IOWA DEPARTMENT OF EDUCATION

In re: Michael S. (Cite as 22 D.O.E. App. Dec 206)	)	
	)	
Chester and Janet S., Appellants	)	Decision
	)	
v.	)	
	)	
Linn-Mar Community School District, and Grant Wood Area Education Agency (AEA 10),	)	Doc. # SE-281
	)	
Appellees	)	

The above entitled matter was heard by Administrative Law Judge Susan Etscheidt on February 4,5,6 and 17, 2004 in Cedar Rapids, Iowa. The hearing was held pursuant to Section 256B.6, Code of Iowa and 20 U.S.C. § 1415, and was conducted pursuant to 34 C.F.R. Part 300 and Chapter 281-41, Iowa Administrative Code (I.A.C.). The Appellants were represented by Douglas R. Oelschlaeger, of Shuttleworth and Ingersoll, P. L. C. The Appellees were represented by Matthew Novak, of Pickens, Barnes and Abernathy. The hearing was closed to the public at the request of the Appellants, and the witnesses were sequestered pursuant to the Appellants' request.

Procedural History

On December 1, 2003 the Appellants filed a request for a due process hearing, alleging that the Linn-Mar Community School District (LMCSD) and Grant Wood Area Education Agency 10 (GWAEA) failed to provide a free and appropriate public education (FAPE) to Michael S. Specifically, the appeal is based on the Appellees' refusal to grant a change in placement. The Appellees are seeking a change in placement and compensatory education.

A motion for continuance was filed by the Appellants on December 8, 2003. The motion was granted and the matter was continued to February 27, 2004. A pre-hearing conference call was held December 29, 2003 and the matter was set for hearing. As agreed, the Appellants submitted a post-hearing brief on Friday, February 20, 2004, and the Appellees submitted a brief on Wednesday, February 25, 2004. The decision was issued February 27, 2004.

Appellants' Motion to Exclude Testimony

During the proceeding, the Appellants filed a motion to exclude the testimony of Dr. Julie Donnelly, called as an expert witness by the Appellees. The Appellants stated that the testimony should be excluded since her testimony would be based on her review of educational records that were provided to her in violation of state and federal law. The Appellants cited the confidentiality requirements of the Individuals with Disabilities Education Act (IDEA) at 34 C.F.R. § 300.571 (parental consent must be obtained before

personally identifiable information is disclosed to anyone other than officials of participating agencies collecting or using the information under this part), Iowa regulations at 281-41.31 I.A.C. (parental consent must be obtained before personally identifiable information is disclosed to anyone other than official of agencies collecting using the information under these rules), and federal regulations for the Family Education Rights and Privacy Act (FERPA). FERPA protects the collection, maintenance and dissemination of student records [20 U.S. C. § 1232(g)]. The purpose of the FERPA was to assure parents had access to their child's education records, and to protect such individual's rights to privacy by limiting the transmittal of personally identifying information without their consent. FERPA requires, with limited exceptions, that prior consent of the parents be obtained before educational records or personally identifiable information in educational records can be disclosed to third parties [34 C.F.R. § 99.30]. FERPA defines "education records" as those records which contain information directly related to the student and which are maintained by an educational agency or institute *or by a party acting for the agency or institution* (34 C. F. R. § 99.3)(italics added).

The motion to exclude the testimony of Dr. Donnelly was denied.

Federal and state law provide the right for school districts to be accompanied by and receive advice from lay advisors who possess special knowledge or training [281-41.114(2) I.A.C.; 20 U.S.C. 1415(h)(1)]. Similarly, FERPA includes numerous exceptions allowing for the release of otherwise confidential records, including the release to "appropriate persons if the knowledge of such information is necessary to protect the health or safety of the students" [20 U.S.C. § 1232g(b)(1)(l)] and the release to "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of a child for whom consent would otherwise be required" [20 U.S.C. § 1232g(b)(1)(A)].

The U. S. Department of Education's Office of Special Education Programs (OSEP), which is the agency with primary responsibility for administering the IDEA, consulted with the U. S. Department of Education's Family Policy Compliance Office (FPCO), which has primary responsibility for administering FERPA, and has interpreted a due process hearing as, in effect, an implicit exception to FERPA confidential requirements:

> "The Department's FPCO has found that an educational institution may infer a parent's or eligible student's implied waiver of the right to consent to the release of information from the student's education records so that the institute can defend itself in the course of judicial proceeding brought by the parents against the institution on the student's behalf. Because a due process hearing is a quasi-judicial proceeding, it is our determination that an institution must be allowed to defend itself in due process hearing brought by the parents. Therefore, no prior consent from the parents or eligible student would be required" [*Letter to Stadler*, 23 IDELR 973 (OSEP 1996).

Allowing parents to partially or totally revoke this implied waiver would defeat the whole purpose of the permitted disclosure, which is to have a record for initial and appellate decision making: the "practical necessity" of such disclosure applies to judicial suits as

well as due process hearing, otherwise parents could effectively block or control the flow of information specific to the individual child at issue [*Philadelphia School District*, 29 IDELR 427 (SEA PA 1998)].

In another policy letter, OSEP opined that FERPA's privacy protections are extended explicitly to records and materials maintained by persons "acting for" an educational agency or institution: "In so doing, FERPA recognizes that educational agencies or institutions do not necessarily perform all operations and services on an in-house basis, and, in fact, frequently obtain professional and other business services in consultation with individuals and organizations outside the institution...it is our opinion that FERPA's prior written consent requirement was not intended to and does not prevent institutions from disclosing education records, or personally identifiable information from education records to outside persons performing professional services as part of the operation of the institution [*Letter to Diehl*, 22 IDELR 734 (OSEP 1995)][see also *Letter to Presto*, 213 IDELR 121 (OSEP 1988) finding if an expert witness was considered an agent or employee of the LEA, disclosure without parental consent was permitted).

Several judicial and administrative decisions have considered the status of certain service providers as school officials, and determined that disclosure without consent to further legitimate educational purposes was appropriate under the regulations [see *Tyler v. Poway Unified School District*, 36 IDELR 157 (CA Ct. App. 2002)(finding that FERPA's confidentiality provision are not inconsistent with the right to be advised by experts: as an expert advisor to the school district, "he was entitled in that capacity to receive confidential information from (the school district) concerning (the student) and to participate in the proceeding, without that information, it is difficult to understand how (expert) could meaningfully act as an expert advisor"); *In Re: Amanda R.*, 25 IDELR 484 (SEA NH 1997)(finding district policy permitted disclosure of personally identifiable records without parental consent to those employed by or under contract with the school district to perform a special task, such as consultant); *Quaker Valley School District*, 102 LRP 5450 (SEA PA 1998)(finding employees from the student's previous school could testify at the due process hearing using information obtained in the student's educational records without parental consent to release those records); *Marshfield School Union 102*, 22 IDELR 198 (SEA ME 1995)(finding no violation of state or federal confidentiality rules by sharing personally identifiable information about the student to outside agencies who provided services to him); *Prins v. Independent School District No. 761*, 27 IDELR 312 (D.C. MN 1997)(finding FERPA's prior written consent policy did not apply to release of student's educational records to behavioral analyst hired by the district to observe the student and provide recommendations for programming); *Board of Education of the Wappingers Central School District*, 26 IDELR 487 (SEA NY 1997)(finding transmittal of student records to physician for conducting a neurological evaluation for the district did not support a finding that the child's confidentiality rights were violated); *Independent School District No. 11, Anoka-Hennepin*, 102 LRP 7056 (SEA MN 2000)(where testimony of experts was permitted and did not require parental consent for release of records); *Butler Area School* District, 32 LRP 6215 (SEA PA 2000)(finding that transmission of record to evaluator did not violate student's IDEA or FERPA rights); and *Trumbull Board of Education*, 102 LRP 19436 (SEA CT 2002)(finding release of records to a consultant for the district is not a violation of FERPA)].

The Appellees also cite *Gill v. Columbia 93 School District*, 1999 WL 33486650 at *2 (W.D. Mo. 1999) as a reason to exclude the testimony of Dr. Donnelly. In this case, the opinion of an autism expert was excluded. The Appellants suggest that the expert's opinions were "not available to or presented to the IEP team for consideration" and therefore excluded. Importantly, on appeal to the 8th Circuit, the court's decision clarified that the reason for the exclusion was not the availability of information to the IEP team, but rather that the potential experts' testimony of the Lovass method and the child's overall program "was not relevant to the appropriateness of the (specific) March 21 IEP" [Gill, v. Columbia 93 School District; 32 IDELR 254 (8th Cir. 2000)].

Appellees' Motions to Dismiss

Issue Preclusion

In their post-hearing brief, the Appellees requested the appeal be dismissed by the doctrine of issue preclusion. The doctrine of issue preclusion or res judicata prevents a party to a prior action in which resolution has been reached from re-litigating a subsequent action involving the same issues which had been resolved [*Dettmann v. Kruckenberg*, 613 N.W.2d 238 (Iowa 2000); see also *Brown v. Kassouf*, 558 N.W.2d 161,163 (Iowa 1997); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981)]. Issue preclusion applies if four requirements are met: 1) the issue determined in the prior action is identical to the present issues; 2) the issue was raised and litigated: 3) the issue was material and relevant to the prior action; and 4) determination made of the issue in the prior action was necessary and essential in reaching resolution. Further, the parties to both actions must be the same [*American Family Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 562 N.W.2d 159, 163-64 (Iowa 1997)].

The Supreme Court has consistently recognized the need for the doctrines of estoppel by judgment: the general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations [*Commissioner v. Sunnen*, 333 U.S. 591 (1948). The commitment to this principle insulates final judgments from "collateral attack" in other forums [*Federated Department Stores v. Moitie*, 452 U.S. 394 (1981)]. The doctrine of res judicata or issue preclusion provides that when a final judgment has been issued on the merits of a case, a valid and final judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties [*Dodd v. Hood River County*, 36 F.3d 1019 (9th Cir. 1998)].

The doctrine of res judicata is applicable to administrative proceedings [see *Plough v. West Des Moines Comm. Sch. Dist.* 70 F.3d 512 (8th Cir. 1995). The doctrine includes both "issue preclusion"(issues litigated and decided) and "claim preclusion" (issues not litigated, but should have been advanced)[*Tyrus v. Schoemehl*, 93 F.ed 449, 453 (8th Cir. 1996). Administrative Law Judges (ALJ's) and hearing officers have determined that res judicata principles may be applied to an adjudication by an administrative tribunal since that forum acts in a judicial capacity [see *Anne Arundel County Public Schools*, 103 LRP 50140 (SEA MD 2003)(finding litigation of issues in a due process hearing was barred because the issues had been the subject of a previous due process adjudication); *Lafayette County C-1 School District*, 102 LRP 10921 (SEA MO 2000)(granting dismissal based on finding that issues before the panel could have been advanced at a prior hearing); *Berlin Sch. Dist*, 25 IDELR 691 (SEA WI 1997)(where

hearing officer barred re-litigation of the issue of individualized tutoring); *Montgomery County Public School* (SEA MD 2003)(finding parents attempting to re-litigate issues of a previous due process and granting dismissal), *Fulton County School System*, 103 LRP 17310 (SEA GA 2002)(finding parent's request for an independent educational evaluation barred by res judicata; three elements necessary to establish application of res judicata were present: identification of parties, identification of issues, and adjudication by a court of competent jurisdiction); *Molalia River School District*, 32 IDELR 52 (SEA OR 2000)(finding parents' claim that student was denied FAPE was litigated in a prior hearing); and *Souderton Area School District* (SEA PA 2002)(hearing officer held that the application of res judicata could be applied since the public agency program was the same as in a previous hearing, the parents' preferred placement was the same as in a previous hearing which resulted in a prior final decision on the merits of the case).

The Appellees ask that the doctrine of res judicata or issue preclusion be applied to the present claims which were addressed previously in settlement agreements. Settlements are not considered to be "fertile ground" for the application of collateral estoppel, as typically there has not been a full contestation and adjudication of all issues (*State ex rel Martinex v. Kerr-McGee*, 898 P.2d 1256 (Ct. App. 1995). In mediations, pre-appeal or state-level complaints, the forum does not act in a judicial capacity (e.g., proceeding does not involve the presentation of sworn testimony or documentary evidence, case law supporting legal positions is not presented). The legal precedent for the application of these doctrines to settlement agreements has not been firmly established.

The principles of res judicata or issue preclusion have been applied to appeals involving previous settlement agreements. The doctrine serves to enable the parties to rely on the finality of adjudications or settlement agreements. A settlement agreement that purports to be the final binding settlement of the dispute between the parties, and under which all claims are released, has preclusive effect:

> Once a party settles a case, that party cannot seek both the benefit of that settlement and the additional right to maintain an action that arose out of the same nucleus of operative facts. If such an action were to be permitted, the certainty and finality that accompany the settlement agreement would always be subject to question [*Welsing v. Government of the District of Columbia*, 18 IDELR 1016 (D.D.C. 1992).

The applicability of these doctrines is analyzed according to the specific language of waiver or release in the settlement agreement. Such releases are included to assure the parties that the underlying matter is completely resolved with a presumption that the parties intend a complete accord and satisfaction of their respective claims against each other [*Bennett v. Kisluck*, 814 P.2d 89 (1991)]. Even if waiver has been properly asserted and included in a mediation agreement, the waiver must be "voluntary and knowing" and the language of the agreement must be unambiguous. This heightened standard was articulated by the Third Circuit:

> Upon examination of the dynamics of an IDEA settlement, however, we find reason to consider employing a more heightened standard. Where a school is resistant, parents seeking special services for their disabled children may be disinclined to delay the start of those services during years of administrative and judicial proceedings. Indeed, a waiver of fees or possible civil rights claims may

> seem a small price for the immediate commencement of services for a young child just beginning school. Accordingly, while we do not hold that settlement agreements which include a waiver of related claims in the IDEA context are per se invalid, we will apply the more searching standards reserved for waivers of civil rights claims, rather than general contract principles [*W.B. v. Matula*, 23 IDELR 411 (3rd Cir. 1995)].

The issue of whether a parents' claims would be barred under the release provision of a settlement agreement was addressed in *In re: Student with a Disability*, 102 LRP 2736 (SEA WA 1999). The agreement's release of claims clause provided that the parents "release, acquit, satisfy, and forever discharge the District of and from any and all causes of actions, in law or in equity, which they had, have, shall have or may have from the beginning of the time to the date of this Agreement...Nothing contained shall preclude the exercise of legal and procedural rights available to a party regarding any future placement determinations". The ALJ determined that the parents were barred, by the terms of the release clause and by principles of res judicata, from litigating those issues which gave rise to the Agreement. An Order of Dismissal was issued in *Sherwood School District*, 25 IDELR 1254 (SEA OR 1997) by a hearing officer who determined that issues identified in a due process request had been dealt with dispositively by means of a settlement agreement: "if these claims are not exactly the same as those included in the complaint the parents filed with the U.S. Department of Education, these claims nonetheless arise out of the 'same nucleus of operative facts' as those claims resolved and settled by means of the agreed settlement" (quoting *Welsing v. Government of the District of Columbia*, 18 IDELR 1016 (D.D.C. 1992). The hearing officer for *In re: Student with a Disability*, 103 LRP 8582 (SEA NM 2002) examined a settlement agreement which included the following language:

> The Parents hereby release [the District] from all issues that were raised or could have been raised in [the request for due process] including without limitation any issues pertaining to the special education placement and services provided to [the Student] at any time to present.

The hearing officer ruled that the parties did intend to complete discharge of all claims, which would bar all claims preceding the settlement date. In *Shoreline School District*, 102 LRP 2650 (SEA WA 2002), a school district filed a motion to dismiss a due process by the doctrine of issue preclusion. The parties had previously entered into a settlement agreement, which included a request that the due process hearing be dismissed with prejudice. A subsequent Order of Dismissal was entered with prejudice. The Order noted that parties were not precluded from requesting a new due process hearing should *further* disputes arise (italics added). The district's motion to dismiss was granted, based on the doctrine of res judicata, or issue preclusion. The ALJ determined that since the dismissal specifically stated it was with prejudice, and since the issues raised in the current appeal had been resolved in previous due process hearing, those issues relating to the education of the student prior to the mediation agreement would be dismissed as barred by the doctrine of res judicata.

Conversely, the doctrine of res judicata or issue preclusion may not be applicable if settlement agreement did not include a statement of release or waiver. An appeals panel found that a settlement agreement between the parents and district did not bar the parent from seeking due process since that agreement made no express waiver of the

retrospective claims [*Fox Chapel Area School District*, 40 IDELR 88 (PA SEA 2003)]. The doctrine of collateral estoppel was inapplicable.

The Appellees assert that all issues raised and resolved by Mediation Agreements should not be re-litigated in this action. The Appellees suggest policy considerations support this conclusion, in that parties will have little incentive to reach mediation agreement if the same issues can be re-litigated at a later date. Yet all three settlement agreements contain specific language that 1) claims would be dismissed by the parents "*without prejudice*" (Appellants' Exhibit 24), 2) "nor anything else set for in this Agreement, is intended to be dispositive of the underlying issues that are the subject matter of the current Appeal, and all such issues are reserved for further negotiation and advocacy at a future date" (Appellants' Exhibit 25), and 3) "Based on this agreement the parents will commence action immediately to dismiss their previous request for hearing in this matter. Such dismissal shall be without prejudice" (Appellants' Exhibit 26). The Appellants also testified that it was not their intent to release claims or waive future litigation concerning the issues addressed in the settlement agreements.

The Appellees' motion to dismiss on the doctrines of estoppel, res judicata, or issue preclusion is denied for two reasons. First, the legal precedent for the application of the doctrine of issue preclusion has not been clearly established. Second, the Appellants clearly did not intend to release claims or waive rights concerning the issues of this appeal as evidenced in the mediation agreements.

Statute of Limitations

The Appellees argue that claims based on allegations more than two years prior to the filing of the due process appeal are time barred.

The IDEA has no statute of limitations for seeking administrative review of an IEP or placement decision. In *Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2000), the Eighth Circuit was asked to determine whether an IDEA appeal was timely. In the opinion, the 8th Circuit determined that when a federal law contains no status of limitations, courts may borrow from the most closely analogous state statute of limitations unless doing so would frustrate the policy embodied in the federal law on which the claim is based (*Aaron v. Brown Groups, Inc.*, 80 F.3d 1220,12223 (8th Cir. 1996). The decision to "borrow" state statute of limitations must be "guided by the aim of the [IDEA] in devising the limitation period in issue here. If state limitations law conflicts with federal procedural safeguards embodied in [the IDEA], the federal concerns are paramount [Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 449 (3d Cir. 1981)]. Although this ALJ could turn to the two year limitations under Iowa Code Chapter 17A § 614.1(2)(applicable to injuries to the person or reputation, based on either contract or tort), the present case does not represent informed parents who "sat on their rights" and lost the opportunity for review. Instead the Appellants have been actively seeking resolution of the issues in either mediation or due process for the three years in question. The first challenge to FAPE did not occur with the filing for due process in November 24, 2003 for the 12th grade year. Challenges were also leveled on April 25, 2002 in the form of a request for preappeal, and March 4, 3003 for a due process hearing that resulted in a mediation agreement. Moreover, the intervening mediation agreements did not result in resolution of the issue concerning the denial of FAPE. According to the

evidence presented, Michael's behavior continued to deteriorate, which resulted in increasingly more restrictive actions and settings. That the Appellants selected mediation twice before pursuing due process should not result in dismissal. Such restriction at the administrative level would be inconsistent with the equitable provisions of the IDEA.

Findings of Fact

Michael S. is 19 years old and resides with his parents within the Linn Mar Community School District. Michael was born 11/12/84 in Delaware. Mrs. S. testified that in his first two years of life, she did not suspect autism since Michael was affectionate. The family moved to Georgia when Michael was two, and over the next couple of years his language skills decreased, and he became attached to inanimate objects. When Michael was four, his mother took him to Georgia Southern University, where a physician suggested the possibility of autism and helped enroll Michael in a special preschool. When Michael was 5 ½, Mrs. S. contacted Dr. Schoppler at the University of North Carolina, who diagnosed Michael with mild to moderate autism and mild to moderate retardation. Dr. Schoppler had developed Project TEACCH (Treatment and Education of Autistic and Communication Handicapped Children). The methodology for TEACCH involves visual schedules of activities to assist the student in gaining independence and a sense of predictability. Mrs. S. was trained in the TEACCH methods, and TEACCH staff stayed in contact with the Appellants as consultants. Mrs. S. learned to construct visual schedules and calendars for Michael and made photographic books of Michael's life for him to read. Project TEACCH also instructed Mrs. S. in how to increase Michael's communication skills. She learned prompting methods, and Michael began to talk more. Mr. S. testified that the family took many road trips to give Michael "hands on" experiences, which seems to help Michael learn. When Michael was 5 ½, the family moved to Cedar Rapids and Michael attended a Life Skills Autism Program at Hiawatha School for grades K-4. Toward the end of this period, Michael was the highest functioning student. His behavior regressed as he began imitating lower functioning students (e.g., wetting his pants). Mrs. S. began an intensive summer program to increase Michael's academic skills. As his academic abilities increased, Mrs. S reported that his autistic behaviors decreased. In the summer of 1993, Michael attended Camp Courageous (Appellants Exhibit 14), and enjoyed jumping on the trampoline, watching videos, and computer games. He also enjoyed family vacations.

Mrs. S. testified that since Michael had gained so much during the summer program, she was reluctant to have him return to the autism program. She also wanted him to be with non-disabled peers. Several independent evaluations were conducted in the late spring and early summer of 1996. A psychological evaluation from Duffy Psychology Associates dated 6/27/96 indicated that Michael functioned in the moderate level of mental retardation with a full-scale IQ of 40. Michael's impairment in communication affected both verbal and non-verbal abilities. Another evaluation from the Children's Therapy Center at St. Luke's Hospital in Cedar Rapids concluded that Michael had limited independence in self-care skills, impaired sensory integration processing, and impaired fine motor and visual-motor skills. The evaluating therapist recommended treatment two to four times per month. A speech/language evaluation conducted at Eastern Iowa Therapeutics recommended Michael receive speech and language therapy 2-3 times per week due to a general language impairment secondary to

autism. Michael's tutor for the summer of 1996 completed a report which indicated progress in language and math. A social work evaluation conducted by Linn County Services for People with Disabilities concluded that "Michael would benefit from increased integration with non-disabled peers" which would provide more positive peer interaction. Integration into some regular classroom situations with an aide was recommended (School Record at 515-520).

An IEP meeting was held to develop an IEP for Michael's 5th grade year of 1996-1997, and it was decided that Michael would attend an SCI MD (special class with integration program for students with mental disabilities) class at Linn-Mar. He was in the special classroom most of the day with some integration with non-disabled peers. Mrs. S. reported that he made "wonderful" progress that year. Mrs. S. supplemented Michael's program with drill books which she constructed and implemented. The district provided extended school year services to Michael with 25 hours of math instruction, communication and social skills. Mrs. S. would tutor Michael in reading, with the District providing the materials (School Record at 491-507). Dr. Anne Maxwell conducted an assessment of Michael on May 6, 1997 in school and home. Her report concluded that Michael's progress had been "remarkable" and that his classroom performance was compliant and cooperative with few behavior problems. Dr. Maxwell interviewed Michael's teacher, Mrs. Duoliem, who reported progress as well as concern for deficits in initiating appropriate peer interactions. Dr. Maxwell offered several recommendations including the use of extinction and redirection for attention-seeking behavior, encouraging extended speech, and creating peer opportunities (Appellants' Exhibit 37).

The IEP for Michael's 1998-1999 school year included annual goals for reading comprehension, math, written expression, independence (work on tasks without adult intervention), and social interaction (initiating, responding, asking for assistance). The need for a functional behavioral assessment and behavioral intervention plan were checked "No". Michael was to receive "45 direct/60 indirect/month" speech/language services, and 50 minutes/week of social work services. A self-contained program with integration was determined to be most appropriate, which included Michael's integration into art, PE and lunch. Michael was provided a full-time associate. There are no progress monitoring data reported for the 1998-1999 school year (School Record at 471-485).

Michael's IEP for his 8th grade year, 1999-2000, was similar to the previous year. Reading, math and written expression goals were included, as well as a goal to improve conversational skills. Speech/language services were provided for 60 minutes/month, and social work services were provided 30 minutes, three times per month. Michael was integrated into Art, PE, "connections" and lunch. The SCI program was again justified: "additional integration could prove to be very frustrating for Michael, leading to behaviors which may be disruptive to other students" There are no progress monitoring data reported for the 1999-2000 school year (School Record at 460-470)

Michael continued to make progress during his 6th, 7th, and 8th grade years, although isolated "autistic behaviors" were reported (e.g., noises, shrieks, swearing). Mrs. S testified she was very satisfied with progress in the 6th grade, that 7th grade was a very positive experience for Michael. Mrs. S. reported that he was not isolated with his associate, but was a part of the class. An evaluation by Michael's 7th & 8th grade teacher Laurie Slater confirmed that Michael was "eager to follow directions and willing to

learn...a polite, pleasant young man"(Appellant Exhibit 13). Michael's educational program during the next three years is the focus of this appeal.

The 9th Grade School Year: 2000-2001

The 9th grade IEP for 2000-2001 notes that Michael's "progress and behaviors are consistent of what would be expected of those with autism and mental disability". It is also noted that "Michael's parents also see a great deal of growth". The annual goals of reading (i.e., comprehension of "wh" questions), math (i.e., money, fractions, averaging, word problems using the Saxton math program), written expression (i.e., paragraph writing) and conversational skills (i.e., initiating and maintaining conversation; asking for help) were included, with the special education setting as the program choice. Michael was to receive 60 minutes/week of speech/language services. Michael was also assigned a one-to-one aide (Mrs. Englekamier or "Mrs. E.") (School Record at 448-459).

Mrs. S. visited Michael's 9th grade program on October 31, 2000. She observed that during the "inclusion" part of his day, Michael was isolated from his peers, not interacting with anyone, doing "worksheet after worksheet after worksheet" at a table by himself. A meeting was held December 13, 2000 to review Michael's IEP and to address concerns of the Appellants. Although "very pleased with Michael's progress over the last several years...regression in some critical areas" was a concern. Specifically, difficulties in social skills, increasing dependence and work ethic were noted. The parents were concerned that Michael was not receiving the 60 minutes per week of speech services, and also suggested that Michael's social interaction and initiations be increased, possibly by working as a library assistant. The Appellants provided several pages of recommendations, particularly in oral and written communication. Michael's speech/language services were increased to 90 minutes/week. It was also decided that Michael would spend more time in the MD classroom, since the inclusion work was too difficult and resulted in Michael's isolation. The IEP team decided that Michael would work on more functional academics more of the school day (School Record at 435-444).

On March 19, 2001 the Appellants outlined Michael's progress and concerns in a Parents' Report. They indicated satisfaction with the Saxon math program, the Reading Milestones program, gains in receptive language (with a corresponding decrease in "autistic behavior"), and his cooperative and compliant behavior for the first semester of the year. However, the Appellants expressed concerns that a "major resurgence" in autistic behavior had occurred after Michael's integration was decreased the second semester. The Appellants offered a document depicting the inconsistencies in social interactions with teachers and peers from 9/01 through 11/01 (Appellants Exhibit 20). In a meeting on 4/6/01 it was decided that Michael would receive speech and language extended school year services in the summer of 2001. Progress monitoring data were also shared at the meeting. Reported on both 11/5/00 and 2/4/01, Michael received progress ratings of 2 ("Progress has been made towards the goal. It appears that the goal will be met by the time the IEP is reviewed") or 3 ("Progress has been made toward the goal, but the goal may not be met by the time the IEP is reviewed") on all goals (School Record at 448-454).

The Appellants challenged the progress reports and ratings for Michael's 9th grade IEP goals. The Appellants offered excerpts from the 8th grade home-school notebook as evidence of Michael's regression in communication during the 9th grade year

(Appellants' Exhibit 34). Mrs. S. testified that the goal of initiating and maintaining conversation was a critically important skill, which had been improving until Michael's ninth grade year. She also testified that the writing goal was not achieved, and that "weekly writing probes" called for in the IEP were not done. Mrs. S reported that Michael did well on the math goal and that the reading goal was not met since Michael was placed in too difficult material. However, Mrs. S. testified that Michael did make progress on the reading goal.

Mrs. S. testified that since Michael did not receive the speech services identified on his IEP, his transition to 9th grade was negatively impacted, most notably the decrease in his social and communication skills. Part of the difficulty was the number of students with behavioral disorders in the special education class. Michael began to develop problem behavior and regress in conversation skills. According to Mrs. S., by the end of the year, Michael's greetings, responding to others, and initiating conversion skills had declined. Mrs. S. also reported that speech therapist Julie Warrington "did not believe in drills" which contributed to the deterioration of Michael's speech. Mrs. S. testified that Michael's associate, Mrs. Englekamier, reported to her that by the end of the year, "Michael was barely talking at all". At home, his speech had "slowed down". The deterioration of communication skills in 9th grade is presented in a document (Appellants' Exhibit 34) which also represented excerpts from the home-school notebook (Appellants' Exhibit 7).

10th Grade Year: 2001-2002

The IEP developed for Michael's 10th grade year, 2001-2002 on 3/09/01 indicated that the Appellants "would like to see Michael attend school through his 21st birthday and then work full time". Michael's skill development during his 9th grade year was described as a "moderate success" and he "experienced some regression in language and social skills in the transition from the middle school". Goals for reading, math (the Saxon series), written expression, oral communication, grammatical understanding and pragmatic language skills, social language skills, and independent living skills were included. "No" was checked for a functional behavioral assessment and behavioral intervention plan. Michael was integrated for Choir, and received 90 minutes/week speech services. Michael received services from a one-to-one associate (Mrs. Hodge). Mrs. S. testified that the IEP team was in substantial agreement for the goals, with the exception of one speech goal. No behavioral goals were included in the IEP. On March 19, 2001 the Appellants forwarded a list of objectives for "living skills", oral communication, written communication, reading, math and vocational areas. Also included were suggestions for working with Michael (School Record at 392-401).

The purpose of a meeting held August 21, 2001 was to plan adaptations and accommodation to enable Michael to have a successful 10th grade year. A subsequent meeting 9/18/01 was held to discuss progress on Michael's start of the 2001-02 school year. It was noted that Michael had steady improvement in communications, "and has made considerable progress over the previous year". At this meeting November 13, 2001, behavioral concerns were discussed (e.g., eye pointing, flicking lights on and off, shrieking, spitting, making noises, swearing, getting out of seat without permission and getting up on tables). Speech-language pathologist Julie Warrington provided IEP goal updates for social language. The data were mostly general comments (e.g., "progress

made"). No progress data for the other IEP goals were provided. Mrs. S. testified that Michael began making noises, touching and fingerpointing in response to the lack of implementation of his communication goals during the 10th grade year. The Appellants also suggested that Michael was "terribly upset about something that is going on at school. His misbehavior stems from his anger". They offered several possible sources of the anger, including lack of associate experience, lack of structure in classroom, lack of positive social interactions and failure to implement several parental recommendations. Mrs. S. testified that the associate had difficultly following directions, was unable or inadequate to assist Michael with math, and that Michael began to refuse to work for Mrs. Hodge. The parents also made several requests of the speech program, including more speech therapy and a different therapy approach. School psychologist Jack Rainey suggested that GWAEA Autism Consultant Kelly Trier be consulted for programming options, behavior management and other suggestions. Principal Van Dyke also presented concerns that the math and English components of Michael's IEP were delivered in an isolated fashion by the associate, as requested by the Appellants the previous year. He suggested the team explore the possibility of reading and math instruction delivered in the classroom setting, which apparently was initiated. Mrs. S. recommended the team look at Project TEACCH. In an Amendment of Meeting Minutes written two weeks later, the Appellants wrote that Michael's IEP has not been effectively implemented this year. Another meeting held 11/30/01 concluded with the team agreeing to bring Michael back into the special education classroom for reading and math, but the parents resisted a recommendation that more of Michael's day be spent in vocational training and life skills. They preferred that the math and reading programs continue as currently written, since "Michael's reading program was specifically developed for language impaired students and that his math program was laying important ground work for more functional training". Kelly Trier, GWAEA autism consultant, was present at a meeting held 12/10/01 and reported on the observations she had conducted of Michael. She offered that Project TEACCH would be a good approach for Michael. Inappropriate touching of women's breasts also began with an incident on December 11, 2001, which resulted in a disciplinary referral. [Additional disciplinary referrals occurred 1/4/2002 for inappropriate touch to associate Mrs. Hodge, 1/10/2002 for inappropriate touch to school secretary Mrs. Heater, and 1/11/2002 for two incidents of agitated behavior in response to GWAEA consultant Wendy Bouslog]. On December 29, 2001 the Appellants sent a document "Parents' Input" to GWAEA psychologist Jack Raney (Appellants Exhibit 3). This information was apparently solicited for the development of a behavior plan. The document included preventive suggestions for Michael's attention-seeking behaviors (scheduled structured social interactions throughout the school day) and suggested timeout as an intervention when inappropriate behavior occurred. For "trying-to-escape" behaviors, warm-up activities and direct instruction were suggested as interventions. "Fun" activities were discouraged since they would "only reinforce his 'trying-to-escape-behaviors". The use of Silly Putty in Michael's hands to eliminate eye-pointing and frustration was also recommended, as well as teaching Michael to ask for a break. The TEACCH training workshop was held January 25, 2002. A meeting was held February 7, 2002 to review Michael's IEP and recent progress reports. The Appellants expressed concern about the "level of implementation" and the team agreed to the following components: Kelly Trier, GWAEA autism consultant, would observe Michael's Daily

Living Course to identify opportunities for socialization and communication, the Child Study Team would conduct a functional behavioral assessment and develop a Behavior Intervention Plan with specific attention focused on antecedents of behavior, and the LMCSD would provide on-going training to the paraprofessional regarding appropriate support to Michael. It was noted that no Circle of Friends Program (i.e., peer support) had been implemented (School Record at 2005).

The non-dated, handwritten "Positive Behavior Plan" included several "adjustments...to promote positive learning and social experiences at school" including independent and small group instruction, a social story and scripted greetings to teachers and staff, sensory experiences to help with down time and stress relief, and a 4-step intervention for problem behavior. First, Michael received a visual prompt/cue to use a sensory item. Second, a verbal redirection was provided. Third, Michael would be removed to a designated time-out spot. Fourth, Michael would be escorted to the office and parents would be phoned (School Record at 2003). There was no evidence or testimony that the Positive Behavior Plan was based on assessment data. In fact, school psychologist Jack Rainey testified that the functional assessment was conducted after the development of the Positive Behavior Plan. Mr. Rainey stated that the FBA was conducted after the TEACCH training to ensure a consistent plan could be administered. An informal plan was being used in the interim. Mrs. S. testified that she requested on January 16, 2002 that a Positive Behavior Plan be developed, but that one was not completed until February 4, 2002

Behavior observations conducted 2/19/02 and 2/22/02 by Kelly Trier indicated that Michael's behavior in Daily Living Class was appropriate. His rocking and touching behaviors in the Careers class were described as "generated from frustration" due to the "abstract" concepts and curriculum. A recommendation that Michael be provided organization activities through auditory, visual and kinesthetic methods" was included. Michael's behavior during the Earth Science class was described as attentive only when verbally redirected to task. A review of additional behavior observation over a four day period by "other personnel" was summarized: "classes or activities that allow more movement, kinesthetic learning or fewer abstract concepts rate the lowest in terms of problematic behaviors" (School Record at 2013 –2015)

A meeting was held February 26, 2002 to review Michael's IEP and the implementation of Project TEACCH. Associate Carrie Hodge stated that Michael was using the work systems about 90% of the time, was initiating a greeting to teachers in classes, loved his word experience program, and "does not do independent work very well". In general, Michael was described as "doing a terrific job with the TEACCH materials". Michael's speech services were discussed by speech/language pathologist Julie Warrington. Michael achieved an age-equivalent score of 5 years, 2 months on the PPVT, and below-age-equivalent scores on the TOLD – consistent with Michael's weaknesses in auditory processing and pragmatic language. School psychologist Jack Raney shared the results of the functional behavior assessment, and concluded that problem behaviors (passive inattention, non-word vocalizations, and touching) occur when Michael was seeking support in "difficult to comprehend academic situations" such as reading, Careers and Earth Science classes. Mr. Raney concluded that "evaluations, in an outside of the school setting, do not indicate any substantial changes (cognitive, language, and social domains) in either a positive or negative direction over the last

several years with the exception of relative growth in basic mathematical computation, basic reading (word calling), and responsiveness to verbal prompting". In a discussion of Michael's math program, teacher Bob Kalsenburg felt the Saxon program was too difficult for Michael and recommended using a "hands on life skills" approach. Mrs. S responded that the Saxon program "broadens Michael's mind and makes him more able to handle changes" but was willing to move to a more functional math program the following year (School Record 2018 – 2029).

The Appellants' response to the February 26, 2002 meeting indicated several concerns. They suggested that several of the conclusions of the functional behavioral assessment were inaccurate. Although the Appellants indicated that an academic evaluation requested by members of the IEP team was unnecessary, they did suggest an independent speech evaluation and Psychoeducational Battery (School Record at 2030 – 2031). Progress monitoring data were recorded on 11/5/01 and 2/4/02. On both dates, the reading, math, and written expression, pragmatic language, and independent living goals received a "3" rating (progress has been made on this goal but the goal may not be met by the time the IEP is reviewed). Oral communication, grammatical understanding, and social language goals received a "2" rating on 2/4/02 (indicating progress has been made towards the goal. It appears that the goal will be met by the time the IEP is reviewed (School Record at 358-373).

It is difficult to interpret the progress monitoring data since they are vague (e.g., "emerging" in oral communication), not reported for specific milestones (e.g., "some milestones have been successfully done" in math), or the data are incongruent with the goal (e.g., "65% accuracy in writing a 6 sentence paragraph").

The Appellants disputed the progress monitoring data for the oral communication and social skill goals in a document "Failure to Progress in Social Skills and Functional Communication at School" (Appellants' Exhibit 42). The conclusions in the documents are based on the daily behavior checklists completed by Michael's associate. Michael was also receiving services from Supported Community Living (SCL) program of the ARC of East Central Iowa. SCL worker Mary Callahan testified she witnessed Michael's behavior deteriorate during this period.

The behavior plan was discussed at an April 2, 2002 IEP meeting, with agreement that since the TEACCH training with schedules and greetings, Michael's behavior had improved. No specific behavioral data were available. The Appellants expressed concern that he was still "agitated" at school, and the school staff agreed that Michael becomes frustrated when waiting. Changes to Michael's transportation were made to decrease his agitation while waiting for the bus. It was decided to describe levels of agitation and begin a new data gathering system to chart the agitation. Mrs. S. testified that although she requested the TEACCH training, the TEACCCH method did not work to decrease Michael's attention-seeking behaviors. The visual schedules further isolated Michael from his teacher and associate in an attempt to "increase independence". Michael's math progress was also discussed and the appropriateness of the Saxon math program. Teacher Kelzenberg again suggested a functional math program, while the Appellant favored a combination of functional math and Saxon math. A proposed math goal addressed functional skills as well as computation. Michael's reading progress was discussed. Special education teacher Barb Greiner indicated that more functional material may be appropriate, while the Appellant favored retaining the reading with comprehension goal.

A combination reading with functional writing goal was developed. The team also determined that Michael would receive extended school year speech and language services due to regression, maintenance and acquisition of skills (School Record at 2032 – 2073).

The next IEP meeting of April 5, 2002, the parents remained dissatisfied with Michael's program and withdrew him from school (letter to Principal Van Dyke, April 15, 2002 in Appellants' Exhibit 3). In a letter dated April 17, 2002, the Appellants indicated they were concerned with the draft IEP developed at the meeting: "it does not reflect the kind of program that we had discussed at our meeting" and requested the IEP team reconvene. On April 25, 2002 the Appellant requested a preappeal conference through attorney Curt L. Sytsma, director of the Legal Center for Special Education. Specifically, the inadequacy of the Positive Behavior Plan and functional behavior assessment were issues (School Record at 2074 – 2099).

A mediation agreement was reached at the end of May. The agreement included the following provisions: 1) Michael will be evaluated in the areas of academics (reading and math) and functional living skills., 2), data will be gathered in an attempt to discover the extent and gravity of any frustrations the child may be experiencing in the school setting and his manifestation of those frustrations in the school or in the home. An effort will be made to determine the causes of those frustrations, 3) an AEA representative and Michael's mother will develop a rating scale to provide a uniform measure in the areas of concern, 4) using this scale, an independent consultant will "shadow" Michael at school at the start of the 2002-2003 academic year. These direct observations will involve 1 and ½ hours per day intermittently for four weeks, 5) the independent consultant will work with the parents to secure such observations of the child in the home as the independent consultant deems necessary to complete the evaluation, 6) the parents may exercise their right to have additional evaluations conducted at their own expense by one or more private professionals, 7) following the completion of the educational evaluations conducted by the AEA, the IEP team will convene to consider the new information and to devise an appropriate program and placement in light of all the information available. It is anticipated that this meeting will be held within four weeks of the start of the 2002-2003 academic year, 8) the AEA will make every effort to enroll Michael's one-on-one assistance in the "TEACCH" program training during the summer, 9) all parties will work in good faith to provide the best possible educational experience for Michael, and 10) the request for preappeal conference will be dismissed by the parents, without prejudice, and all allegations set forth therein will be withdrawn (Appellant Exhibit 24).

Mrs. S. testified that Michael made minimal progress toward certain goals, and regressed in others. Mrs. S testified that Michael was given work at a very low level so he could work independently, which resulted in profound regression. Mrs. S. also testified that Michael's love for math was gone. Mrs. S testified that the goals and objectives for the 10th grade IEP were appropriate, but there was a problem with their implementation.

The Appellants also presented behavioral data to demonstrate Michael's deterioration (Appellants Exhibit 17). Chart 1 shows that in only one day during the 2001-2002 school year up through March, 2002, the "initiate conversations with peers and teachers at least 3 times per day" IEP goal was achieved. For 48 days, no conversations occurred. Speech/language pathologist Julie Warrington said school-based data were inconsistent with the data compiled by the Appellants. She testified that data

from the speech therapy sessions were not sent home, and that the data sent home by the associate or the classroom teacher may not have been accurate or conclusive. She stated that for reliable data, the observation systems must be similar. The Appellants' documents also included charts of touching and inappropriate touching, fingerpointing, noises, charging, spitting, and screaming (Appellants' Exhibit 17).

11th Grade Year: 2002-2003

The Appellants took Michael to Dr. Patricia McGuire, M.D., FAAP, from Developmental and Behavioral Pediatrics in Cedar Rapids, Iowa in August of 2002. Dr. McGuire received her medical degree from St. Louis University Medical School in 1982, and completed a pediatric residency at Mayo Clinic from 1982-1984 and at the Gunderson Medical Clinic from 1984-1985. She has been employed as a board-certified pediatrician both in solo practice and in medical centers and clinics since 1985. Her professional associations include the American Academy of Pediatrics, The Society for Developmental and Behavioral Pediatrics, and the American Medical Association. The Administrative Law Judge finds Dr. McGuire qualified to serve as an expert witness in these proceedings.

Dr. McGuire diagnosed Michael with school phobia. Summer data from the SCL workers in the Marion library show Michael's behavior as escalated prior to the beginning of school. SCL worker Mary Callahan, who began working with Michael in 2001, testified that his behavior began to deteriorate in August, 2002. Michael began inappropriate touching and shrieking, which limited the community activities in which he could participate. In a letter dated August 13, 2002 Dr. McGuire outlined the "accommodations and plans of action" to facilitate Michael's re-entry to Linn Mar High School for his 11th grade year. In the area of emotional functioning, Dr. McGuire recommended several strategies to reduce school phobia and improve behavior. Suggestions included allowing Michael time to adjust to the school building, his schedule and his educational team before school started, providing Michael with a location for escape when he feels overwhelmed, and reinstituting a Circle of Friends peer support group. For social, communication and practical functioning skills, Dr. McGuire recommended regular nonacademic contact with friends or classmates of Michael. One-to-one time with teachers was also suggested, as well as school work assignments that involve social interaction (e.g., office, library) rather than isolated work experiences. A full-time associate for social support was also recommended. In the area of adaptive functioning, Dr. McGuire recommended determining the source of Michael's agitation by observing his interactions in social environments. She also suggested an updated academic evaluation may assist in determining abilities and needs (School Record at 2100 – 2103).

An e-mail from Principal Jerry Van Dyke dated August 20, 2002 provided a schedule of activities to familiarize Michael with his educational program prior to the beginning of school. Lisa Mumma was assigned as Michael's one-to-one associate, and a meeting was scheduled for 8/28/02 to address program issues. Teacher Bob Katzenberg and Mrs. S. worked out a first quarter scheduled for Michael that included math, reading, adaptive PE, two hours of daily living, functional math and functional reading, and two and one-half hours of work experience. A behavior rating scale was also developed by

consultant Kelly Trier and Mrs. S. to distinguish mild to more severe behavior problems (School Record at 2015).

As provided in the mediation agreement, observations by GWAEA autism consultant Kelly Trier were conducted on 9/4/02, 9/12/01, and 9/20/02 to assess two behaviors of concern: agitation and inappropriate touch. The document reported antecedents and consequences of the occurrences of inappropriate behavior. Kelly Trier's observations indicated behavior was OK, but Mrs. S. testified that this brief observation period did not result in "representative" data. As specified in the mediation agreement, an evaluation by independent psychologist Steven Smith was conducted September 9-12, 2002 and indicated Michael's reading and math skills were at the 2nd grade level. An adaptive behavior assessment showed Michael consistently below average. Recommendations that Michael continue to receive special education services with an emphasis on developing functional skills in academic areas, and developing his occupational, self-care, communication and social skills were included in the evaluation report.

Dr. McGuire observed Michael for two hours on September 20, 2002. Her report contained several recommendations including using visual cards to communicate his needs as opposed to continuing the "no touch" response to inappropriate behavior. Dr. McGuire observed that the touching was an attempt to communicate, and that eliminating the behavior without a replacement would increase agitation. Dr. McGuire also suggested that Michael serve as a peer helper for younger children to increase the opportunities to use socialization skills. She recommended that he be provided visual not auditory choices, and devices for stress relief (School Record at 2118 – 2133). Dr. McGuire testified that during the visit she did not observe any of the recommendations she had suggested in her August 13, 2002 evaluation. She observed Michael's agitation, which she thought may be due to his inability to communicate. Although he had a schedule for the day, he did not have any means to handle the "little transitions" or moment-to-moment needs. Dr. McGuire testified that Michael was prescribed three mediations for anxiety, depression and agitation.

In receipt of a draft of Michael's IEP for 2002-2003, Mrs. S. requested that certain modifications be made. A subsequent meeting held November 15, 2002 outlined a visual behavior plan to be incorporated into Michael's program, and the data keeping system was discussed. Mrs. S. also requested that social skills be imbedded into Michael's visual work system (School Record at 2143 – 2144). This visual behavior plan was not included in the school record nor presented in evidence. No progress data related to the plan were available.

In an up-dated IEP dated November 15, 2002, the modifications to the PLEP suggested by Mrs. S. had been incorporated. The IEP included goals for functional math, daily living skills, vocational skills, reading and writing skills, and expressive language via the use of his visual schedule and visual cues. Michael was to receive classroom accommodations, functional communication cards, instruction in work-related skills, extended standards and benchmarks in academic areas, direct specially-designed instruction, adult service linkages with Mercy Hospital, the assistance of an associate, professional development for his teachers and associates, and speech therapy services (School Record at 2186 – 2203).

According to correspondence from the Appellants, Michael received injuries at school on December 17, 18 and 19, 2002. On November 25, 2002, Mrs. S. reported to Principal Van Dyke that Michael had injured his thumb and several fingers. She concluded that he was injured at school, and the physician indicated the injuries were first degree burns. Mrs. S. requested adequate supervision at school so "he doesn't get injured again". Principal Van Dyke responded that Michael is well-supervised at school, and provided memos from the school nurse, classroom teacher, and associate verifying the adequacy of Michael's supervision (School Record at 2168 – 2172). Mr. Van Dyke testified that he conducted an investigation of the alleged burns, and concluded that Michael did not receive the injuries at school.

A series of correspondence between the Appellants and LMCSD addressed the social and functional communication components of Michael's IEP. Mrs. S. wrote to special education coordinator Dawn Young on November 30, 2002 with concerns that Michael's IEP still did not adequately address Michael's failure to progress in social skills and functional communication. Mrs. S wrote on December 11, 2002 that the Appellants did not agree with the communication goal on the current IEP and that they had repeatedly requested a social and functional communication goal be specifically added to the IEP (School Record at 2173 – 2178).

The Appellants' attorney Andrew McKean wrote to Superintendent Joe Pacha on December 16, 2002 outlining several concerns including Michael's unexplained injuries, his failure to process in social skills and functional communication, and an escalation of anger and aggression. Mr. McKean suggested that the failure might be due to the absence of a behavior plan until November, and that if the current visual behavior plan did not make a positive difference by February 1, "other alternatives" would be explored. Two alternatives suggested were contracting with Dr. McGuire to provide training for school personnel and placement at River Hills School in Cedar Falls, Iowa (School Record at 2179 – 2181

A meeting was held February 7, 2003 to provide progress monitoring data and to discuss adding a communication goal to Michael's IEP. There were no progress monitoring data reported for any goals except speech/language. Julie Warrington had readministered the Peabody Picture Vocabulary Test (PPVT) and concluded "Gains noted in receptive one word vocabulary skill. Raw scores improved, age equivalents improved, standard score remained constant". The results of the Test of Oral Language Development (TOLD) indicated "gains noted in all areas with the exception of grammatical understanding". Anecdotal progress notes also indicated "Michael uses his visual program (PEC's) to express wants and needs with 80% accuracy within the speech environment", "(spontaneous speech) goal has been met with 80% accuracy in 2 consecutive days in the speech environment" (note that goal included initiate communicative action with peers and adults), and "Michael follows his visual schedule with point cues with 80% accuracy in 2 consecutive days in the speech environment". Ms.Warrington requested that the reports from the parentally-arranged independent speech therapist Gina Voss be provided to the school district. Michael had been receiving the additional therapy since the middle of 10th grade through 4/03. Ms.Warrington testified that she used a variety of measures to assess Michael's speech and communication deficits in order to advise the IEP team which goals would be appropriate. Based on scores from the PPVT and the TOLD, Ms. Warrington developed

goals for Michael 2001-2003 IEP's. She testified that his age equivalency scores of 4.9 in 2001, 5.2 in 2002, and 5.3 in 2003 as indicating "steady gains" for a student with autism and comorbid mental disabilities. However, the Appellants argued that considering the standard error of measurement associated with the PPVT, these gains may best be described as trivial. Ms. Warrington testified that although Michael was not proficient in all skills, the speech language goals for Michael were appropriate. In comparing the 10th and 11th grade IEP goals, she suggested that they be changed for more specific speech and language skills to a more functional program designed to build independent expressive language skills using Michael's visual program and other strategies. Progress toward goals in 10th and 11th was evident, although the goals were not met. Mr. McKean testified that at the subsequent IEP meeting of February 7, 2003 the school district refused to discuss placement options and indicated an intent to proceed with a due process hearing.

In a letter dated February 12, 2003, Mrs. S requested several modifications to Michael's IEP. A new goal, Goal #8, was to be added: to improve expressive language. The final IEP did not include the requested statement "based on daily monitoring of implementation and progress". Eight communication milestones were included. Although Mrs. S. requested that the evaluation procedures be changed to "major milestones will be graphed monthly", the final documents read "Major milestones will be graphed three times per year at IEP updates". The suggestion that Michael's schedule include at least six conversations a day was not added, but the assistive technology section included "use of functional communication cards to request breaks, ask for help, initiate conversations, (PEC's work systems, and TEACCH schedules) developed in consultation with parents to ensure appropriate level" (School Record at 2219 – 2225).

Appellants shared graphs they had prepared concerning Michael's inappropriate behavior through March, 2003 (Appellants' Exhibit 17). These charts show an accelerated increase in touching, inappropriate touching, charging, noises, screaming or yelling, spitting during the 11th grade year. Chart 18 depicts the number of school-based community training missed during 11th grade due to behavior, and Chart 19 displays the incidents of inappropriate behavior in the community which resulted in removing Michael from the site. Mrs. S. testified that although the IEP requires that Michael receive community based training, he did not receive those services due to the severity of his inappropriate behavior. Michael was either not permitted to go to the community settings from school or was removed from the community site due to inappropriate behavior.

Associate Lisa Mumma provided some of the most compelling testimony of this appeal concerning the impact of Michael's inappropriate behavior on his educational program. In her testimony, Ms. Mumma recalled over 30 days between September and March, 2002, when Michaels was not allowed to go to his community activities, was removed to the van for the remaining time of community activities, or returned early from community activities due to his inappropriate behavior. These behaviors included episodes of spitting, shrieking, screaming, fingerpointing to others' faces and eyes, touches to teachers and students on the breast, and breast grabbing. She testified that Michael liked going to work, so MDE teacher LaRonna Orr's decisions to remove Michael from work settings was used as a consequence for misbehavior. Ms. Mumma also provided insight into the possible causes for the inappropriate behavior: escape from

activities in which he did not want to participate. For example, when Michael pushed his finger against Lisa's temple, she explained that that was his sign that it was "time to stop working"in the laundry and that he "doesn't want to be here". She also indicated the use of noise was "if things don't go the way Michael wants" or if an activity was "something he wasn't wanting to do". Climbing on tables and chairs was also his "escape thing". Ms. Mumma testified that Michael's inappropriate behavior was the basis for excluding him from the activities required in his IEP (Appellants' Exhibit 45).

On March 4, 2003, the Appellants requested a due process hearing to address problems in Michael's current placement and the provision of a free appropriate public education. The request indicated the Linn-Mar High School environment had a detrimental effect on Michael's progress in social/communication skills, behavior, mental health, independence, education, community and vocational training, and that the placement was dangerous to his physical safety and not appropriate to his needs. Specifically, the Appellants alleged that the Positive Behavior Plan was ineffective, the development of the IEP for the 2002-2003 school year was delayed; the educational environments for both 2001-2002 and 2002-2003 were counterproductive to Michael's mental health, independence, educational progress, development of social and communication skills, and his physical safety. The Appellants requested a change of placement (School Record at 2303 – 2306). The first inappropriate breast touch to peers was recorded March 7, 2003. Mrs. S. testified that an overall escalation in the MDE room was noted in March. On March 24, 2003, Dr. Gary D. Gray confirmed the diagnosis of school phobia, and suggested a "change of school setting" as a possible solution (Appellants' Exhibit 29).

A mediation was held, and the first draft agreement dated April 7, 2003 indicated that Michael would be placed at the GWAEA Life Skills Program temporarily. The purpose of the placement was to stabilize and reduce Michael's inappropriate behavior and to assess and evaluate Michael's needs. The Appellants also requested that Michael's aide be replaced and that the Life Skills in-house therapist assume Michael's speech therapy work. Leslee Sandberg of GWAEA was to assist the Appellants in contacting area schools to schedule visits. The parties agree to stay the scheduled due process hearing, and agreed that the temporary placement was not intended to be dispositive of the underlying issues and that all such issues are reserved for further negotiation and advocacy at a future date. The school district asserted that Michael's current placement at Linn-Mar constitutes FAPE. The finalized agreement of May 14, 2003 specified: 1) the temporary placement at the GWAEA Life Skills program was to be Michael's permanent placement through the remainder of the 2002-2003 school year, for the extended year summer services, and for the *beginning* of the 2003-2004 school year (italics added), 2) the Life Skills Program was not intended to be Michael's final placement but rather a transitionary placement to gain skills and prepare for less-restrictive placements, 3) during Michael's placement at Life Skills, the staff and parents would be working to develop "transition goals", preparing Michael for a less-restrictive school. The goal was to find Michael an appropriate less-restrictive school placement sometime during the 2003-2004 academic school year; 4) Michael was to be provided extended school year (ESY) services for two hours per day of community-based supervised settings focusing on Michael's educational, vocational, and behavioral skills and needs, lasting six to eight weeks in duration. The school was to attempt to hire a special education teacher if

possible. If one was not available, then someone without a teaching certificate would be hired and trained to work with Michael for the EYS. Staff from Linn-Mar would oversee the provision of EYS; 5) both parties agreed that the current staff and placement at Life Skills has worked well and that it is in Michael's interest to keep this arrangement intact to the extent possible. The parties agree to avoid contracting with persons to work with Michael whom he perceived associated with Linn-Mar High school, as such contact may cause Michael increased anxiety and agitation; 6) Michael's mom would continue to transport Michael to Life Skill in the mornings, be reimbursed by the School for the transportation, and the School was responsible for providing appropriate transportation home at the end of the day; 7) for purposes of collaboration and oversight of Michael's progress, the parties agreed to meet at least once every nine week period; and 8) the parents were to commence action to dismiss the request for hearing without prejudice (Appellants Exhibit 26).

Michael began attending the GWAEA Life Skills Program on 4/14/03. Reports from teacher Bud Griffins indicated that Michael made good progress and his continuation in the program in the fall was anticipated (School Record at 2340 – 2341). Speech-language pathologist Libby Edwards reported progress for Michael during the April 17 to May 29, 2003 period (School Record at 2409).

On May 5, 2003 the IEP team met to discuss extended school year services. Progress monitoring data compiled through March 2003 for speech and language goals were also reviewed (School Record 2309 – 2330). However, the progress monitoring data for language goals consisted of one data point for each of the three years and indicated improvement in all milestone areas.

Mr. Griffins testified that Michael's typical day at the program involved morning unprompted greetings and "parallel" interactions with other students, vocational training at the GWAEA teacher work center where he made buttons, shredded paper, or completed janitorial jobs, math or money academics in a separate room with the aide, lunch with other peers, reading, language, and prompted conversation academics in a separate room with his aide, his life skills activities (doing laundry), adapted physical education (walking, shooting basketball), and typing and journaling in the main classroom area at the end of the day. Every Friday, a community-based recreational hour is scheduled for bowling, working out at the recreation center, billiards, or watching movies. Mr. Griffins testified that Michael was interacting with adults and peers in the program, yet also testified that a majority of Michael's day is one-to-one with his aide. Mr. Griffins testified that his one-on-one time with Michael was a matter of "minutes". Mr. Griffins testified he received assistance in developing and implementing Michael's program from the speech language pathologist, the autism consultant and a work experience consultant.

In a letter to teacher Griffins dated May 7, 2003, Mrs. S. expressed her concern for the TEACCH approach and requested attention and emotional support (Appellants' Exhibit 39). The Appellants also expressed concern that no socially-appropriate peers were in the Life Skills program, and that Michael is socially isolated in his program at Life Skills. Due to the increase in behavior, Michael is less able to function independently and less able to receive his training in vocational or community living skills called for in the IEP. The Appellants requested his placement be changed to River Hills School (School Record at 2438 – 2448).

12th Grade Year (2003-2004)

A meeting was scheduled for August 15, 2003 to share progress monitoring data. Teacher Karen Ward provided information concerning Michael's summer program. She reported that Michael had demonstrated progress in the four goal areas of job skills, communicative dialogue, using speech to express thoughts and knowledge, and expressive language skills but that his progress was inconsistent. She also reported that Michael used negative behaviors instead of words to communicate during some transitions and community tasks (School Record at 2403 – 2408). The Appellants provided a Parents' Report dated August 15, 2003 that included charts of inappropriate behavior (Appellants' Exhibit 17). Chart 1 and 2 showed that as inappropriate touching decreased, fingerpointing behavior increased "dramatically" in the GWAEA Life Skills Program. Chart 3 showed the continuation of noises, Chart 4 showed a decrease of swearing, and Charts 5 and 6 showed screaming at home. Chart 7 showed inappropriate behaviors occurring 75% of the days he worked at summer day camp for vocational training. In this report, the Appellants also provide "anecdotal information" to demonstrate a deterioration in social skills, which they argue is due to no peers available at the SWAEA Life Skills program, and the isolated nature of his program there.

In a follow-up meeting 8/22/03 the IEP team discussed placement options for the fall. The Appellants presented information showing a deterioration in behavior and progress (School Record at 2313-2314). The Appellants shared the recommendations of Dr. McGuire dated 8/14/03 indicating that the Life Skills program did not allow him to participate in many community activities due to behavioral concerns that remained unaddressed. Dr. McGuire indicated that Michael suffered significant regression in his confidence and ability to interact with others in the last year, and had developed depression and an anxiety disorder for which is he medicated. Dr. concluded that Michael needs a more restrictive, nurturing type of environment that "River Hills would provide" (School Record at 2410). Dr. McGuire testified that her recommendations were based on her observation of Michael at the Life Skills program on August 13, 2003. The parents requested a change of placement take place, with River Hills as their preferred option. The district proposed that Michael attend the Life Skills Program for the 2003-2004 school year.

The Appellants requested a comprehensive evaluation of Michael's' recreation/leisure, vocational and domestic skills on 9/10/03 (Appellants' Exhibit 40). Jennifer Snell, regional facilitator and supervisor of the Life Skills Program facilitated the evaluation. The results indicated that Michael's performance in the communication, daily living, socialization and adaptive behavior domains on the Vineland Adaptive Behavior Scales Survey was at a "low" level. Consultant Judy Weyant recommended a functional academic curriculum to increase his skills in all domains (School Record at 2436 – 2437). SCL worker Renee Pohlman testified she observed increasingly more frequent behavior outbursts (inappropriate touching, eeking) and anger from Michael since her assignment as case manager in November, 2002, and that the variety of his recreational activities has decreased due to his behavior. Ms. Pohlman described Michael's agitation arriving home from school on 10/22/03 (Appellants' Exhibit 45). Ms. Pohlman testified that she had not been given any instructions for redirecting Michael's inappropriate behavior.

Progress monitoring data for Michael's eight goal areas were provided through 10/30/03. Once again, the progress monitoring data are incomplete (e.g., goals 1, 3 & 6 have milestones with no data reported), vague (e.g., "very sporadic" as progress comment for goal to use voice tone appropriately for the environment), or incongruent with the skill objectives (e.g., "Mike has a pen pal in blgd. Mails letters in agency mail" as progress for milestone "Writes a letter when given information")(School Record at 2426–2433).

In the meeting held October 31, 2003 to discuss Michael's IEP. The Appellants presented graphs depicting Michael's behavioral performance through October, 2003. In a document labeled "Parents' Report", the Appellants claimed that placement in the Life Skills program had not eliminated inappropriate behavior. Although spitting and noises had decreased, several other behaviors had increased including screaming, inappropriate touching, swearing, screeching, standing on tables or chairs, and fingerpointing. The following chart displays the reported data.

Behavior	Parent Data
Standing or chair or table	Sept. = 4 occurrences Oct. = 4 occurrences
Screeches, Screams	Sept. = 95 occurrences Oct. = 49 occurrences
Swearing	Sept. = 60 occurrences Oct. = 22 occurrences
Finger Pointing	Sept. = 32 occurrences Oct. = 30 occurrences
Inappropriate touching	Sept. = 10 occurrences Oct. = 5 occurrences
Touching	Sept. = 95 occurrences Oct. = 80 occurrences

(School Record at 2438-2446). At this meeting, the Appellants requested placement at River Hills, while the school district personnel indicated Michael had made significant improvement in all of his IEP goals and should stay in his current educational placement (School Record at 2435).

Another meeting was held November 7, 2003 to develop Michael's IEP for the 2003-2004 school year. Although school personnel indicated performance improvement in all eight goal areas, the Appellants reported no change or poor performance and/or less independence in all goal areas except independence (following visual schedule without prompts)(School Record at 2461 – 2462). Using the current IEP as a guide, the team developed a proposed IEP for Michael. The Appellants requested a change in placement to River Hills School in Cedar Falls, while the remaining members of the IEP team determined that continued placement in the Life Skills Program would be appropriate for Michael. Although Michael's supplemental aids and services could be provided in an integrated setting, the remaining IEP members did not offer such a placement since the "alternate placement at Life Skills was agreed upon".

The IEP included applied math, daily living, vocational, functional reading and writing, appropriate behavior, and physical health goals. In the description of special education services, Michael was to receive classroom accommodations, assistive

technology (functional communication cards) community and work experiences, linkages with Vocational Rehabilitation and MHDD, program modifications, specially designed instruction (direct instruction), supplementary aids (an associate), and speech therapy in individual and small group settings (240 minutes/month). In the specification for programming section, the IEP indicates that the parents are requesting placement at River Hills and compensatory education for two years beyond age 21, and that "supplementary aids and services can be provided in an integrated setting, but an alternative placement at Life Skills was agreed upon" (School Record 2450 – 2465).

In a letter dated November 20, 2003, Mrs. S. suggested several modifications to the specification of milestones of the IEP. Although several suggestions were incorporated, her request that Goal #5 include the statement "reduction in all inappropriate behaviors" was not incorporated. On November 21, 2003, Dr. McGuire testified that she visited Michael at the SWAEA Life Skills program to observe his interactions and behavior. She testified that in the vocation setting at the teacher work center, Michael was sorting buttons, and was the only student in the facility. In the main location, she observed inappropriate pointing behavior and no formal social interactions with anyone other than the associate. On November 24, 2003, the Appellants filed for a due process hearing based on LMCSD's and GWAEA's failure to grant a change in placement and failure to provide a free, appropriate education for Michael. Michael's IEP for his 12th grade year was finalized 12/2/03 (Appellants' Exhibit 51).

On January 2, and January 14, 2004 Mrs. S. requested an independent observer be permitted to observe Michael's school behavior since she did not believe his behaviors were "being tracked accurately" (Appellants' Exhibit 27). The Appellants offered several examples of "data discrepancies" as the reason for the request for an independent observer (Appellants' Exhibit 35). These discrepancies concerned Michael's independent/dependence in work setting, Michaels cooperative/refusal behaviors with his associate and teacher, Michael's inappropriate/not a behavior of concern breast touching, Michael's improving/deteriorating behavior in January, 2003, and recording/non-recording of Michael's inappropriate behavior. Mrs. S. testified that the district replied that the request would be discussed at a subsequent IEP meeting.

Mrs. S testified that Michael has regressed in his functional living skills (Goal 2) and employment skills (Goal #3), as observed in the home and in reviewing the notes of the Supported Community Living (SCL) workers (Appellants' Exhibit 8). Earlier Michael worked at the library and Burger King, while currently Michael works in the laundry (washing, drying & folding clothes) and office (shredding paper) at the SWAEA Life Skills Program. Mrs. S. testified that during twelfth grade, Michael has an average of 26 inappropriate behaviors per day. She indicated that the IEP goal of reducing the occurrence of inappropriate behavior "to an average of 9 incidences daily by 2/04" had not been reached. Teacher Bud Griffin indicated Michael could not participate in community-based vocational training due to his behavior.

Dr. Julie Donnelly testified as a witness for the Appellees over the objection of the Appellants' counsel. Dr. Donnelly is an autism consultant, with a PhD in special education from the University of Missouri-Columbia. The topic of her dissertation was "Subtypes of Autism by Cluster Analysis", and she has receiving post-doctoral training in functional analysis methodology. Dr. Donnelly had 24 years of teaching experience, and currently had a half-time position with Columbia schools. She has held adjunct positions

at the University of Missouri-Columbia for classes addressing autism. Dr. Donnelly has published several book chapters, articles and manuscripts (Appellees' Exhibit 1). Dr. Donnelly is also a parent of a child with autism. The Administrative Law Judge finds that Dr. Donnelly's knowledge and experience of autism qualifies her to serve as an expert witness.

Dr. Donnelly observed Michael for approximately three hours in a variety of educational settings. She also reviewed Michael's educational records and interviewed staff involved with Michael since 1999. Dr. Donnelly summarized her findings in a report (Appellees' Exhibit B). She interpreted testing results to indicate that Michael operated at a low functioning level in communication, self-care, social skills, and academics. Observing Michael in both the Life Skills classroom and the teacher work center at SWAEA, Dr. Donnelly concluded that Michael has mild behavior difficulties and does not have the capacity to succeed in an academic-based curriculum. She offered that Michael has made progress in learning functional life skills, and should continue with a functional life curriculum. Dr. Donnelly's opinions would have been more persuasive if accompanied by data from the school records or specific examples. Dr. Donnelly questioned whether the GWAEA Life Skills program is an appropriate placement for Michael.

Year-Span Documents

The Appellants' presented several documents to demonstrate Michael's deterioration over the last three years. In a document entitled "Failure to Progress and Regression" the Appellants provide data suggesting minimal progress or regression in each of the goal areas over the last three years (Appellants' Exhibit 32). The document contains information extracted from the home-school notebooks (Appellants' Exhibit 7), IEP documents, and personal communication. The Appellants also submitted samples of worksheets from school in reading and math to demonstrate academic regression in grades 9, 10 and 11 (Appellants' Exhibit 9). A specific document depicting the decrease in functional communication skills (e.g., greetings, please, thank you, I don't know, excuse me, asking question, initiating and maintaining conversations) from 2001 through 2004 was provided (Appellants' Exhibit 41). The Appellants offered the math exam given to Michael at the beginning of the year in the Life Skills program (Appellants' Exhibit 23) and sample worksheets from Grade 10 (see Appellants' Exhibit 9) as evidence of regression in math. The excerpts from SCL workers reports (sample report card Appellants' Exhibit 38) were suggested to show a loss of social skills.

The decrease in Michael's independence was depicted in a document offered by the Appellants of excerpts from the school-home notebook, his IEP, and personal communication (Appellants' Exhibit 28).

The occurrence of inappropriate behavior in the community is documented in Exhibits 18 and 19, charts developed from LCS reports (Appellants' Exhibit 8). SCL worker Leah Larson confirmed this deterioration in her testimony and in writing (Appellants' Exhibit 15). Ms. Larson testified that by the Fall of 2002, Michael's inappropriate behavior were so severe (spitting in her face, eeking loudly and refusing to stop) that she would often have to leave the community settings. She testified that she witnessed a decline in his community living skills and social interaction skills. The

Appellees highlighted dates between January 2003 and March 2003 in Exhibit 8 that describe Michael's behavior as appropriate.

The deterioration of behavior at school is presented in a "Behavior Summary" document (Appellants' Exhibit 33) which represented excerpts from the home-school notebook (Appellants' Exhibit 7) and personal communication. Comments from one-to-one associates Mrs. Englekamier (Mrs. E) for 2000-2001, Mrs. Hodge for 2001-2002, and Mrs. Lisa Mumma for 2002-2003 are included. A summary document of the inappropriate behaviors by type from 9th through 12th grade was also presented (Appellants' Exhibit 43) which represented excerpts from the home-school notebook (Appellants' Exhibit 7) and personal communication. Mrs. S. testified that the regression in Michael's behavior had repercussions both in and out of school. She expressed concern that serious behaviors occur at church and family gatherings, at eye exams and at independent speech therapy, in the grocery store, and that home life is now dominated by inappropriate behavior. Although the Appellees described the documents as "self-serving", they did not offer evidence demonstrating behavioral progress at school over the years.

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 procedural requirements of an IEP involve assurances that the program developed was technically valid. A valid evaluation [20 U.S.C. § 1414(a)] must guide a properly constituted IEP team [20 U.S.C. § 1414(d)(1)(B)] in formulating the IEP that includes the required components [20 U.S.C. § 1414(d)(1)(A)] and in determining placement [34 C. F. R. § 300.552(a)(1)]. An IEP may be deemed inappropriate if "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits" [*Roland M. v. The Concord School Committee*, 16 IDELR 1129 (1st Cir. 1990)]. The Appellants are not claiming procedural violations in the development of Michael's IEP's.

Substantively, an IEP must be reasonably calculated to provide educational benefit. The benefits must be more than trivial or de minimis (*Polk v. Central Susquehanna Intermediate Unit 16*, 441 IDELR 130, 1988) but need not be optimal or maximum (*Rowley*, 1982, at 3046). Several opinions from circuit courts have helped to define this

substantive requirement. The First Circuit in *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) held that "The IDEA does not promise perfect solutions to the vexing problems...The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education". The Second Circuit in *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120-21 (2d Cir. 1997) reasoned that the Rowley standard contemplates more than mere trivial advancement. That same circuit court later concluded that an IEP must "produce progress not regression"[*Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2nd Circuit 1998)]. The Third Circuit Court of Appeals has defined the requirements of the FAPE mandate in several decisions. In *Polk v. Central Susquehanna Intermediate Unit 16*, 1988-89 EHLR 441: 130 (3rd Cir. 1988) the court concluded that states must provide "some sort of meaningful education--more than mere access to the schoolhouse door"...and that the benefit conferred by the Act "must be more than de minimus":"Just as Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit...when the Supreme Court said 'some benefit' in Rowley, it did not mean 'some' as opposed to 'none.' Rather, 'some' connotes an amount of benefit greater than mere trivial advancement". In *M.C. v. Central Regional School* District, 23 IDELR 1181 (3rd Cir. 1996) the court highlighted in the importance of "meaningful progress", while later in 1999, the 3rd Circuit held that the standard of "more than trivial" was wrong, and that the appropriate standard was whether the IEP offered the opportunity for "significant learning" and "meaningful educational benefit" [*Ridgewood Board of Education v. N. E.*, 30 IDELR 41 (3rd Circuit 1999)]. The court also determined that the question of what is appropriate cannot "be reduced to a single standard", and that benefit "must be geared in relation to the child's potential". The 4th Circuit clearly rejected a minimalist interpretation of the FAPE requirement, holding that "Congress did not intend that a school system could discharge its duty under IDEA by proposing a program that produces some minimal academic advancement no matter how trivial" [*Hall v. Vance county Board of Education*, 774 F.2d 629 (4th Cir. 1985). The Fifth Circuit opined that "an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction...nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a more modicum or de minimis,; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement. In short, the educational benefit that an IEP is designed to achieve must be meaningful [*Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303, 118 F.3d 245 (5th Cir. 1997)]. Later in 2000, the 5th Circuit concluded that "documented improvement in test scores documented benefit" and that progress should not be measured in relation to rest of regular education class, but with respect to individual student [*Houston Independent School District v. Bobby R.*, 31 IDELR 185, 200,F.3d 341 (5th Cir. 2000)].The U.S. Court of Appeals for the Sixth Circuit developed a metaphor in its interpretation of the FAPE requirement: "The Act requires that the [school district] provide the educational equivalent of a serviceable Chevrolet to every handicapped student...the [school district] is not required to provide a Cadillac" [*Doe v. The Board of Education of Tullahoma City Schools*, 20 IDELR 617, 9 F.3d 455 (6th Cir. 1993)]. In *Linda W. v. Indiana Dept. of Education*, 32 IDELR 66 (7thCir. 1999) the 7th Circuit

established boundaries for claims of inappropriate programs, insisting that deficiencies in a program that can be remedied with minor adjustments would not result in conclusions that FAPE had been violated: "parents must establish much more than that the original plan is deficient". The 9th Circuit in *Gregory K. v. Longview School District*, EHLR 558:284, 811 F.2d 1307 (9th Cir. 1987) concluded that although the parent-preferred program may have been "better" for the student, the court "must focus primarily on the District's proposed placement" and whether it was reasonably calculated to provide the student with educational benefits. The 10th Circuit similarly concluded that IEP's, even if "not optimal," are appropriate when "calculated to, and did, confer some educational benefits" as required by the IDEA [*O'Toole v. Olathe District Schools Unified School District No. 233*, 28 IDELR 177 (10th Circuit 1998)]. In *J.S.K. v. Hendry County School Board*, 18 IDELR 143, 941 F.2d 1563 (11th Cir. 1991), the 11th Circuit held that while "a trifle might not represent 'adequate' benefits, maximum improvement is never required" and concluded that the educational benefits from the educational program must be of "significant value" to the child.

Importantly, the 8th Circuit held that the IDEA does not require a program to maximize ability or produce "the best possible education or superior results. The statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student" [*Fort Zumwalt School District v. Clynes*, 26 IDELR 172 (8th Circuit 1997)]. The 8th Circuit also opined that the determination of whether or not a school district provided FAPE was based on an examination of IEP's "at the time when they were written". Therefore, the test of substantive appropriateness examines the IEP at its inception.

In addition to the 8th Circuit, several courts have held that the adequacy of an IEP is not judged in hindsight, but at the time it was developed. The First Circuit in *Roland M. v. The Concord School Committee* (1990) held that "an IEP is a snapshot, not a retrospective" and that "comparative academic progress, in and of itself, is not necessarily a valid proxy for, or determinative of, the degree to which an IEP was reasonably calculated to achieve the mandated level of educational benefit"(16 IDELR 1129). Similarly, the Third Circuit Court in *Fuhrmann v. East Hanover Board of Education* (1993) held that the "measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date . . . neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement"(19 IDELR 1065). The Ninth Circuit in *Adams v. State of Oregon* (1999) advised: "We do not judge an IFSP in hindsight; rather, we look to the IFSP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer . . . meaningful benefit" (31 IDELR 130). Demonstrated progress is not determinative of an appropriate program. The school district must provide that the IEP, when it was created, was reasonably calculated to provide some educational benefit: "ultimate success is not the touchstone of the inquiry: reasonable calculation is all that is required under the law" (*The Board of Education of the County of Kanawha v. Michael M.*, 2000].

These rulings lead to a conclusion that judging the substantive adequacy of an IEP is a determination that an IEP has been reasonably calculated to provide meaningful benefit of significant value to the child. The IEP need not produce the "best possible education" or maximize the child potential, but the benefits of the IEP must be more than

trivial or de minimis. The determination of substantive appropriateness examines the IEP at its inception. The Appellants claim that the substantive requirements of Michael's IEP's have not been met, and he has therefore been denied a free appropriate public education. The Appellees argue that second prong of the *Rowley* appropriateness test requires a determination of whether Michaels IEP *goals* were reasonably calculated to enable him to receive educational benefit (italics added). They point to the testimony of Mrs. S. that the goals were appropriate. However, *Rowley* instead requires the "the individualized educational program" be reasonably calculated to enable the child to receive educational benefit. Not just the goals, bur rather the entire IEP must be reasonably calculated to provide educational benefit. Interestingly, minimal progress may also be evidenced if a child's IEP's repeat the same goals and objectives each year [2]. Many of Michaels' IEP goals were repeated over several years (e.g. ,initiating conversations).

Did the school district provide Michael S. with a free and appropriate education?

The answer to this question requires an examination of the substantive adequacy or Michael's IEP's at their inception to determined if the IEP's were reasonable calculated to provide Michael with meaningful educational benefit. The IEP is to include 1) a statement of the child's present level of educational performance, 2) a statement of measurable annual goals, including benchmarks or short-term objectives, 3) a statement of the special education and related services and supplementary aids and services to be provided to the child or on behind of the child *to advance appropriately toward attaining the annual goals*, 4) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class, 5) a statement of individual modification in the administration of State or districtwide assessments of student achievement...or if the IEP team determined that the child will not participate, a statement of how the child will be assessed, 6) the projected date for the beginning of services, and the frequency, location, and duration of those services, 7) a statement of transition services, and 8) a statement of how the child's progress toward annual goals will be measured and how the parents will be informed of the extent to which the *progress is sufficient* to enable the child to achieve the goals by the end of the year [20 U.S.C. § 1414(d)(1)(A)(i-vii); 34 C.F.R. § 300.347(a-b); § 281 - 41.3(3) I. A.C.](italics added). Further, during the development of the IEP, the IEP team is to consider several factors including:

> in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including *positive behavioral interventions, strategies, and supports* to address that behavior [20 U.S.C. § 1414(3)(B)(i)](italics added).

The issues of this appeal concern three of these requirements: 1) whether the special education and related services identified in Michaels' IEP were reasonably calculated to enable him to advance appropriately toward attaining his IEP goals, 2) whether the progress monitoring enabled a determination of the sufficiency of progress, and 3) whether his behavior plan included positive behavioral interventions, strategies and support to address impeding behavior.

Provision of Special Education to Advance Appropriately Toward Attaining IEP Goals

The Appellants are not disputing the appropriateness of the goals and major milestones of Michael's IEP's; in fact, they were very involved in the development of those goals. Although there was testimony about the Appellants favoring more "academic" goals in reading and math in 9th and 10th grades while representatives from the school district favored a more functional approach, Michaels' goals for his 11th and 12th grade years were more functional and vocationally-focused. Rather, the Appellants assert that the implementation of the IEP – the provision of special education, related services and supplemental aids and services to advance appropriately to attaining the annual goals - was deficient. They assert that LMCSD and GWAEA have "failed to follow and implement significant parts" of Michael's IEP.

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.]. 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. As the Fifth Circuit noted: The IEP must be specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction" [*Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303, 118 F.3d 245 (5th Cir. 1997)]. The Eighth Circuit has ruled that although "specific results are not required", the school district must make a "good faith effort" to assist students in achieving educational goals [*CJN v. Minneapolis Public Schools, Special School District No. 1*, 38 IDELR 208 (8th Cir. 2003)].

Special education is defined as "specially designed *instruction*" [20 U.S.C. 1402(22), (25)(italics added) which means "adapting content, methodology or delivery of instruction to address the unique needs of an eligible individual that result from the individual's disability" (281-41.5 I.A.C.).

Michael's 10th grade IEP called for seven periods of "special education" provided by a special education teacher with support from an associate, his 11th grade IEP called for "316 min/day" of specially designed instruction (e.g., direct instruction in the areas of communication, social skills, functional reading and writing, math, vocational and daily living skills") with no provider listed and the support of an associate, and the 12th grade IEP called for 360 min/day of specially designed instruction provided by special education teachers (e.g., "direct instruction in the areas of communication, social skills, functional reading, writing and math, vocational and daily living skills"). Michael was also to be "supported by an associate across all settings during the school day to support IEP goals". The majority of "instruction" over the last three years was provided by Michael's aides, uncertified in special education.

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.].

Michael's aides were responsible for instruction, the selection of instructional materials, data collection, and behavior management. Mr. Kalsenberg also testified that he did not work 1:1 with Michael, but rather Michael's associate provided the instruction for half of the 9th grade year and all of 10th. The majority of Michael's day is isolated from other students, and a small amount of time with his teacher, and very little time with peers. Most notably in Michael's present program at SWAEA Life Skills – the program proposed by the school district for 2003-2004- Michaels spends the majority of the day isolated with his associate in his "office". Although the TEACCH methodology remains the methodology in the Life Skills program, teacher Griffins has not been trained in TEACCH methods although associate Candice is TEACCH trained. Mr. Griffins testified that Michael's teacher was his one-to-one associate, and that his one-to-one time with Michael was a matter of "minutes". Mr. Griffins testified that the Life Skills program was to be a transitional program. A teacher was to be hired during the summer for Michael, but when the AEA was unable to do so, the plan returned to Mr. Griffins supervising an associate. Mr. Griffins testified that Michael was able to work at the SWAEA teacher center, for vocational activities, but due to his behavior could not be placed in the community for vocational training. Mr. Griffins also testified that Michael did not initiate verbal contact with peers. Mr. Griffins thought Michael's IEP was appropriate to meet his needs and that Michael is making progress on his IEP goals, although his behavior progress is variable. Since Michael had missed 15 out of 45 day of the first quarter, the goal of the IEP have not been met. Mr. Griffin testified that he trusted the associate to do the progress monitoring and trusted the other professional around him to design Michael's educational program. Mr. Griffins was unaware of IEP goals pertaining to "initiating and maintaining conversation" or the 4-prompt limit prior to Michael's responses.

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.). Although an aide may assist in the provision of special education and related services, the responsibility to monitor the implementation of the IEP falls first to the special education teacher and ultimately to Linn-Mar Community School District and Grant Wood AEA10.

By virtue of the provision of a 1:1 aide over the three years in question, direct provision of special education services were diminished. The services of an associate may not replace special education services identified in the IEP. The educational and behavioral plans require development, implementation and evaluation by a trained professional. Isolated with his aide or sitting in his "office" the majority of the day with his associate would certainly prevent the provision of special education services to advance Michael toward attaining his IEP goals.

Progress Monitoring as an Index for Gauging the Sufficiency of Progress

The development of subsequent IEP's should be based, in part, on a review of progress monitoring data. By evaluating student progress, IEP teams make decisions about future programs. The purpose of the annual review is to determine whether the annual goals are being achieved and to revise the IEP to address any lack of expected progress toward the annual goals [34 C.F.R. § 300.343(c)(1-2); 281-41.61(3) I.A.C.].

The progress monitoring data presented by the school district is vague for certain IEP components and nonexistent for others. Few meaningful data are available to help an IEP team review progress or to confidentially convince this ALJ that the programs offered to Michael were calculated to provide meaningful benefit. In lieu of progress monitoring data for IEP goals, the Appellees could have submitted teacher-made tests, teacher observation, report cards, student handouts, and student portfolios as evidence of progress [*Pace v. Bogalusa City School Board*, 38 IDELR 207 (5th Cir. 2003)], but no such evidence was offered. Instead, subjective judgments that Michael was "happy" or that he "loved his work experience program" were substituted for objective evidence or progress. No witness testified explicitly to Michael's progress using specific examples. Although we have the testimony and convictions of Alice Dahle that Michael was making academic progress, there is scant evidence to support those conclusions. Dr. Donnelly testified that Michael was making progress in learning functional life skills, but her opinion would be more persuasive if accompanied by data from the district showing Michael's actual progress or refuting the claims of behavioral deterioration.

The district is also required to administer an "alternate assessment" to those students not involved in state or districtwide assessments (20 U.S.C. § 1412(a)(17)(A). No data from such alternate assessments was available.

As evidenced in the preceding case law, *courts have been unwilling to accept school district's assertions concerning the appropriateness of a student's educational program absent proof in the form of data.*[1] The school district has not provided adequate proof that Michale's IEP was reasonably calculated to provide educational benefit. However, the Appellants presented samples of Michael's academic work from 6th through 12th grade (Exhibit 9) to support their claim that Michael's academic skills have deteriorated. Although the Appellees argued that the compilation of samples by the Appellants may be unrepresentative and biased, they did not offer contrary, convincing evidence showing more than trivial educational benefit: "However, an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such... Thus, we do not hold that a school district can ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student" [*O'Toole v. Olathe District Schools Unified School District No. 233*, 28 IDELR 177 (10th Circuit 1998)].

The Adequacy of the Behavioral Plan in Addressing Behavior

During the development of the IEP, the IEP team is to consider several factors including:

> in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including *positive behavioral*

interventions, strategies, and supports to address that behavior [20 U.S.C. § 1414(3)(B)(i)](italics added).

A "behavioral intervention plan" (BIP) is referenced in the discipline provisions of the IDEA. Prior to disciplinary action the local educational agency (LEA) is to review the BIP if one exists or develop a BIP if the LEA "did not conduct a functional behavioral assessment and implement a behavioral intervention plan" [20 U.S.C. § 1415(k)(B)(i)].

The specific components of the BIP are not identified in either the federal statute or regulations. State rules similarly require consideration of behavioral strategies in the development of the IEP [Iowa Administrative Rules of Special Education (IARSE 281-41.67(5)(b)(1) Iowa Administrative Code (IAC)] but do not outline the specific contents of a BIP. In an earlier ruling, this Administrative Law Judge identified several criteria useful in examining the appropriateness of a BIP. These criteria were 1) the BIP must be based on assessment data, 2) the BIP must be individualized to meet the child's unique needs, 3) the BIP must include positive behavior change strategies, and 4) the BIP must be consistently implemented as planned and its effects monitored (36 IDELR 50, SEA IA 2001).

Michael's Positive Behavior Plan does not appear to be based on assessment data. In fact, school psychologist Jack Rainey testified that the functional assessment was conducted after the development of the Positive Behavior Plan. The plan is individualized and includes scripts and sensory experiences as two positive change strategies. Although additional strategies could have been identified (e.g., reinforcement of alternative, appropriate behavior, social stories), the strategies included in the plan were suggested by the Appellants.

However, the fourth criteria, the consistent implementation and monitoring – clearly has not been met. The school district has presented no evidence that the Positive Behavior Plan was consistently implemented or monitored. Further, there are no data to suggest Michael's inappropriate behaviors have diminished or decreased. Data from the behavior plan are not available, and no formal classroom observations other than 3 days by Kelly Trier were conducted. The Appellants' however, have presented numerous documents as evidence of Michael's behavioral deterioration. Although the Appellees described these documents as self-serving, they have offered no evidence of behavioral improvement particularly in the GWAEA Life Skills program – the program chosen to address Michael's inappropriate behavior. Inappropriate touching of women's breasts has continued the entire time Michael has been at Linn-Mar and appearing to increase in frequency. Michael's current speech pathologist, Alice Dahle, testified that Michael inappropriately touched her breast as recently as February 16, 2004. Although Kelley Trier and Dr. Connelly described Michael's behaviors as "mild", teacher Bud Griffins, SLC workers, and Michael's aide Lisa Mumma all testified that Michael's behavior significantly interfered with his community and vocational activities identified on his IEP. Further, the seriousness of Michael's behaviors is evidence by the issuance of four disciplinary referrals. Although the referrals stopped while the behavior continued, the school officials could not provide the reason. SCL workers Leah Larson, Rene Pohlman, and Mary Callahan all confirmed Michael's serious behavioral regression. The current Life Skills Program has not been successful in managing Michael's inappropriate behaviors. These behaviors have occurred in the school context and generalized to the home and community context.

It is doubtful that Michael would *advance toward attaining* goal 3 ("development of skills to complete a variety of jobs and assignments in and out of the school setting") or goal 5 ("demonstrate socially acceptable behavior across all settings") without an effective behavior plan implemented and monitored. Michael's escalating behavior did impact the provision of his community and vocational programs. Removal from community and vocational activities as a consequence for inappropriate behavior cannot be described as "positive behavior interventions, supports and strategies" to address impeding behavior. The behavior plan was not reasonably calculated to provide benefit to Michael S.

In *Neosho R-V School District v. Clark*, 38 IDELR 61 (8th Cir. 2003), the Eighth Circuit held that failure to properly implement a behavior management plan was a denial of FAPE. The school district in *Neosho* failed to address and implement a proper behavior management plan, although the student's behavior had been a concern at several IEP meetings. Although the student had made "slight academic progress", this evidence was properly discounted because "any slight benefit obtained was lost due to behavior problems that went unchecked and interfered with his ability to obtain a benefit from his education". The court confirmed that the need for such a plan existed long before the effort was made to establish such a plan. Additionally, witnesses testified that "papers attached to the IEP's were not sufficient to amount to a cohesive behavior management plan". Although the special education teacher and the paraprofessional "commendably attempted to cope with [the student's} behavioral problems using methods that could have been employed in a behavior management plan, they were not professionally trained to successfully reduce the inappropriate behavior in a manner fitting to [the student's] disabilities". In the present appeal, any de minimis academic or communication progress was overshadowed by a clear record of deteriorating behavior. Records also indicate that work at higher levels was only possible with a great deal of assistance and prompting from the associate.

In *CJN v. Minneapolis Public Schools, Special School District No. 1*, 38 IDELR 208 (8th Cir. 2003) the Eighth Circuit rejected the argument that a student's IEP was inappropriate because a student's behavior was escalating resulting in time-out and restraint. Importantly, the student was making academic progress, and the behavior intervention plan was based on functional behavioral assessment data and included a positive point reward system. Earlier in *Evens v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988) the court held that and IEP cannot ignore behavior, particularly when it is a prominent problem and significantly affects the child's ability to learn. The need to address behavior in an IEP was also confirmed in an administrative decision from Iowa in 1994, *North Scott Community School District*, 21 IDELR 226 (SEA IA 1994). This case involved an autistic child whose IEP stressed academics, but whose greatest problems were behavioral. The administrative law judge found the IEP inappropriate in addressing behavior.

Compensatory Education

Compensatory educational services are appropriate relief under the IDEA for denial of FAPE [see *Miener v. State of Missouri*, 800 F.2d 749, 754 (8th Cir. 1986); *Birmingham v. Omaha School District*, 200 F.3d 850, 856 (8th Cir. 2000); *Independent School Dist. No. 284 v. A.C.*, 258 F.3d 769, 779-80 (8th Cir. 2001)]. An award of

compensatory education may include assistance beyond the statutory age of entitlement [see *Pihl v. Massachusetts Dept. of Education*, 9 F.3d, 184 (1st Cir. 1993)]. The Office of Special Education Programs has opined that the purpose of a compensatory education award is to remedy the failure to provide services the student should have received when entitled to FAPE, and are an appropriate remedy even after the period when the student is otherwise entitled to FAPE: "because, like, FAPE, compensatory education can assist a student in the broader educational purposes of the IDEA, including obtaining a job or living independently" [*Letter of Riffel*, 34 IDELR 292, OSEP 2000).

Decision

The Appellants have prevailed in this matter. Michael S was denied a free and appropriate education. Compensatory education for three years is awarded.

The Appellants requested that the ALJ order a change in placement to River Hills School for a period of three years from the date of the ruling, including transportation. Such an order will not be issued. Michael's IEP and placement must be determined on an annual basis by his IEP team [281-41.50(5) I.A.C.]. This ALJ is unwilling to order a specific placement based on Michael's current needs and certainly not on speculation of his future needs. Decisions regarding Michael's IEP and placement will be left to his IEP team, which will be reviewed at least annually.

The IEP team is ordered to reconvene within one week of this ruling to develop Michael's IEP for the 2004-2005 school year and then to discuss a full continuum of placement options. Decisions must be governed by the requirements of FAPE [20 U.S.C. § 1401(8)(D);34 C.F.R. § 300.1(a); 34 C.F.R. § 300.13(d); § 281 - 41.3(3) I. A.C.] and federal and state mandates concerning education in the least-restrictive environment (LRE) [20 U.S.C. § 1412(5)(A); 281-41.3(5) I.A.C.]. The IEP team must include an autism consultant, who will assist in the development of Michael's IEP and BIP.

Motions and objections not previously ruled upon, if any, are hereby over-ruled.

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

27 FEB 2004

Date

[1] Zelin, G. M. (2000) Educational benefit and meaningful progress under the new IDEA. Paper presented at the Fourth Annual Iowa Special Education Law Conference. Des Moines, IA.

[2] Yell, M. L. (1995). Least restrictive environments, inclusion, and students with disabilities: A legal analysis. *The Journal of Special Education, 28, 389-404.*