in interaction with classmates". Of considerable importance to this appeal, the PLEP also contains the following statement: "Lev's school programming consists of the use of (PRT). Lev's aide is well-trained in this area and could provide training to her replacement should the team and UCSB determine a replacement would fit Lev's needs." (School Record at 177). The IEP also indicated that Dr. Koegel would be contacted by the "parent/AEA" two times per month. In order to assure Lev's regular class placement would be successful, the IEP also stated "send materials home before presented in class so aid can prime" (School Record at 183). Pre-teaching, or priming, involves preparing the child for interaction by introducing the tasks and activities ahead of their actual presentation in the classroom. In this case, the teacher would send material home with Mrs. B. so she could "pre-teach" Lev, ensuring more successful responses during class

Lev attended the half-day kindergarten program with teacher Mrs. Dwyer, and also participated in his home program. OT and speech services were also provided. Mrs. B testified that this year was successful since Mrs. Dwyer took the extra effort to increase Lev's peer interactions and highlighted Lev's talents. Mrs. B. added that initial difficulties concerning the teacher's understanding of priming and the provision of the pre-teaching materials were successfully resolved in conversations with Mrs. Dwyer and then-principal Bartek. Mrs. Peters testified that Mrs. Dwyer has contacted her twice during the kindergarten year with a specific concern about preparation time for organizing the preteaching materials and a general concern about preteaching limiting spontaneity in the classroom. . Both concerns were resolved successfully. The IEP update in the spring of 2002 (4/26/02) reported progress towards goals and a decision to provide extended school year services. An earlier letter from Dr. Koegel dated March 7, 2002 indicated that "he has made consistent progress and in general his behavior appears to be improved at school". Dr. Koegel later wrote on 5/8/02 recommending that Mrs. B. "be actively involved in (Lev's) educational program next year as a direct aid or as a trainer of his aid...at this point her active engagement in his program may be critical" (School Record at 359). According to documents and testimony, kindergarten was successful for Lev (Parents' Video Exhibit C: Lev's Kindergarten Year with Mrs. Dwyer, March 14, 2002).

On 9/17/2002 a meeting was held to develop Lev's program for first grade. There is considerable evidence and controversy concerning the process and products of this meeting. According to the Appellants, in preparation for the meeting they developed a draft IEP, including goals for attending, class participation and social interaction. They also prepared and distributed a one-page statement of Lev's current functioning and

needs. Although not so-labeled, this statement appears to be the appellant's draft of the PLEP section for the IEP. A comparison of this document to the previous IEP reveals the following:

2001-2002 PLEP	Parent's Document
1st ¶: Lev is currently a Kindergarten student at Clark Elementary School. He is in regular education 100% of the time with the assistance of a 1/1. Lev's academic skills are well above his peers. He can read sentences and do simple math – addition. Lev has significant delay with Communication, both expressive and receptive. He is also experiencing delays in interactions with classmates.	1st ¶: Lev is currently a 1st grade student at Clark Elementary School. He is in regular education 100% of the time with the assistance of a 1/1. Lev's academic skills are well above his peers. His reading skills (particularly decoding) are at the 4th grade level, and he can do simple math – addition. However Lev has significant delay with Communication, both expressive and receptive. He is also experiencing delays in interactions with peers.
2nd ¶: At the present time Lev's school programming consists of the use of Pivotal response techniques. Lev's aide is well-trained in this area and could provide training to her replacement should the Team and UCSB determine a replacement would fit Lev's needs.	2nd ¶: At the present time the Pivotal response techniques are implemented in Lev's school programming. Lev's aide is well-trained in this area and could provide training to Lev's replacement should the team and his consultant from UCSB determine a replacement would fit Lev's needs.
3rd ¶: In order to improve Lev's social skills he will need peer tutoring and friendships. Social Skills Groups would meet some of these needs. Lev will at times befriend another classmate with limited interactions.	3rd ¶: In order to improve Lev's social skills he will need peer tutoring and friendships. Peer-buddies may be helpful in taking over most or all of the activities. Specifically, peer assistance should be increased during transitions, following directions, staying on tasks, during reading time, working on the worksheets and other classroom activities. This will be important in fading his aide time. It is equally important for Lev to be with peer-buddies during activities outside of the classroom, such as participating in the games during recess time, interacting during lunch, choosing the books in the library, etc.
Remaining ¶'s: Discuss PRT, improvement in motor skills, lack of speech initiation, and behavior. Specifically "Lev's behaviors in the classroom include humming and outbursts during auditory learning time or if he is unfamiliar with an activity. Behaviors might surface if	Remaining ¶'s: Discuss need to individualize Lev's reading program, particularly to address needs in reading comprehension, to pull Lev out of classroom for 1:1 tutoring by trained professional if he becomes bored and exhibit disruptive behavior, for teacher to

activities are too long or if he is tired or frustrated or if there are impromptu activities or long discussions.	use short sentences and concrete language, and behavior. Specifically, "Lev's behavior in the classroom may include humming, making noise or outbursts. These behaviors occur in the following situations: Lev is not primed, Lev is not properly reinforced for his attempts, auditory learning activities without visual support, long waiting periods between or within activities, activities are too long,

The parents' draft PLEP was based on correspondence from Dr. Koegel dated 9/13/02 (School Record at pp. 360 & 361). Dr. Koegel offered suggestions after viewing the September, 2002 videotape submitted by the school district. The 2002 PLEP reflect the recommendations (nearly word-for-word) of Dr. Koegel.

It is important to note that the PLEP is a description of student current performance; it is not part of the educational programs or services to be provided.

Mrs. B. testified that in the discussion, members of the IEP team indicated that an individualized reading program could not be scheduled everyday, but could be arranged for three times per month. Members of the team also disagreed with the statement of Lev's superior skills, so Mrs. B subsequently made a video to demonstrate Lev's skills (Parents Video Exhibit I: Lev, September 2002). There was no discussion of Lev's home program and another IEP meeting was scheduled for September 25, 2002. At the 9/25/02 IEP meeting, the Appellants were told that the agreed-upon IEP would be "transferred" to new forms. Principal Cyndi Turner delegated the responsibility of transferring the agreed-upon IEP to the "new forms" to Mrs. Suz Ann Jensen, special education teacher for the multicategorical, resource teaching program. Mrs. Turner testified that the new forms called for a "breaking up" of the longer, narrative PLEP into smaller comments for each goal area. In transferring the information, Mrs. Jansen testified that she did not intend to change any of the substantive components of the IEP. Other IEP team members testified that there was no intent to change any provision of Lev's program when the agreed-upon 2002-2003 IEP was "transferred" on to new forms. More importantly, consultation with UCSB did continue throughout the fall and throughout subsequent attempts to hire a replacement aide

The "new forms" IEP, also dated 10/2/02, was received by the Appellants on October 18, 2002. Mr. B testified that when he first received the final IEP, he was interested in only the goal statements and did not realize the language concerning the replacement of Lev's aide was missing. The IEP includes goals for attending, comprehension, social interaction, participation and communication:

Goal 1 for Lev is attending. The current functioning data indicated that he was provided 5-20 prompts from his aide in a 20 minute period. Baseline indicated the aide was providing 90 – 100% of the prompts. The goal was for Lev to attend with less than 50% of the prompts from his aide and the necessary prompts would be provided by the

teacher. Peers would also be encouraged to provide the prompts. Progress monitoring data from 11/02 included "depends on day", "continues to need prompts according to his interest", "much prompting" – most of this stuff is not of interest to him" and "w/ prompts".
Goal 2 for Lev is comprehension. When presented simple recall questions, Lev was to expand simple responses with 80 – 100% accuracy. Progress notes from 11/02 indicate satisfactory progress.
Goal 3A for Lev is social interaction. The current functioning data indicated that he initiates social interaction 2-5 times a day at recess, and answers questions from peers at lunch 80 –90% of the time. The goal was for Lev to be engaged with his peers 90 – 100% of the time at lunch, recess and free play time. The progress data of 11/02 noted "1:1 assistant reports that there has been no progress towards this goal".
Goal 3B is also social interaction. Lev was to raise his hand in class and share with peers with less than 50% prompts. There are no progress data reported for this goal.
Goal 4 is participation. Just as with goal 1, prompts from the aide are to decrease by 50% while teacher prompts and encouraged peer prompts increase. However instead of attending, Lev was to participate by following simple directions, responding to simple questions asked by the teacher (a list of questions to be provided by the aide), and participating in art, music, PE, library, sharing time and paper and pencil activities. There are no progress data for this goal.
Goal 5 is in the communication area. Improvement in vocabulary and comprehension were objectives for the home program. No progress data are reported for this goal.

The IEP listed the following special education services: 1-hour videotaping monthly, 1:1 classroom aide, speech and language services, autism team consultant (four times per year) and consultation with Dr. Koegel (2 times per month), reading instruction, in-home therapy, preteaching and priming materials provided to the aide, and "pair Lev with a variety of peers in classroom and playground activities daily"(School Record at 317 – 331). It is important to note that Mrs. B. is not designated as the 1:1 classroom aide.

Lev's 2002-2003 school year is the focus of this appeal. The Appellants had numerous concerns regarding Lev's program. Mr. and Mrs. B testified that they attempted to address concerns to the teacher Mrs. Reed several times, but that she did not seem "interested". Among these concerns was the teacher not following the IEP by asking Lev very few questions, saying "No" instead of reinforcing attempts, not simplifying her language, not calling on Lev when he raised his hand, and not creating opportunities for Lev to work with other children in small groups. They were also concerned with long waiting periods during the day, when Lev was not engaged. Another IEP goal was to shift more than 50% of Lev's prompts from the aide to the teacher and peers. Mr. and Mrs. B were concerned that Mrs. Reed was not encouraging peer prompting. On November 25, 2002 the Appellants, Mrs. Turner, Mrs. Reed, and Mrs. Jansen met to discuss Lev's program. According to testimony from Mr. B., he had prepared a list of "urgent" concerns directed at Mrs. Reed's failure to implement Lev's IEP. Mrs. B. provided examples for each of the concerns. In discussing Lev's need to work with other children in small groups, Mrs. B gave an example of Mrs. Reed not allowing Lev to go to one of the centers developed to explore size and textures. Mrs. B. testified that Lev wanted to go

to the "cornmeal" center but Mrs. Reed directed him to return to his desk since he had been "bored enough". Mrs. Reed testified that it was Mrs. B who had suggested that Lev not participate in the center: "I always let (Mrs. B.) make the final decision". Mr. B. described the incident as "discrimination" and Mrs. B. suggested that the other students in Mrs. Reed's classroom were afraid to interact with Lev because they thought it would upset Mrs. Reed. The Appellants also described situations in which peer prompting had been discouraged by Mrs. Reed. Principal Turner testified that Mrs. Reed was initially defensive and emotional – in fact, left the meeting crying - but later returned to discuss ways to improve the implementation of Lev's IEP. Mrs. Reed also discussed concerns with Mrs. B's late arrival times. The group agreed that Mrs. B. would arrive at 8:45.

This meeting clearly represented how the relationship between Mrs. B. and Mrs. Reed had deteriorated. Both had accused the other of "lying" and Mrs. Reed's actions had been described as "discrimination".

Following that meeting, the Appellants decided to document future concerns in Mrs. B's classroom notebook. Mrs. B testified that she wrote these notes at home, and distinguished them from Lev's self-management spiral that she used in the classroom. Several incidents are recorded in the classroom notebook, including a Thanksgiving activity on 11/26/02 in which preteaching materials were not provided. When Mrs. B. expressed concern about Lev's ability to participate, "Mrs. Reed said 'here's how we will handle this'" and physically assisted Lev in drawing a pilgrim picture. Mrs. B's described Mrs. Reed's intervention with Lev as "hostile". Mrs. B. discussed the incident with Principal Turner (Parents' Statement of the Case & Parents' Documents at 15).

Special education teacher SuzAnn Jansen testified that her responsibilities included monitoring the implementation of the IEP, conducting the monthly videotaping, and providing the 9-week progress monitoring updates to the IEP. However, she also testified that she did not regularly observe in Lev's classroom and did not monitor, record or document any of the specific provisions of the IEP such as teacher prompting or peer prompting. There are no progress monitoring data for two of the 5 goals, and no objective data for the other three. Although there is testimony from Mrs. Jansen, Principal Turner and speech-language pathologist Tammy Daane that the IEP was being following, their conclusions are based on limited observations and no specific data. Even when directed by Mrs. Peters to check the implementation of Lev's IEP, notes from Principal Turner's are general, narrative comments.

All parties involved in this dispute confirmed that the classroom conditions in the first grade room changed considerably after the 11/25/02 meeting. Mrs. Jansen testified that "communication stopped", that Mrs. Reed "was not herself", that the "fun was out of the room" and "lots of tension" was present. Following the 11/25/02 meeting, Principal Turner increased the frequency of her visits to look for both IEP implementation issues and for relationship issues. Based on her classroom observations, Principal Turner concluded that the IEP was being implemented and that there clearly existed a "broken working relationship" between Mrs. Reed and Mrs. B. Mrs. Reed testified that she no longer had a "functional" relationship with Mrs. B. Evidence confirms that Lev's

behavior was also deteriorating. Mrs. Jansen testified that after the 11/25/02 meeting, Lev was in her room more often, although she did not determine if the reason was for discipline, length of activity, or to use the computer. She watched the December videotape and observed that Lev was agitated, needed many prompts, had trouble focusing, was moving a lot, and "having a harder time". Mrs. B. testified that Lev's behavior captured in the video was due to no priming, pacing too slow, and activities lasting too long. Dr. Koegel concurred, after viewing the December videotape, and suggested that individualized instruction with task variation should reduce Lev's attempts to escape from tasks with avoidance and stereotypic behavior (see Parents' Video Exhibit F: Dec. 20, 2002). The contrast between this videotape and the September videotape is significant: the relationship between Mrs. B. and Mrs. Reed had deteriorated as had Lev's behavior.

Mrs. Peters testified to a series of phone calls and meetings that occurred between December 3 – 9, 2002. First, Principal Turner called Mrs. Reed to report that things were not going well between Mrs. Reed and Mrs. B, and that working conditions were not acceptable. Mrs. Turner called again to ask Mrs. Peters to come to a school meeting on December 5, 2002 with Mrs. Reed, who had also invited Bruce Lear, teacher union representative. Mrs. Peters agreed to attend the meeting, but also directed Mrs. Turner to set up another meeting with Mr. and Mrs. B: "We have two parties involved". Mrs. Peters was also to attend this meeting, which was scheduled for December 9, 2002. Mrs. Peters was "surprised" by the December 5, 2002 meeting. She described it as "intense", "stressed", and the atmosphere as "charged". As she listened to the participants, she was surprised at the conviction that the situation was "impossible to resolve". The meeting of 11/25/02 was discussed, with Mrs. Reed concluding Mrs. B. was not talking to her, was keeping data on her, and was creating difficult work conditions. Mrs. Reed was resistant to working out a resolution, but did discuss two options: Lev and Mrs. B could go into another classroom or Lev could stay in Mrs. Reed's classroom with another aide. A third option was also considered: resolution of the situation so that the existing arrangement could be continued. Mrs. Turner testified that Mrs. Reed "said 'No'". No decision was made, but consideration of the two options was to be carried into the December 9, 2002 meeting.

Mrs. B testified that on December 6, 2002, Principal Turner called her to the office and informed her that Mrs. Reed could not trust her or work with her any more. Mrs. Turner orally presented two options: Lev and Mrs. B could go into another classroom or Lev could stay in Mrs. Reed's classroom with another aide. Principal Turner informed Mrs. B. that a meeting had been scheduled for the following Monday morning to finalize the decision. Principal Turner asked Mrs. B to make her decision over the weekend before the meeting.

The Appellants considered neither of the options acceptable: Lev needed to remain with his established peer group and no other aide was trained or qualified to meet Lev's needs. Since they had been given the weekend to decide between the options, Mr. B. testified that he called Superintendent Larry Williams at home and requested a meeting. Superintendent Williams agreed to meet with Mr. and Mrs. B at 7:45 Monday 12/9/02.

Mr. B prepared a detailed letter of concerns and presented them to Superintendent Williams prior to the scheduled meeting. Mr. B. characterized the meeting as positive.

Later on 12/9/02 the Appellants then met with Mrs. Peters, Mr. Crary, Principal Turner, Mrs. Daane and Mrs. Lyle (speech pathologists with WTAEA). Mr. B. characterized this meeting as "tense", and Mrs. Peters described the meeting as "difficult". Steve Crary informed the group that no decision would be made since Superintendent Williams would make the final decision. Mr. B. discussed the meeting of 11/25/01 and tried to confirm that the issues were concerning the implementation of Lev's IEP and not personal attacks on the classroom teacher (Parents' Statement of the Case & Parents' Documents at 18-20). Mrs. B's performance as an aide was also discussed. First, the issue of Mrs. B's arrival time was resolved. She would arrive at 8:45. Next, Mrs. B. was to take data only on Lev and not on the classroom teacher. Also, Mrs. B's involvement in progress monitoring data was discussed. Mrs. B. testified that the school district had asked her to collect data, but she thought the forms were difficult and couldn't understand how to use them. It was decided that new "user-friendly" forms would be developed and Mrs. B. would be trained to use them. Finally, Mrs. Peters directed Principal Turner to make sure the videotaping was conducted. Mrs. Peters testified that these concerns were addressed in an effort to resolve the classroom conflict and not as evidence or reasons for termination. Mrs. Peters testified that the concerns were not to a point that the school district would have considered termination.

Mrs. Peters also testified that she directed Principal Turner to investigate the Complainant's claims. Principal Turner wrote a letter to the classroom teacher reminding her to follow the IEP in regard to the provision or pre-teaching materials, prompt shifting, and responding to Lev. Additional suggestions concerning curricular accommodations were also provided (School Record at 367, letter dated On December 16, 2002).

Following the12/9/02 meeting, Mrs. Turner offered to be a mediator for a private discussion between Mrs. B and Mrs. Reed. When Mrs. B arrived later that day for the meeting, Mrs. Turner asked permission to tape the meeting and also asked if AEA speech pathologist Barb Lyle could attend. Mrs. Reed had requested Barb Lyle attend as a "neutral party". The Appellants claim that no "mediation" occurred, but that Mrs. B was accused of personally attacking Mrs. Reed. While Mrs. B. indicated that the problem could be worked out, Mrs. Reed did not. Mrs. Lyle commented on tape that "it was obvious that the relationship could not be repaired". The meeting ended. Later that day, Mr. B met with Principal Turner and also met with Superintendent Williams (Parents' Statement of the Case & Parents' Documents at Parents' Documents at 20).

On December 11, 2002 Mrs. B asked Principal Turner for a copy of the "mediation" tape. Mrs. Turner indicated she was not comfortable with the situation and had burned the tape. That same day, the Appellants received a letter from Assistant Superintendent Linda Madison, informing them that the District had decided to hire another aide for Lev to replace Mrs. B.: "I anticipate this will take not more than 2-3 weeks. Please understand it is the District's prerogative to change employees when work relationships have been seriously damaged..." The letter indicated that Mrs. B could assist with the transition, as

long as a positive environment was maintained. The Assistant Superintendent also invited Mrs. B. "to meet with Mr. Crary to discuss possible options of employment in the District should she so choose. I am not aware of current openings but Mr. Crary can provide guidance and assistance in this area" (School Record at 416). It is clear from both Dr. Madison letter and Mrs. Peters' testimony that the school district intended to transfer Mrs. B. to another aide position, not to terminate her employment with the district

On December 16, 2002, Mr. B sent Principal Turner a letter outlining concerns. That same day, Principal Turner forwarded the letter to teacher Reed, with a letter instructing her to follow the IEP in regard to the provision or pre-teaching materials, prompt shifting, and responding to Lev. Additional suggestions concerning curricular accommodations were also provided (School Record at 367).

A videotape was not recorded in November, as per Lev's IEP. Although one was recorded in December, the Appellants had difficulty receiving the tape and forwarding it to Dr. Koegel. The taping procedures typically involved Mrs. Jansen taping the school day, with Mrs. B. adding the home program component and sending it to Dr. Koegel at UCSB. Although a videotape was made December 28, 2002, the appellant did not have feedback from their consultant from November 2002 through February 2003 (Parents' Statement of the Case & Parents' Documents at 22). The school district had decided it would be important to make copies of the tape before sending them to UCSB. Mrs. Peters testified that it came to her attention that the IEP team was not reviewing tapes, keeping copies or visiting with Dr. Koegel. She instructed Principal Turner to get the IEP team more involved with the UCSB consultation.

On January 8, 2003 Mr. Crary informed Mrs. B the district was hiring an aide for Lev. The Appellants were concerned that no one was – or could be – trained in the Pivotal Response Techniques in time to serve as Lev's aide. Around January 9, 2003 Principal Turner developed a draft of a "Timeline and Plan for Assistant Transition" (School Record at 626). Beginning on January 13, 2003 the newly hired assistant was to observe Mrs. B with Lev, with Barb Lyle also assisting in training. At the end of the day, Mrs. Jansen and Mrs. Reed were to meet with Mrs. B., Barb Lyle and the new assistant to discuss the day's activities. This procedure was to be duplicated the following Wednesday. On Thursday and Friday, the aide was to work with Lev while Mrs. B observed and assisted with training. During the following week, Mrs. B was to report to Clark School but be assigned to other rooms as an aide. She would be available to training and consultation if needed. January 24, 2003 was to be the last day of work at Clark Elementary for Mrs. B. The timeline was not implemented.

On January 11, 2003 Mr. B. wrote to Principal Turner, describing the Appellants' decision to "pull Lev out of Clark School because he is not receiving an appropriate program" (Parents' Statement of the Case & Parents' Documents at 88). The letter cited the absence of meaningful assignments, long waiting periods, very little task variation and a lot of long auditory activities with excessive language. Mr. B summarized: "(Mrs. B's) participation at school as his aide today is crucial for Lev's performance. Replacing

(Mrs. B.) with an untrained aide in the current situation will be disastrous for Lev. I do not believe that without (Mrs. B's) assistance Lev's IEP would be performed correctly. We are pulling Lev out of Clark School until a mutual agreement about changes in placement to provide an appropriate educational program for Lev is reached". In response to this letter, Principal Turner replied that she understood that the Appellants had chosen to home school Lev and provided instructions for obtaining permission to home school. Mr. B. responded by indicating they did not wish to home-school, but wanted to find an appropriate placement for Lev. Lev did not attend school for the remainder of the school year.

On February 5, 2003 the Appellants were invited to an IEP meeting. A meeting summary prepared by Dr. Mary Day indicated the school district had decided to organize the training of school personnel using a consultant from the Santa Barbara program. The Appellants had indicated they would return Lev to school for partial participation with Mrs. B as the aide prior to the scheduled training. The school district agreed that partial participation was an option, but that Melissa Michael had been hired as Lev's aide. Stating concerns that Lev's IEP could not be carried out under such circumstances, the Appellants left the meeting. Mrs. Peters testified that IEP concerns were never addressed at this meeting. A letter from Dr. Koegel dated February 7, 2003 indicated she could not "guarantee that the person assigned by the School District will develop a competence level similar to that of Mrs. (B.) after this brief training...at this point in time, Mrs. (B.'s) active engagement in Lev's program may be critical...I strongly recommend that she be actively involved in Lev's educational program" (School Record at 385).

In a letter dated March 4, 2003 Special Education Director Peters indicated that the "District is ready, willing and able to provide Lev an appropriate education consistent with his IEP. The District shares your concern that individuals who work with Lev should be appropriately trained to assist with his program. Personnel decisions, however, are the responsibility of the District as employer, and not the IEP team." The letter also identified the procedures for Lev's return to school. Mrs. B was to function as Lev's instructional aide "We will not exit her from that role until we are confident that they new aid has been properly trained". Following the training scheduled the week of April 24, 2003 "there will be an appropriate transition of the aide responsibilities from (Mrs. B.) to the new aide" (School Record at 396-397).

From January through May, 2003 Mrs. B provided Lev's educational program at home. The school district provided the pre-teaching materials. In April, plans were undertaken to arrange training from UCSB. A 5-day training session was organized by Danny Openden, a trainer selected by Dr. Koegel. The proposed aide Melissa Michael attended the training, but Mr. and Mrs. B did not have Lev present for the training. According to Dr. Koegel, without Lev present it would be difficult to determine if the aide would be ready to begin the transition to serve as Lev's aide. Mrs. B. testified that the "circumstances under which the training was taking place" were the reasons why she and Mr. B. chose not to being Lev to the training: she had been ousted from the classroom and replaced without reason.

On 5/14/03, an IEP meeting was held to discuss progress monitoring for Lev and extended school year services. In attendance were the Appellants, Directors Peters and Hess, Principal Turner, Mrs. Reed, Mrs. Jansen, as well as support personnel from speech, social work, school psychology, consultation. The minutes from that meeting indicate that "conferences with Santa Barbara must include the school if the district is to pay for that consultation". In a document dated 5/22/03, Mr. B. indicated "the school does not need to be involved in those consultations" (School Record at 338). Mr. B. clarified his position in a letter dated June 1, 2003: "it is not necessary to have the school representative present during (Mrs. B's) consultations with Dr. Koegel regarding Lev's home program. In a response letter dated June 1, 2003, Director Peters clarified that since the home program is a part of Lev's IEP, team members from Clark Elementary school should be present and the consultations scheduled by Principal Turner. Mr. B also objected to an aide other than Mrs. B. Mrs. Peters testified that there were not IEP concerns discussed at this meeting. Following the meeting, Mrs. Peters discussed with the Appellants why the decision had been made to change Lev's aide: "We are not transitioning to another aide because (Mrs. B.) has a lack of skills. We needed to transition to another aide because of (Mrs. B's) difficulty separating her role of mother vs. aid" and because of the breakdown in professional relationship between Mrs. B. and Mrs. Reed (School Record at 593).

This series of events represents several important facts associated with this appeal. When Lev was to begin kindergarten, the SCCSD initiated training of an individual to serve as his 1:1 aide. The aide worked in a preschool setting with Lev's mother, Mrs. B., who had been trained to use specialized techniques for children with autism. The Appellants were dissatisfied with the aide's performance, and expressed their concerns to the kindergarten teacher. Subsequently, the aide decided not to apply for the position. The SCCSD prepared to hire another aide who had previous experience working with students with autism. A training plan was developed which included Mrs. B working with the prospective aide in a preschool setting. The Appellants rejected this plan, and instead asked SCCSD Director of Special Education Jean Peters if Mrs. B. could serve as Lev's aide. Mrs. Peters indicated that although Mrs. B. would assist with the training, the District intended to hire the prospective aide. Mr. B. sought the intervention of the Assistant Superintendent Richard Bathurst, who arranged a meeting to discuss options. One option was to put Mrs. B. in the classroom as a paid aide for Lev, assigned temporarily. Although some discussion of the detriment of hiring a parent as an aide was offered, the district agreed to this option. Mrs. B would work as Lev's aide at Clark School for his kindergarten year.

The Appellants had concerns about the implementation of Lev's first-grade IEP, based on observations by Mrs. B. who continued to serve as Lev's aide. The special education teacher testified that her responsibilities included monitoring the implementation of the IEP, conducting the monthly videotaping, and providing the 9-week progress monitoring updates to the IEP. However, she also testified that she did not regularly observe in Lev's classroom and did not monitor, record or document any of the specific provisions of the IEP such as teacher prompting or peer prompting. There are no progress monitoring data

for two of the 5 goals, and no objective data for the other three. The IEP implementation difficulties occurred as an artifact of insufficient planning for Lev's full inclusion

The relationship between Mrs. B. and Mrs. Reed had seriously deteriorated by the 11/25/02 meeting, at which the Appellants addressed their concerns to Principal Turner. Mrs. Peters described the difficult work conditions created by the mistrust between Mrs. Reed and Mrs. B. The classroom environment was impacted by the strained relationship, including a deterioration of Lev's performance. Two options were orally presented to the Appellants on 12/6/02: Lev and Mrs. B could go into another classroom or Lev could stay in Mrs. Reed's classroom with another aide. The Appellants considered neither of the options acceptable, and sought the intervention of the Superintendent. The Superintendent consulted advisors and concluded that the relationship could not be mended. The Assistant Superintendent notified the Appellants that the second option had been selected – another aide for Lev. In her letter, the Assistant Superintendent also advised Mrs. B. to discuss possible options of employment in the District. Mrs. B. was not terminated from SCCSD, had employment opportunities as a transfer, and chose not to pursue those opportunities. The District hired an aide and planned a January transition that included Mrs. B. working with the new aide. The Appellants removed Lev from school, and did not cooperate with the District in the attempts to train a new aide. In February the District organized training with UCSB to prepare the new aide. The training was held, but the Appellants did not cooperate and did not bring Lev to the training. The hiring of a replacement aide had been clearly intended. Statements in the PLEP sections of both the 2001-2002 and 2002-2003 IEP's indicate plans to hire a replacement aide. The hiring of a replacement aide was to be coordinated with consultation from UCSB.

Conclusions of Law

The IDEA requires that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living [20 U.S.C. § 1400(d)(1)(A)]. The free appropriate public education is to be provided in conformity with the individualized education program [20 U.S.C. § 1401(8)(D)]. Similar specification is found in federal regulations [34 C.F.R. § 300.1(a); 34 C.F.R. § 300.13(d)] and in Iowa regulations [§ 281 - 41.3(3) I. A.C.]. The appropriateness of a child's program is determined in a two-pronged inquiry which examines the procedural and substantive requirements [*Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982)]. First it must be determined whether the educational program was developed with the procedures required by IDEA, and second, it must be determined whether the educational program developed through those procedures was reasonably calculated to enable the child to receive educational benefit. The Appellants claim the SCCSD and Western Hills AEA 12 have denied a free and appropriate education to Lev B. Each claim will be considered individually.

1. Whether the Appellees have denied a free an appropriate education to Lev B. by changing a material provision of his program without the prior written notice to

the parents mandated by the IDEA (to wit, the prior IEP's assurance that Lev's aide would not be changed until both the IEP Team and Dr. Koegel determined that a new aide could meet his needs).

The IDEA mandates that written prior notice be provided to the parents of a child whenever the local education agency (LEA) proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate education to the child [20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); § 281 - 41.104 I.A.C.]. The content of this notice must include a description of the action proposed by the agency, an explanation of why the agency proposes the action, a description of any other options that the agency considered and the reasons why those options were rejected, a description of each evaluation procedure, test, record or report the agency used as a basis for the proposed action, a description of any other factors that are relevant to the agency's proposal, a statement of the procedural safeguards available to parents, and the sources to obtain assistance [20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); § 281 - 41.401(1) I.A.C.].

The "aide replacement language" (i.e., "Lev's aide is well-trained in this area and could provide training to her replacement should the Team and UCSB determine a replacement would fit Lev's needs") was in the PLEP of Lev's IEP for the 2001-2002 school year. It is not included in the PLEP section of the 2002-2003 IEP. Appellants claim that such a change without notice is a violation of IDEA.

The School district personnel testified that there was no intent to change any provision of Lev's program when the agreed-upon 2002-2003 IEP was "transferred" on to new forms. More importantly, consultation with UCSB did continue throughout the fall and throughout subsequent attempts to hire a replacement aide. Although the actual language was omitted, the omission of this language did not substantively alter the provision of FAPE.

However, when personnel matters necessitated a change in the intent of this "language", the Appellants were provided notice in the letter from Assistant Superintendent Linda Madison on December 11, 2002. The letter informed the Appellants that the District had decided to hire a replacement aide for Lev. A related issue is whether that notice was legally sufficient.

The letter described the action proposed, to "authorize the immediate hiring of an instructional assistant for Lev to take up the work that (Mrs. B.) has been doing. The District will immediately begin a search for and training of an assistant for Lev". The letter explained why the district proposed the action: "a significant breakdown in the professional relationship between Mrs. Reed and (Mrs. B.) has occurred". The letter described this proposal as the "best option". Although other options weren't identified in the letter, the "other option" of Lev and Mrs. B. both moving to a different classroom had been presented orally by Principal Turner on December 6, 2002. The letter described the basis for the proposed action in reference to the "numerous efforts to med the relationship" and the conclusion that "it cannot be mended". Other relevant factors in

selecting this option was a reference to the Appellants' "strong desire to have Lev educated within his current classroom so he can remain with his established peer group" and the provisions established for "transitioning" the new aide. Although a statement of procedural safeguards and sources of assistance were not included in this letter, this procedural inadequacy did not compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits (*Roland M. v. Concord School Community*, 910 F. 2d, 983, 994 (1st Cir. 1990). The omission of the "aide replacement language" did not compromise Lev's right to FAPE, hamper the Appellants opportunity to participate in the formulation of his IEP, or deprive Lev of education benefits. Such deficiencies have been described as "insufficient to discredit the appropriateness of the education that was shouldered by the IEP" [*Independent School District No. 283 v. S. D.*, 948 F.Supp. 860, 882 (D. Minn. 1995), aff'd 88 F.3d 556,561 (8th Cir.1996). The Appellants were in contact with legal representation in June of 2001, prior to the time of the notice (School Records p. 354) and had earlier contacts with Iowa Protection and Advocacy in March, 1998. Appellants were aware of, and involved with, the procedural safeguards available under the IDEA. The letter from Dr. Madison provided the Appellants with legally sufficient notice of the district's intent to change Lev's instructional assistant.

Further, if the omission of the "aide replacement language" did not represent a change in the Lev's educational placement or provision of FAPE, the notice provisions of 20 U.S.C. § 1415(c), 34 C.F.R. § 300.503(b), and § 281 - 41.401(1) I.A.C. would not be triggered. The SCCSD considered the "aide replacement language" to be an understanding of how the present aide could provide training to a replacement aide, but not impacting the direct provision of FAPE to Lev. B. The Office of Special Education Programs (OSEP) ruled that for purposes of triggering the IDEA's procedural safeguards, a change in placement occurs if a change substantially or materially alters a student's educational program [*Letter to Green*, 22 IDELR 639 (OSEP 1995]. To determine whether a change substantially or materially alters a student's educational program, the effect of the change on the following factors must be examined: whether the educational program set out in the student's IEP has been revised; whether the student will be educated with non-disabled children to the same extent as before the change; whether the student will have the same opportunities to participate in non-academic and extracurricular services; and whether there has been a change in the continuum of alternative placements. If this inquiry leads to the conclusion that a substantial or material change has occurred, the District must provide IDEA's procedural safeguards including prior written notice [*Letter to Fisher*, 21 IDELR 992 (OSEP 1994)]. The assignment of specific classrooms or specific teachers are administrative decisions not impacting educational placement [*Letter to Wessels*, 16 IDELR 735 (OSEP 1990)]. For example, intra-district school transfer does not constitute a change in placement [*J. S. v. Lenape Regional High Sch. Dist Bd. of Educ.* (102 F.Supp.2d 540,545 (D.N.J 2000); *Anchorage School* District, 37 IDELR 204 (SEA AL 2002) and change in a qualified teacher absent a significant change in the program content or methodology is not a change of placement [*Capistrano Unified School District*, 103 LRP 21848 (SEA CA 2003); *Ludington Area Schools,* 20 IDELR 211 (SEA MI 1993); Office of Civil Rights, EHLR 353:144]. In *Tuscaloosa County*

Board of Education, 21 IDELR 826 (SEA AL 1994) a school district's change in the number and identity of therapists for a 10-year-old child with autism did not constitute a change in the student's IEP. A hearing officer determined that the district had discretion to choose personnel as long as the program offered met the requirements for FAPE and was not obligated to provide notice to the parent or comply with other procedural safeguards which triggered from changes in IEPs. Methodology and personnel decisions are left to the school administration and are not subject to notice requirements as they do not affect student's identification, evaluation or placement [*Department of Education, State of Hawaii*, 102 LRP 3757 (SEA HI 2000).

Other decisions have held that educational placement is defined as the educational program and services provided to the child. If changes in the IEP do not terminate those programs or services or change the "amount or frequency" of the program or services, written prior notice is not required. See e.g., *Bangor School Department*, 36 IDELR 192 (SEA ME 2002) where change from one aide to several aides to provide 1:1 services did not change the amount or frequency of the services identified in the IEP; *Granite School District*, 19 IDELR 402 (SEA UT 1992) where decision to discontinue home-school communication notes was not a change in the programs or services provided to the child.

The omission of the "aide replacement language" from the 2002-2003 IEP did not trigger the requirements of written prior notice [20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); § 281 - 41.104 I.A.C.]. The omission was a procedural deficiency that did not compromise the student's right to an appropriate education, seriously hamper the parents' opportunity to participate in the formulation process, or cause a deprivation of education benefits. This omission did not revise the educational program set out for Lev in his IEP. However, when the district did initiate a change in Lev's aide, the Appellants were provided notice. The Appellees prevail on this issue.

2. Whether the Appellees have denied a free and appropriate education to Lev B. by failing to comply with the provisions of his IEP concerning the replacement of his aide.

The IDEA specifies the required components of an IEP at 20 U.S.C. § 1414(d)(1)(A)(i-viii). These eight components include a) a statement of the child's present level of educational performance, b) a statement of measurable annual goals, including benchmarks or short-term objectives, 3) a statement of the special education and related services and supplementary aid and services to be provided to the child, 4) an explanation of the extent to which the child will not participate with nondisabled children in the regular class, 5) a statement of individual modifications in the administration of State or districtwide assessment of student achievement, 6) the projected date for the beginning of the services and the frequency, location and duration of those services and modifications, 7) a description of transition services, and 8) a statement of how the child's progress toward the annual goals will be measured and how the parents will be regularly informed of their child's progress (see also 34 C.F.R. § 330.347(a)(1-8); § 281 - 41.67(1)(a-g) I.A.C.].

The following language was included in Lev's previous IEP and it was clearly the intent and understanding of the parents that the language would be included in the 2002-2003 PLEP: "Lev's aide is well-trained in this area and could provide training to her replacement should the Team and UCSB determine a replacement would fit Lev's needs". Other members of the IEP team testified that there was no intention to omit that language. Lev's former and disputed IEP also list the services of a 1:1 aide in both the description of supplemental aids and services and the description of related services in the 2001-2002 IEP, and as special education services in the 2002-2003 IEP. The legal issue is whether the district's decision to change Lev's aide constituted a failure to comply with his IEP's "aide replacement language" resulting in a denial of FAPE.

First, "under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit" [*Houston Independent School District v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000)]. The "aide replacement language" suggests that the IEP team and UCSB would determine when replacement would best fit Lev's needs. Clearly such a replacement was anticipated, and the length of training and the need to establish a "positive trend line" with a replacement aide had been discussed in June of 2001. The Appellants were invited to and participated in IEP meetings discussing replacement training and assured that UCSB would provide critique and consultation throughout the training and the school year. Although the conflict between Mrs. Reed and Mrs. B. may have resulted in moving the aide replacement process quickly ahead, the IEP team and UCSB were involved. As team members, the Appellants may not have agreed with the decision involving aide replacement, but the process clearly followed the intent of the "aide replacement language". The omission of the "aide replacement language" in the PLEP was a de minimis oversight as the process for replacement was followed by the district.

Even had they not complied with the "aide replacement language" of the PLEP, it is possible the SCCSD and Western Hills AEA 12 could have replaced Mrs. B. without an IEP meeting or consultation from UCSB. Several decisions addressing IEP implementation have held that school districts have prerogative to assign staff to provide educational services. Of particular interest are issues of IEP implementation concerning the provision of an aide. For example, in *Manalansan v. Board of Education of Baltimore City*, 35 IDELR 122 (D. MD. 2001) the district court held that "while the school may have discretion in determining the mode of implementation of the IEP and even the site of the implementation, it is limited by what the IEP actually lists as agreed upon services and is bounded by the mandate that those services be provided...While (the student) is not entitled to a particular aide, the services of an aide must be provided in accordance with his IEP". A change in paraprofessional personnel is within the discretion of the district and not subject to discussion by the IEP team: "School districts have the discretion to determine who will provide students with their program of special education and are not required to seek parental input when a staffing decision is made"

[*Independent School District No. 11, Anoka-Hennepin* (SEA MN 2001)]. See also *Bryan County School District*, 30 IDELR 445 (SEA GA 1999) (recognizing the authority of local agencies in the "choice of educational personnel" to carry out the education programs for students with disabilities); *Vidor Independent School District*, 27 IDELR 679 (SEA TX 1998) (denying parents the right to select the aide since such assignments were an administrative function of the district); *Spring Branch Independent School District*, 2 ECLPR 23 (SEA TX 1996) (affirming the school district's authority to select appropriate personnel to implement IEP goals and objectives).

Two cases relevant to the present appeal concerned the assignment of a specific aide preferred by the parents. In *Slama v. Independent School District No.* 2580, 39 IDELR 2 (D.C. MN 2003), the district – after initially vacillating - acceded to the parents' demand that their private aide be their child's school aide, and the agreement was memorialized in the IEP. When the district changed the assignment of the aide, the parents claimed a failure to implement the IEP while the district argued that the wordage of the IEP merely documented an informal agreement with the parents and did not constitute a substantive decision concerning the IEP. The district court determined that the IEP mandated the district provide the student with an aide, not a particular aide, and that the choice of aide was not a substantial or significant part of the IEP. By initially accommodating the parents, "the district in no way lost its prerogative to determine who would provide service". Further, the district was not required to assign an aide with equal or better qualifications as the parent-preferred aide, for the district's obligation was "simply to assign (an aide) who is sufficiently capable of assisting (the student) so as to provide her FAPE [referencing *Hendrick Hudson District Board of Education v. Rowley*; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997)]. See also *Los Angeles Unified School District*, 28 IDELR 324 (SEA CA 1998)(where district had no obligation to furnish student with best possible aide).

A second case involved a child whose mother was assigned as the 1:1 aide. When the mother's presence was found to be counterproductive and another aide was assigned, the parents removed the child from school and provided home schooling. When the student returned to school, the board identified an aide for the child and refused the mother's request that she be allowed to resume serving as the student's aide for a three-month transitional period. The parents filed for due process to contest that refusal. A state review officer held that "the child requires the services of an aide, but that his needs are not so unique that he would not be able to benefit from instruction without the services of his mother as his aide. Petitioners' concern about the child's ability to return to school and benefit from instruction without the assistance of his mother is speculative" [*Board of Education of Scotia-Glenville Central School District*, 28 IDELR 727 (SEA NY 1995)].

Other cases have confirmed that if the selection of aide was "reasonably calculated" to provide the student benefit, the provision of FAPE was not violated. See e.g., *Pittsfield Public Schools*, 18 LRP 998 (SEA MA 1992)(finding that the replacement of the one-on-one aide with a less experienced aide was not necessarily a denial of FAPE since the district had provided supervision and on-the-job training to met the requirements of "trained paraprofessional" as called for in the student's IEP); *Freeport School District*

145, 34 IDELR 104 (SEA IL 2000)(rejecting the parents' attempt to substitute the aide with another qualified individual. The parent's contended that there was insufficient rapport between the students and aide, necessary for the student to communicate her medical needs. The parents failed to prove by a preponderance of the evidence that the student's aide interfered with the implementation of the IEP or the provision of FAPE); *Lake Havasu Unified School District* (OCR 2001) (ruling that because the IEP did not specify a specific individual to act as a student's aide, changing of aide was not a failure to follow the IEP); *Moorestown Township Board of Education*, 38 IDELR 139 (SEA NJ)(holding the present 1:1 aide was capable of meeting obligations specified by the IEP without additional training).

Importantly, the *Slama* decision described the aide services as "generic", and the needs of the child in *Scotia-Glenville* were described as "not so unique". In *Freeport*, the qualifications of the aide proposed by the school district were uncontested. The general nature of the aide services may distinguish those cases from the present appeal. If a school district's refusal to provide the services of a specific individual to a child constituted a denial of a FAPE a hearing officer or judge could order that steps be taken by the school district to provide the child with a free appropriate public education, including the services of a specific individual (*Ludington Area Schools*, 20 IDELR 211[SEA MI 1993]. Yet a court specifying individuals to provide services or enjoining specific personnel from working with students would be "extraordinary" or on "rare occasion" [*Moubry By and Through Moubry v. Independent School District 696, Ely, Minn.*, 951 F. Supp. 867, 885 (D.C. MN 1996)].

The Appellants argue that the discretionary authority of a school district on personnel issues is not absolute, and does not override the requirement that a child eligible under the IDEA is entitled to a FAPE. See e.g., *Freeport School District* 145, 34 IDELR 104 (SEA IL 2000) where the hearing officer determined that "Normally the selection or retention of an aide to assist a student with disabilities is an administrative function and not subject to review under the IDEA. An exception exists when the selection or retention of an aide deprives a student of a free appropriate public education"; *Vidor Independent School District*, 27 IDELR 679 (SEA TX 1998) where "the selection or retention of an aide or other personnel to assist a student with disabilities is normally an administrative function of the school district and is not subject to review under the IDEA. An exception exists where the selection or retention of the aide would, in some manner, result in the denial of a free appropriate public education to the student".

The Appellants argue that Lev B. requires an exceptionally qualified aide to receive a FAPE, and present three cases to support the contention that unbridled administrative discretion to change a specially-credentialed aide resulted in the denial of FAPE. In *Independent School District No. 318*, 24 IDELR 1096 (SEA MN 1996), parents requested that the paraprofessional assigned to their son be trained in Lovaas-based therapy. The school district had offered to have a paraprofessional trained in the use of applied behavior techniques, but refused the Lovaas-based training. The ALJ concluded that it was highly unlikely that an aide "without knowledge of the methodology to which the Student is accustomed and its long-term goals would be able to assist the Student in

maintaining and generalizing his skills, as well as acquiring new skills". The ALJ also order that an autism consultant be included as a member of the child's IEP team. This case is distinguished from the present appeal in several ways. First, the aide proposed by the district to replace Mrs. B. as Lev's assistant was trained in the PRT method. The proposed aide was to 'transition" into the position by first observing Mrs. B and later serving as Lev's aide under Mrs. B's supervision. An autism consultant was to be contacted twice a month, and critique the performance of the aide. It is clear that the school district intended to assure that the replacement aide had the training and skills necessary to provide Lev with a FAPE.

Gerber Union Elementary School District, 26 IDELR 199 (SEA CA 1997) involved a dispute concerning the provision of an aide during due process proceedings for a student with serious emotional disturbance. The district had specifically identified an individual to serve as the aide for a 3-week interim period before the next schedule IEP meeting. The meeting was cancelled and the aide continued serving the student for three months. When the district decided to reduce the amount of time the aide spent with the student, the parents filed for due process and claimed the specifically-named aide was the de facto and "stay-put" placement. The IHO agreed. This case is significantly different from the current appeal. In *Gerber*, a specific individual was identified as the aide in the IEP. In Lev's IEP, no specific individual is identified, but only a "1:1 aide". Also, the parents were appealing the reduction in the amount of time the aide spent with the student and requesting full-time aide services as the "stay-put" placement until the issue of amount of time was resolved. In this appeal, the SCCSD never proposed nor initiated a reduction in Lev's 1:1 services.

The third case presented by the Appellants, *Calaveras Unified School District*, 29 IDELR 1099 (SEA CA 1998) resulted in a decision that the 1:1 aide proposed by the district for a 9-year-old with autism was not appropriate. The hearing officer concluded that the aide must be familiar with the student, had worked with him in the context of his home program, was trained in behavior analysis, could prevent dependence, could assist the student's teacher and had experience with students with autism. However, this case was subsequently appealed to district court which held that "such a restriction imposed too high a standard upon the district" [*Gellerman v. Calveras Unified School District*, 34 IDELR 33 (E.D. CA 2000). The district court decision was affirmed on appeal to the 9th Circuit, which held that although a behavioral consultant had "recommended" that the aide have certain qualification, the aide selected by the district was capable of furnishing appropriate services [*Gellerman v. Calaveras Unified School District*, 37 IDELR 125 (9th Cir. 2002).

Parents cannot charge that the school district failed to provide a FAPE when they refuse to consent to a replacement aide or remove their children from school due to disagreements of personnel choice. See e.g., *Montello School District,* 102 LRP 25586 (SEA WI 1999)(where parent refusal to consent to replacement health service provider resulted in the delay of related services specified in the IEP); *Dallas School District*, 27 IDELR 873 (SEA PA 1997)(where parents withdrew their son from school in a dispute over the person the District proposed as his new nurse enabler. The review panel

concluded that relevant requirements specified that related services providers be certified and qualified: "the regulations do not contain provisions that parents also approve, based on their personal preferences, those persons who are to deliver the program of special education and related services").

The SCCSD has attempted to follow the understanding of the "aide replacement language" outlined in the IEP, but those efforts have been thwarted by the parents' refusal to cooperate. The decision of SCCSD and WHAEA 12 to change Lev's aide did not constitute a failure to comply with his IEP's "aide replacement language" and did not result in a denial of FAPE. The Appellees prevail on this issue.

3. Whether the Appellees have denied a free and appropriate education to Lev B. by failing to monitor and enforce the provisions of his IEP concerning intervention techniques and supports in the classroom.

Local school districts and AEA's "must provide special education and related services at public expense, under public supervision and direction" [20 U.S.C. § 1401(8); 34. C.F.R. § 300.13(a); § 281 - 41.3(3) I.A.C.]. Each agency shall provide special education and related services to an eligible individual in accordance with the IEP and make a good-faith effort to assist the eligible individual to achieve the goals and objectives or milestones listed in the IEP [34 C.F.R. § 300.350(a)(1)(2); § 281 - 41.70(3) I.A.C.]. Each public agency shall ensure that the IEP is accessible to each general education teacher, special education teacher, support services provider, and other service provider who is responsible for its implementation; and each teacher and provider is informed of the teacher or provider's specific responsibilities related to implementing the eligible individual's IEP and the specific accommodations, modifications, and supports that must be provided for the eligible individual in accordance with the IEP" (§ 281 - 41.60 I.A.C.).

These regulations clearly indicate that it is the responsibility of the local school district and AEA to provide and monitor the provision of FAPE in accordance with an individual's IEP. Lev's IEP listed the following special education services: 1-hour videotaping monthly, 1:1 classroom aide, speech and language services, autism team consultant (four times per year) and consultation with Dr. Koegel (2 times per month), reading instruction, in-home therapy, preteaching and priming materials provided to the aide, and "pair Lev with a variety of peers in classroom and playground activities daily". Three of Lev's IEP goals also specify "teacher prompts" are to be provided to reduce the prompts from the 1:1 aide, and that peer prompts are to be encouraged.

Not only did the district fail to adequately monitor Lev's IEP, but that failure led to the circumstances surrounding the issues of this appeal. The special education teacher testified that her responsibilities included monitoring the implementation of the IEP, conducting the monthly videotaping, and providing the 9-week progress monitoring updates to the IEP. However, she also testified that she did not regularly observe in Lev's classroom and did not monitor, record or document any of the specific provisions of the IEP such as teacher prompting or peer prompting. There are no progress monitoring data for two of the 5 goals, and no objective data for the other three. Although there is

testimony from Mrs. Jansen, Principal Turner and speech-language pathologist Tammy Daane that the IEP was being following, their conclusions are based on limited observations and no specific data. Even when directed by Mrs. Peters to check the implementation of Lev's IEP, notes from Principal Turner's are general, narrative comments.

The person monitoring the implementation of Lev's IEP was his aide, Mrs. B. As the Appellants testified, Mrs. B. tried to discuss implementation issues with Mrs. Reed, but that she "did not take it seriously". The meeting the Appellants scheduled on 11/25/02 with Principal Turner was to discuss IEP implementation concerns. On their "urgent list" were teacher prompting, peer prompting and pairing Lev with peers – all identified components of Lev's IEP. The Appellants testified that after the meeting they saw little improvement in the implementation of Lev's IEP. The relationship between Mrs. Reed and Mrs. B. deteriorated, options were considered, and a final decision to remove Mrs. B. as Lev's aide was made.

Difficulties with the implementation and monitoring of Lev's IEP occurred as an artifact of insufficient planning for Lev's full inclusion: Mrs. Jansen did not have daily or regular contact with Lev, yet she was the assigned special education teacher. Principal Turner testified that since Lev did not go to the special education classroom, the role of the special educator is "different", and she would not be responsible "in this case" for monitoring the IEP. It appears that Mrs. B. may have been forced to monitor the implementation of the IEP by "default".

Mrs. Jansen has considerable experience and expertise in special education. With her expertise in consultation, it is possible that any inconsistencies involving the implementation of Lev's IEP could have been addressed, professionally, to Mrs. Reed – providing Mrs. Jansen had the opportunity to observe frequently, collect data and conduct progress monitoring. As she testified, the November 25, 2003 meeting was the first time she was aware that the Appellants were dissatisfied with the implementation of Lev's IEP. It is the opinion of the Administrative Law Judge that Lev's full inclusion required intensified efforts from special education personnel, including specific plans for progress monitoring. Although two forms exist for progress monitoring (School Record at 313 and 333) no data were collected or reported. The "observation" and "bi-weekly documentation" to be used for progress monitoring (see "Evaluation" sections on 10/2/2002 IEP) were the responsibility of special education personnel.

There was confusion of roles and responsibilities of IEP implementation and progress monitoring. Was the UCSB consultant progress monitoring? Who was responsible for assisting the regular classroom teacher in increasing prompts (i.e., how many, when, how) and encouraging peer prompts (i.e., how many, when, how). Was Mrs. B, in her position as aide, responsible for progress monitoring?

Paraprofessionals "may be employed to assist in the provision of special education and related services to children with disabilities [§ 281 - 41.10(1) I.A.C.], shall "work under the supervision of professional personnel who are appropriately authorized to provide

direct services in the same area where the paraprofessional provides assistive services" and "not serve as a substitute for appropriately authorized professional personnel" [§ 281 - 41.10(1)(b)(c) I.A.C.]. Although Mrs. B. can be involved in data collection, the responsibility to monitor the implementation of the IEP falls first to the special education teacher and ultimately to SCCSD and WHAEA 12.

The Appellees have denied a free and appropriate education to Lev by failing to monitor and enforce the provisions of his IEP concerning intervention techniques and supports in the classroom. The Appellants prevail on this issue.

4. Whether the Appellees have denied a free and appropriate education to Lev B. by recriminating against his one-on-one aide for advocating on the child's behalf.

The 1st Circuit in *Weber v. Cranston School Committee*, 32 IDELR 141 (1st Cir. 2000 concluded that a claim of retaliation fell within the "zone of interests" protected or regulated by the IDEA statutes, due to the central role played by parents in assuring a free appropriate public education (FAPE) [20. U.S.C. § 1400(d)(1)(A)]. The IDEA also provides the "opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child [20 U.S.C. § 1415(b)(6)]. The court in *Weber* determined that a claim of retaliation is "literally related'"...to efforts to gain the provision of FAPE. As such, an appellant would have standing under IDEA to bring a retaliation complaint.

The only other decision discovered by the Administrative Law Judge that addressed the topic of recrimination or retaliation as an IDEA issue was *Watson Chapel School District*, 35 IDELR 288 (SEA AK 2001). The hearing officer held "while this tribunal does not have jurisdiction over section 504 claims of discrimination and retaliation or for violation of constitutional rights, and cannot award civil remedies for such violations, when such discrimination and retaliation have the effect of denying a student a free, appropriate, public education, then these acts violate the IDEA and do come within the jurisdiction of this tribunal". Since the Appellants assert that the alleged recrimination against Mrs. B. has denied a free and appropriate education to Lev B, subject matter jurisdiction is established.

It is first necessary to ascertain if recrimination occurred. If so established, it must be determined if the recrimination denied Lev B. a free and appropriate education.

Absent standards for a legal analysis of recrimination under the IDEA, the approach incorporated by the Office of Civil Rights (OCR) in investigating claims of retaliation will be utilized. First, the Appellants must establish a prima facie case of retaliation. A prima facie case of retaliation is made by showing that 1) the individual engaged in a protected activity, 2) the school district was aware of the protected activity, 3) the school district took adverse action against the individual contemporaneous with or subsequent to the protected activity; and 4) there was a causal relationship between the adverse action

and the individual's participation in the protective activity (i.e., an adverse action followed the participation in the protected activity within a period of time and under such circumstances that a retaliatory motivation can be inferred). Once a prima facie case has been established, the burden shifts to the school district to articulate a non-retaliatory reason for its action. The evidence is then analyzed to determine whether the school district proffered reasons are a pretext for recrimination. To establish a prima facie showing of retaliation, the evidence must be sufficient to meet all four elements.

The United States Supreme Court clarified that, after a plaintiff presents a prima facie case, "[t]he burden must shift to the [defendant] to articulate some legitimate, nondiscriminatory reason" for its adverse action [*McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668 (1973). In the later decision *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), the Supreme Court presented the burden-shifting analysis:

> McDonnell Douglas and subsequent decisions have "established an allocation of the burden of production and an order for the presentation of proof in ... discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). First the plaintiff must establish a prima facie case of discrimination. *Ibid.*; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ... [Once the prima facie case is established,] the burden ... shifts to [the defendant] to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine, supra*, at 254, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207. This burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center*, supra, at 509, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407. [A defendant meets] this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired [for a legitimate reason]. Accordingly, "the McDonnell Douglas framework—with its presumptions and burdens" disappear[s], *St. Mary's Honor Center*, supra, at 510, 509 U.S. 502, 113 St. Ct. 2742, 125 L. Ed. 2d 407, and the sole remaining issue was "discrimination *vel non*," [*U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. [711,] 714, 103 S. Ct. 1478, 75 L. Ed. 2d 403.
>
> Although intermediate evidentiary burdens shift back and forth under this framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S., at 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207. And in attempting to satisfy this burden, the plaintiff–once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision–must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.; see also St. Mary's Honor Center*, supra, at 507—508, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407. That is, the plaintiff may attempt to establish that he was the victim of intentional

> discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, supra, at 256, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center*, supra, at 511, 509 U.S. 502, 113 St. Ct. 2742, 125 L. Ed. 2d 407, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual," *Burdine*, supra, at 255, n. 10, 450 U.S., 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 [*Reeves*, 530 U.S. at 141].

The allocation of evidentiary burdens is also described in *Ryther v. KARE11*, 108 F.3d 832, 837 (8th Cir. 1997): "it is well settled that a plaintiff's presentation of a prima facie case creates a legal presumption of unlawful discrimination. This presumption places an obligation upon the [defendant] to produce evidence of a legitimate, nondiscriminatory reason for [the adverse action]".

Protected Activity

Under this standard, the Appellants must have attempted to assert or protect a right or privilege secured under IDEA. As a member of the IEP team, parents are extensively involved in formulating an appropriate education program for their child. Parental input is included in evaluations [20 U.S.C. § 1414(b)(2)(A)] in eligibility determinations [20 U.S.C. § 1414(b)(4)(A-B)]; in re-evaluations [20 U.S.C. § 1414(c)(1)(A)]; in IEP development [20 U.S.C. § 1414(d)(1)(B)(i)]; and in placement decisions [20 U.S.C. § 1414(f)]. Further, the IDEA provides parents with extensive procedural safeguards, including the "right to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such a child" [20 U.S.C. § 1415(b)(6)]. Although this language is intended to describe the formal dispute-resolution, it would be inconsistent with the intent of the law to prohibit parents from informally presenting complaints, or as the Appellants assert, advocating for their child.

The Appellants engaged in protected activity when Mrs. B. advocated on November 25, 2002 for better compliance of her son's IEP.

Knowledge

The Appellants must show that the school district was aware of the protected activity. The Appellants advocated for the better implementation of Lev's IEP in a meeting held November 25, 2002. In attendance at the meeting were the Appellants, the principal, the special education teacher, and the general education teacher. From the documents submitted and testimony, it is clear that the purpose of the meeting was to address the Appellants' concerns about their son's IEP. The school district was aware of the protected activity.

Adverse Action

The Appellants must show that the District took adverse action against Mrs. B., contemporaneous with or subsequent to the protected activity. The District's action must significantly disadvantage Mrs. B.

Courts have made it clear that "'not everything that makes an employee unhappy is an actionable adverse action.'" [*Jeffries v. Kansas Dept. of Social and Rehabilitation Services*, 946 F. Supp. 1556, 1567 (D KS 1996) quoting *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996)], yet adverse action should be "liberally construed' in retaliation claims [*Hysten v. Jefferson County Board of County Commissioners,* 995 F. Supp. 1191, 1202 (D KS 1998)].

Action involving transfers, non-renewal of contracts or failure to re-hire has been found "adverse" within the meaning of Section 504 law. See e.g., *Chicago Public Schools*, 17 IHLR 762, 763 (OCR 1991)(ruling that the third element of a prima facie case was established by the school district's decision to transfer the complainant's sons after she refused to release medical records to the school. The transfer was inconsistent with district policy prohibiting unilateral transfers, and resulted in adverse action); *Osceola County School District*, 23 IDELR 352, 353 (deciding that the non-renewal of the complainant's contract as an employee of the school district was an adverse action); *Orange County School District*, 23 IDELR 51, 51 (OCR 1995)(ruling that the failure to re-hire a paraprofessional constituted adverse action).

The school district argues that Mrs. B has not been terminated, is eligible for employment and that a change in her assignment does not constitute an adverse action. The District argues that an employer should be able to separate individuals in a work environment if those individual can no longer work together effectively. If neither individual is forced into a position where employment advantage is lost, such as loss in pay or opportunity for advancement, the District suggests no adverse action should be found.

The 8th Circuit in *Kim v. Nash Finch Co.*, 1123 F.3d 1046, 1060 (8th Cir. 1997) ruled that "retaliatory conduct may consist of 'action less severe than outright discharge' [quoting *Dortz v. City of New York*, 904 F. Supp. 127, 156 (SD NY 1995) where negative evaluations, increased supervision, and decreased communication with her supervisors "disadvantaged, and interfered with, her ability to perform her job, which could support the conclusion that Plaintiff suffered from adverse employment action"] and be "more disruptive than a mere inconvenience or an alteration of job responsibilities [quoting *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)]. Although the Plaintiff in *Kim* had his duties reduced, was required to undergo special training, and had his personnel file "papered" with negative reports, the conclusion that action less severe than discharge may be adverse is important in this appeal. See also *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) where negative job references represented adverse action: "we think that actions short of termination may constitute adverse actions within the meaning of the statute"; *Vergara v. Bentzen*, 868 F. Supp. 581, 592 (SD NY 1994) where "misstatements and exaggerations" in employee evaluation represented adverse action: "Although in most cases the alleged conduct involves

instances of retaliatory discharge...adverse action may take a variety of other forms"; *Motto v. General Services Administration*, 335 F. Supp. 694, 696 (ED LA 1971) where an employee was transferred because he was considered an undesirable employee and to induce his resignation: "Hence it was an adverse action even if it entailed no reduction in rank"; *Hysten v. Jefferson County Board of County Commissioners*, 995 F. Supp. 1191, 1202 (D KS 1998) where racial animus resulted in unfounded disciplinary action: "Examples of actionable adverse action include disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, and extension of a probationary period"; *Willie v. Hunkar Laboratories, Inc.*, 724 N.E.2d 492, 504 (OH Ct. App. 1998) where employee's exclusion from sales meetings and constructive discharge constitute adverse action: "Being treated differently from other employees because of protected conduct may be an adverse action"; and *Sauers v. Salt Lake County*, 1 F.3d, 1122 (10th Cir. 1993) where the plaintiff demonstrated that she was reassigned against her wishes: "satisfying the requirement that an adverse action be taken against her".

On December 11, 2002 the Appellants received formal notification from Assistant Superintendent Linda Madison that a replacement aide was to be hired for Lev and that Mrs. B. was invited to pursue other employment options with the district (School Record at p.416). Although Mrs. B was not terminated from employment with the district and it was her decision not to pursue other employment options with the district, a mid-year change in assignment and loss of normal work assignment could be viewed as disadvantageous to Mrs. B. Replacing Mrs. B. as Lev's aide was more than a "mere inconvenience" [*Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)] but "less severe than outright discharge" [*Kim v. Nash Finch Co.*, 1123 F.3d 1046, 1060 (8th Cir. 1997)] The decision to replace Mrs. B. as Lev's aide may be construed as adverse action.

Causal Connection

The Appellants must show that there was a causal relationship between the adverse action and the individual's participation in the protective activity (i.e., an adverse action followed the participation in the protected activity within a period of time and under such circumstances that a retaliatory motivation can be inferred). A causal connection exists based on the closeness in time between the protected activity and the adverse action. See e.g., *Pinon Unified School District*, 31 IDELR 63 (OCR 1999); *Orange County School District*, 23 IDELR 51 (OCR 1995). Other evidence may include a change in the treatment of the student or advocate after the district had knowledge of the protected activity, or the treatment of the student or advocate compared to other similarly-situated persons.

A causal connection can be inferred between the protected activity of November 25, 2002 and the notification to replace Mrs. B. on December 11, 2002. The notification to hire a replacement aide and to transfer Mrs. B. occurred in close proximity to the date she participated in the protected activity.

The Appellants have met the burden of establishing a prima facie case of retaliation or recrimination. The SCCSD must articulate and advance legitimate, non-retaliatory reasons for the adverse action. The district's explanations or justification for the adverse action must be supported by the evidence. It must be determined whether the reasons offered by the district are a pretext for retaliation.

The District' Reasons for the Adverse Action

The SCCSD argued that such a connection cannot be inferred between the protected activity and the adverse action because Mrs. B. was treated as persons who were similarly situated. Mrs. B.was not reassigned as Lev's aide due to personnel-related reasons. Specifically, the relationship between Mrs. B. and the regular classroom teacher had deteriorated to the point that in order to ensure an appropriate program for Lev B. and to maintain an effective learning environment for all the first-grade students, SCCSD decided to hire a replacement aide. The SCCSD acted to restore the learning environment, and protect the rights of both Lev and other children in the classroom. Without such action, the SCCSD would be at risk of denying a FAPE to Lev and impacting the education of all students. The Director of Special Education for the SCCSD testified that the district occasionally has had to move associates to other positions due to teacher-aide relationships. In this last year in which Mrs. B.was replaced, similar action was taken in regard to "one or two" other aides.

The school district argues that Mrs. B has not been terminated and is eligible for employment with the district. Both the Letter from Assistant Superintendent Madison and the testimony of Mrs. Peters indicated that the Mrs. B. would be eligible for other employment with SCCSD

To demonstrate pretext, the Appellants must show that the Appellees' explanation is "unworthy of credence" or demonstrate directly that a discriminatory reason more likely motivated the Appellees' action [*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)].

The Appellants argue that Mrs. B. advocacy caused or motivated the adverse action, not personnel matters. They argue that the "working relationship" reason shields and sanctions discriminatory retaliation. Yet, the record is replete with examples of advocacy from the Appellants, none of which resulted in adverse action. The Appellants have advocated for a home-based program, independent educational evaluations, specific training from autism experts, and on-going consultation from outside autism consultants - all of which have been provided by SCCSD. Both of the Appellants have been very involved in the development of Lev's educational program and very articulate advocates. This involvement and advocacy can be expected to continue and perhaps increase, a result non-analogous with the outcome in *Costenbader-Jacobson v. Pennsylvania*, 227 F. Supp 2d 304, 312 (MD PA 202) in which an employee's termination was intended to eliminate her complaints of sexual discrimination and maintain an efficient workplace, an interest outweighed by the plaintiff's right to free speech. The Appellants will continue as members of Lev's IEP team responsible for developing his educational program.

Under the IDEA, the Appellants will have available a variety of procedural safeguards and dispute-resolution options, including an impartial due process hearing, if they disagree with "any decision relating to the identification, evaluation, or educational placement of the child or the provision of FAPE to the child [20 U.S.C. § 1415(b)(6) & 20 U.S.C. § 1415(f)]. Mrs. B's advocacy did not cause or motivate the adverse action, but rather the deterioration of Mrs. B's and the classroom teacher's relationship. Both had accused the other of "lying" in the 11/25/02 meeting, the special education teacher testified communication between them had "stopped". The principal testified that she observed the strained relationship and that such a relationship was detrimental to enforcing Lev's IEP. It is reasonable and credible that the damaged relationship between Lev's aide and his classroom teacher would create barriers to implementing Lev's IEP and provided the motivation to hire a replacement aide.

The Appellants argue that Mr. B's use of the word "discrimination" at the 11/25//02 meeting hinted at perpended legal action and thus motivated the hiring of a replacement aide [analogous to the decision in *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996) in which an employee's pondered abortion was the reason for her discharge]. Yet the SCCSD offered that the action now described as "adverse" (i.e., the replacement of Mrs. B. with another aide) had been intended for nearly two years. Both the IEP's of 2001-2002 and 2002-2003 discussed a replacement aide. Although the personnel matter between the teacher and Mrs. B. may have quickened the process, replacement had been previously discussed. Mrs. Peters testified that when Mrs. B. was initially assigned as the 1:1 aide, it was a "temporary" appointment. A suggestion by the Appellants of possible legal action did not motivate the hiring of the replacement aide. The deterioration of the aide-teacher relationship quickened an aide-replacement process that had been contemplated by the IEP team for some time.

The Appellants also argue that the reason for the decision to replace Mrs. B's as Lev's aide was discriminatory. They allege that the classroom teacher was discriminating against them by not following Lev's IEP and SCCSD aided and abetted that discrimination by replacing Mrs. B. They claim this discrimination was effected with legal malice and a wanton and callous disregard for the rights of Lev, parents of children with disabilities and school district employees to advocate for compliance with a child's IEP.

An early decision from the 8th Circuit distinguishes denial of FAPE issues from disability discrimination allegations:

> The language of the (504) statute is instructive. It prohibits exclusion, denial of benefits, and discrimination "solely by reason of . . . handicap." Manifestly, in order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the "free appropriate education" required by (IDEA) must be shown. The reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational

> placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under EAHCA, is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reasons of his or her handicap... We think, rather, that either bad faith or gross misjudgment should be shown before a 504 violation can be made out, at least in the context of education of handicapped children. It is our duty to harmonize the Rehabilitation Act and the (IDEA) to the fullest extent possible, and to give each of these statutes the full play intended by Congress. The standard of liability we suggest here accomplishes this result and also reflects what we believe to be a proper balance between the rights of handicapped children, the responsibilities of State educational officials, and the competence of courts to make judgment in technical fields. So long as the State officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under 504 [*Monahan v. State of Neb.*, 687 F.2d 1164, 1171 (8th Cir. 1982)].

The classroom teacher's difficulties in implementing and monitoring Lev's IEP may best be described as an artifact of insufficient planning for Lev's full inclusion. The IEP difficulties are "system" errors due to the confusion of roles and responsibilities required for his full inclusion rather than discrimination solely by reason of his disability. The SCCSD's replacement of Mrs. B. as Lev's aide may be described as reasonable professional judgment rather than aiding and abetting discrimination.

The school district's reason for hiring a replacement aide is credible, non-retaliatory, and non-discriminatory.

VIII. Conclusion

Conclusion

The district has offered a legitimate reason for the assignment of a replacement aide. The Appellants have failed to demonstrate that reason as a pretext for retaliation. The reason given by the District for Mrs. B.'s replacement is legitimate and non-retaliatory. The evidence does not establish that the decision to replace Mrs. B. was based on her advocacy, perpended legal action, or discrimination. The decision to transfer Mrs. B. to another assignment was a personnel decision related to the breakdown in confidence and communication between the regular class teacher and the aide.

There is insufficient evidence to support the allegation of recrimination. The Appellees prevail on this issue.

5. Whether the Appellees have denied a free and appropriate education to Lev B. by failing to offer the parents credible assurances that the IEP will be fairly and fully enforced in the classroom.

The Appellants argue that the SCCSD violated the parents' reasonable expectations by failing and refusing to adequately enforce the IEP in the classroom and by retaliating against the parents for asserting the issue. They argue that this violation of expectation has resulted in a denial of FAPE. The Appellants cite several cases of parental hostility [*Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F.2d 712, 715 (7th Cir. 1991), cert. denied, 502 U.S. 1066, 112 S. Ct. 957 (1992); *Greenbush School Committee v. Mr. and Mrs. K.*, 25 IDELR 200 (D ME 1996); *Metropolitan Government of Nashville v. Guest*, 28 IDELR 290 (MD TN 1998); *South Royalton School District*, 27 IDELR 920 (SEA VT 1998)] and argue that if parental hostility has denied FAPE, then, *a fortiori*, FAPE is denied when a school district cannot provide credible assurances that an IEP will be fully and fairly implemented in the future.

Vigorous advocacy is an anticipated by-product of a policy encouraging parental involvement [*Warren G. v. Cumberland County School* District, 31 IDELR 27 (3rd Cir. 1999)]. However, parental hostility may interfere with the provision of FAPE.

While "the possibility that the District's failure to respond to [the parents' adamant] concerns has contributed to the opposition [and] necessitates considering "hostility" as a variable" [*Plymouth School District*, 102 LRP 25485 (SEA WI 1995)], reliance on parental hostility in this appeal is inappropriate for two reasons. First, in the cases cited, the effect of that hostility on the child's potential for FAPE was the determinative. For example, in the *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education* case, the parents had so poisoned the mind of the child that the public school placement could to provide FAPE to the child, and a private day school placement was ordered. The 7th Circuit ruled that hearing officers must assess whether a family's hostility is manufactured or poses a real threat to the success of the proposed IEP: "[parent opposition of] an IEP so vehemently and vocally as to "doom" its prospects...[must be] part of the prospective evaluation required by the {IDEA] of the placement's expected educational benefits". [See also e.g., *Greenbush School Committee v. Mr. and Mrs. K.*, 25 IDELR 200 (D ME 1996) where parent hostility and the student's "gripping fear" of persecution and harassment by administration, teachers and peers was the basis for a change in placement. It was the "animosity" between the parents and the school "*and its effect on [the student's] education*" that supported a change in placement [italics added]; *South Royalton School District*, 27 IDELR 920 (SEA VT 1998) in which "the dynamic between parents and a school is so destructive that educating their child at that school in anything close to a satisfactory manner is not possible. The animosity in the case under consideration has risen to such a level that attempts at cooperation and debate have long since been abandoned. The *effect on the student* of the long-term, intensifying hostility around her is that she will not be able benefit from her education"(italics added); and *Leslie B. v. Winnacunnet Cooperative School District*, 28 IDELR 271 (D NH 1998) reaching similar "poisoned" conclusion by

determining the child's own relationship with school officials had deteriorated, dooming any attempt to provide FAPE].

There is no evidence that Lev's mind has been poisoned so as to threaten the success of his IEP, and there is nothing to suggest that his parents' hostility would doom the success of Lev's educational program.

Second, if parental hostility has not impacted their meaningful participation in the procedural and substantive development of their child's education program, it cannot result in the denial of FAPE. For example, in *Roy and Anne A. v. Valparaiso Community Schools*, 25 IDELR 413 (ND IN 1997) the parent's hostility did not interfere with her participation in the development of the IEP nor with the effectiveness of her son's program: "[the student's] mother participated in all five case conferences, signed documents showing her unqualified agreement with the plans developed in each conference, and did not provide the school with notice that she later came to disagree with the plans. These factors hardly depict [the student's] parents as criticizing the IEP to the point where [the student] could not abide by it and would receive no benefit from it" [But see *Metropolitan Government of Nashville v. Guest*, 28 IDELR 290 (MD TN 1998) where placement in another elementary school was necessary due to the poor relationship between the parents and the school, which resulted in "belligerent and combative" IEP meetings].

Since the Appellants have meaningfully participated in the procedural and substantive development of Lev's education program, "hostility" has not resulted in the denial of FAPE for Lev.

The Appellees prevail on this issue.

Decision

The Appellees have prevailed on all but one of the issues of this appeal. However, the one issue on which the Appellants prevailed is significant and of equal value to the other issues combined. The finding for the Appellants on that one issue requires an order to the school team to ensure that the provisions of Lev's IEP concerning intervention techniques and supports in the classroom are enforced and monitored. Upon receipt of this decision, the SCCSD and WHAEA 12 shall:

1. Convene the IEP team to develop a plan for training and transitioning the replacement aide. It is important the UCSB provide consultation in the development of this plan. The plan shall be implemented immediately after its development in accordance with the provisions of § 281 – 41.124(2) I.A.C.
2. Convene the IEP team to develop a plan for data collection and progress monitoring. The plan shall include the type of data to be collected, the frequency of data collection, and the person(s) responsible for data collection. The plan shall also specify when, how and who will be involved in progress monitoring. For example, classroom data, videotapes, and interviews might be included in progress monitoring. The individuals monitoring progress must also be identified (e.g., special education teacher,

consultant from UCSB), as well as when (e.g., 9-weeks) and where (e.g., classroom, recess). Although Lev's aide may be one of the individuals involved in data collection, the responsibility of progress monitoring will remain with the professional personnel of SCCSD and/or WHAEA 12.

It is the hope of the undersigned administrative law judge that SCCSD/WHAEA 12 and Mr. and Mrs. B. will successfully establish a positive, trusting, and collaborative relationship - in the interest of Lev B.

Any party who is aggrieved by the findings and decision can bring civil action [20 U.S.C. § 1415(i) (2) (A)]. A party initiating civil action in federal court shall provide an informational copy of the petition or complaint to the department within 14 days of filing the action. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy [§ 281-41.124(2) I.A.C.].

Susan Etscheidt

Susan Etscheidt, Ph.D.
Administrative Law Judge

19 August 2023
Date