

**Iowa Department of Education**

(Cite as 23 D.o.E. App. Dec 99)

IN RE: Tanner E.,  
Tim & Pam E., Appellants

Decision  
(Admin. Doc. SE-293)

#141

vs.

Lewis Central CSD  
Loess Hills AEA 13 and Iowa Department  
of Education, Appellees

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on December 8<sup>th</sup> and 9<sup>th</sup>, 2004 at the Loess Hills AEA offices in Council Bluffs, Iowa. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code Section 281.6 of the Rules of the Iowa Department of Education (Iowa Administrative Code 281-41.112-41.125) and applicable regulations from the Individuals with Disabilities Education Act (IDEA) as amended in 1997. It should be noted that the IDEA has recently been amended but the actions that were the emphasis of this hearing were under the auspices of IDEA 97.

The Appellants in this matter were represented by Attorney Curt Sytsma of Des Moines, Iowa. The Lewis Central School District and the Loess Hills AEA 13 were represented by Mr. Joseph Thornton. The Iowa Department of Education was represented by Ms. Christie Scase, Assistant Attorney General for the State of Iowa.

According to the appeal filed by the Appellants on August 26, 2004, Tanner, a 17-year-old student with Attention Deficit Disorder and significant Learning Disabilities, has been denied several critical elements associated with the provision of an appropriate special education program. First, they assert that Tanner was forced into a situation, as a result of a drug related offense, that led to he and his parents agreeing to certain program contingencies that should not have been required. They also contend that key program elements needed for Tanner such as completion of a functional behavioral assessment and a behavioral intervention program were not done correctly. As asserted in the Appeal:

... a "Behavioral Intervention Plan" was developed which stated that any drug related behavior would result in the "predetermined consequences" set forth in the March 4 Agreement. A "Functional Behavior Assessment" was conducted on March 15 (after the development of the Behavioral Intervention Plan), but the assessment did not address an identified "behavior of concern," *to wit*, "possessing drugs and/or drug related materials at school." On April 1, 2004, Tanner's IEP was rewritten to state that "a behavior plan will be implemented to assist Tanner with complying to the terms" of the March 4 Agreement. (p. 2, Appellant's Appeal)

In May of 2004 Tanner was reported as failing a drug screen test and the LEA asserted that this was a violation of the agreement they had with Tanner and his parents and indicated that unless other agreements were reached that expulsion procedures would commence. The Appellants assert that this constitutes a disciplinary action taken without due consideration of manifestation determination issues and led eventually to a proposed placement for Tanner that failed to meet his needs, was not sensitive to least restrictive environment considerations and failed to meet the required components of an Interim Alternative Educational Program.

The Appellants also assert that Tanner's receipt of a free appropriate public education was denied for over two years in the following ways:

They have failed to evaluate him (Tanner) in all areas of suspected disability, they have failed to adopt and implement accommodations, modifications, and related services necessary to address his learning disabilities, and/or they have failed to adopt and implement accommodations, modifications, and related services necessary to address the underlying causes of his problematic behaviors. (p. 3, Appellant's Appeal)

A final issue brought forth by the Appellants is a question regarding whether a full continuum of programs and services were considered by the LEA, through the IEP process, in arriving at the proposed placement for Tanner. The Appellants further name the Iowa Department of Education in this issue for allegedly failing to meet the state education agency responsibility in assuring that a full continuum is considered for meeting the needs of students with disabilities in Iowa.

The Department of Education aspect of the Appeal relates to a settlement agreement entered into by the Department in May, 2001 following an earlier due process action (Jessica D., SE-228). This agreement led to the convening of a Continuum Task Force (CTF) who charge was as follows:

... addressing all issues connected with the provision of services, including, but not by way of limitations, 1) the protection of parental rights under IDEA when a child is placed out of district; 2) the maintenance of equity between and among school districts; and 3) insuring

that provisions promoting a continuum of services do not, inadvertently or otherwise, discourage the development of appropriate services in neighborhood schools or encourage placement in more restrictive environments. (p. 413, Record)

As a product of this Task Force a number of recommendations were forwarded to Mr. Ted Stillwell, the then Director of the Iowa Department of Education, on May 21, 2002. (Record, p. 413). The Appellants in this Hearing bring specific concerns regarding two of these recommendations they consider to be most relevant to these proceedings. These are:

- Develop a process for districts and parents to access services outside of the resident district, and
- Develop a set of criteria that LEA and AEA must use to demonstrate that they have a genuine continuum of services system. These criteria must include a method for moving the continuum issue from the LEA level, to the AEA level, and then from the AEA to the SEA. (p. 415, Record)

The Appellants assert that the methods necessary to implement these recommendations is still lacking As stated by Mr. Systma in his opening statement:

... we will candidly state there is no procedure. If a small district's only option doesn't work, there is no procedure except the cup in hand – tin cup in hand procedure available for accessing something else. (pgs. 11 & 12, Transcript)

Two conference calls were held on September 7<sup>th</sup> and 10<sup>th</sup>, 2004 in preparation for this Hearing. At that time Mr. Sytsma indicated that in addition to the parties currently listed as Appellees that he intended to name the Council Bluffs School District because of his understanding that they were refusing to accept Tanner into a program being considered by Tanner's IEP team. On September 10<sup>th</sup> this ALJ ruled that he did not find a basis for recognizing the Council Bluffs School District as a party in this Appeal. Following this discussion the parties agreed that this Hearing would be held on October 14<sup>th</sup> and 15<sup>th</sup>, 2004. Prior to October 14<sup>th</sup> this ALJ received a message requesting that the Hearing be postponed. On October 26, 2004 the Appellants requested a continuance until December 15, 2004. On November 4, 2004 a conference call was held involving the parties at which time the hearing dates of December 8 & 9, 2004 were agreed upon. Following this discussion the parties reached an agreement regarding Tanner's program with Dr. Panyan, the mediator assigned to this Appeal, and agreed to having the District hire a teacher to provide tutoring for approximately six hours per week pending the outcome of this Hearing.

This Hearing was held on December 8<sup>th</sup> and 9<sup>th</sup> with the parties exchanging witness lists and agreeing on relevant records in a timely manner. The Appellees did enter an objection to pages 368A & 368B submitted by the Appellants dealing with details of the preappeal process and this objection was sustained by the ALJ based on the following:

Discussions that occur during a mediation process must be confidential except as may be provided in Iowa Code Chapters 679C and may not be used as evidence in any subsequent due process hearings or civil proceedings. However, the parties may stipulate to agreements reached in the mediation. (Iowa Administrative Code, 41.113(10).

This Hearing concluded on the afternoon of December 9, 2004. At that time the parties agreed to submit written briefs to the ALJ by December 22, 2004. The ALJ agreed to provide questions to the attorneys for which he would like such briefs to address. He agreed to provide these questions to the attorneys by December 13, 2004. Furthermore, in a discussion with Mr. Sytsma and Ms. Scase it was agreed that Ms. Scase would provide a delineation of the work done by the Iowa Department of Education since 2002 to implement the recommendations of the Continuum Task Force. A request was also made and granted at the end of the Hearing to continue the Appeal through January 10, 2005.

### **I. Finding of Fact**

The Administrative Law Judge finds that he and the Iowa Department of Education have jurisdiction over the LEA and AEA parties and the subject matter involved in the appeal. Furthermore, this ALJ finds that he has jurisdiction in the Department of Education aspect of this appeal.

Several witnesses presented testimony during these proceedings to complement the pages of record referred to during the two-day hearing. These witnesses included:

- Laurie Thies (LEA Special Ed Admin.)
- Dennis Stubbs (Counselor – Student Assistance Program)
- Doug Radtke (H.S. Principal)
- Pam E. (Tanner's Mother)
- Tanner E.
- Lucinda Klein-Lombardo (Ed. Coord. – Children's Square)
- Jennifer Kern (H.S. Teacher)
- Todd Reznicek (School Psych.)
- Cal Sinn (AEA Regional Coord.)

Tanner E. is a 17 year old student who is considered an eligible individual for special education programs and services. His primary disability has been described as a significant learning disability and attention deficit/hyperactivity disorder. Tanner was first referred for special education services in the area of speech and language in 1990. He began receiving direct speech services in October of 1990. In 1992 Tanner was diagnosed with attention deficit/hyperactivity disorder by the University of Iowa Hospitals & Clinics. In 1993, when Tanner was six, he began receiving special education in a resource teaching program in the Lewis Central Schools because of behavioral and academic needs. In 1994 he moved into more of a self-contained setting based on

growing concerns regarding his achievement. In 1996 Tanner was enrolled in a program in the Council Bluffs School District based on growing concerns, particular expressed by his parents, regarding his achievement.

Tanner returned to the Lewis Central Schools in the 4<sup>th</sup> grade and continued special education services through the Fall of his ninth grade year. In 2001 Tanner, as a ninth grader, was withdrawn from the Lewis-Central Schools by his parents. Tanner lived at the Omaha School for Boys to complete that year and attended Benson High School in Omaha. Tanner was assessed during this time and determined to be a student with learning disabilities under Nebraska special education procedures. The following year Tanner returned to Lewis-Central and continued to receive special education services in a more self-contained program at Lewis Central High School. Tanner continued to receive such services up until the time of the major events surround this Appeal.

In order to best capture the essence of the facts in this Appeal the information presented and considered is organized around the key issues to be addressed.

### **Issues of Expulsion/Change of Placement**

There appears to be consensus in these proceedings that Tanner is a student who is has been involved in using illegal drugs. There are obvious concerns regarding this behavior shared by both school officials and his parents. There was substantial testimony during these proceedings of the assessment and treatment options that have been pursued for Tanner through the school and Tanner's parents.

On March 3, 2004, Tanner was apparently caught with a pipe commonly used for drug related activity in his possession at school which led to his parents being called to meet with Dr. Radtke, the school principal, to discuss necessary actions. Although there are varying perceptions regarding the way in which discussions progressed at the time of this incident, this incident led to a referral to a Student Assistance Program provided by Jennie Edmundson Hospital via a contractual relationship with the Lewis Central Schools and the development of a contract developed between the school and Tanner which read:

Tanner agrees to:

1. Do a drug screening every month at his expense until the month he graduates from Lewis Central High School.
2. See the drug counselor provided by Lewis Central on a weekly basis.
3. Do 40 hours of community service at the high school, supervised by a maintenance person.
4. Not skip any class.
5. Attend an AA meeting once a week until graduation day.

If Tanner violates one or more of the listed items, a recommendation of expulsion for one school year will be made to the Lewis Central Board of Education. (Pg 314, Record)

It should be noted that there was an amendment suggested by Tanner's mother to modify item #4 above to have additional community service added as a consequence rather than expulsion. Apparently this was agreed to by Mr. Radtke.

When questioned during the Hearing, Ms. E., Tanner's mother recalled her doubts regarding this contract:

I felt at the time this was setting Tanner up for failure. I even asked his Case Manager at the Parent/Teacher Conference what would happen if he were suspended from school for a year. She checked with Dr. Radtke who said that he would not be able to attend any school in Iowa and probably Nebraska. There were no indication of alternative programs. (p. 313, Transcript)

On May 7, 2004 Tanner's Chemical Dependency Counselor, Mr. Stubbs, notified Tanner's parents and school administrators that Tanner had failed his most recent drug screening. At a meeting held on May 11, 2004 the IEP team, including Tanner's parents, met to, among other things, complete a manifestation determination. The team was not able to reach consensus on all of the questions required in this process. As noted in a letter sent by the Legal Center for Special Education, "Ms. E. has reason to believe that Tanner's behavior is a manifestation of his disability and a misguided attempt on his part to relieve the symptoms of his disability by 'self-medicating' with an illegal substance." (Pg. 364B, Record) Testimony by Mr. Stubbs in these proceedings, when addressing the substance use assessment process, supported this hypothesis of self-medicating behavior (p. 164, Transcript). In regards to the final disposition of the manifestation process within the IEP meeting on May 11<sup>th</sup>, the following is noted on the IEP:

The team met for a manifestation determination staff as outlined in state and federal procedures for student referral for expulsion. The team did not reach a unanimous conclusion on the determination and Tanner's parents were give information regarding a independent hearing to be conducted. (p. 339, Record)

On May 11, 2004, the school district exercised what it believed to be its authority to place Tanner in a 45-day interim alternative settings because of these drug related issues. The interim setting was homebound instruction with up to six hours per week in core courses. In August of 2004 a meeting was held to discuss an ongoing placement for Tanner while this Appeal was being considered. There was conflicting testimony during these proceedings regarding the array of options considered during this meeting. According to school personnel (p. 228, Laurie Thies Testimony, for example) the parents did not consider Lewis Central a viable option. The parents apparently wanted to have considered a comprehensive secondary program in the Council Bluffs School District (p. 390, Transcript) to be considered. Mr. Sytsma did make an inquiry regarding the availability of this program and was told that the Council Bluffs School District would not accept a student from Lewis Central into this program. This policy position by the

Council Bluffs Schools was further corroborated in other testimony provided in these proceedings. During this August meeting the staffing team, with the exception of the parents, agreed that a special out-of-district school, Children's Square Academic Center, would be an appropriate setting for Tanner.

Tanner's parents did not consider Children's Square to be an appropriate placement and immediately filed for this Hearing following the August meeting. Having done so, they did agree to have Tanner attend the Children's Square program pending the outcome of these proceedings. Ms. Klein-Lombardo, educational coordinator for the Children's Square program testified that while this program is considered a specialized program for students with significant behavioral disorders that they do serve students with a variety of learning and behavioral needs (pp. 488-489, Transcript).

Tanner attended the Children's Square program for a short period of time. He testified during these proceedings (p. 426, Transcript) that he did not consider this program appropriate for himself. Specifically he felt that the program was overly confining and that he had little in common with the other students served in this program. Following a short time Tanner did not return to Children's Square and was to be provided homebound instruction pending the outcome of this Appeal.

Dr. Rahtke was asked during these proceedings what the position of the LEA would be if it was concluded that Tanner should be returned to the Lewis Central School District to receive his education (p. 377, Transcript). He stated that if that were the decision that the District would proceed with their expulsion procedures consistent with policies governing students with drug-related offenses.

In relation to the circumstances surrounding the alleged and/or proposed expulsion of Tanner from the Lewis Central Schools this ALJ will have to consider whether the procedural requirements surrounding discipline procedures with students with disabilities have been followed in this situation. Related to this would be any procedures governing change of placement that need to be considered in this situation and any relevant issues regarding least restrictive environment considerations that are pertinent to this situation.

The Appellants also contend that a change of placement process has occurred with Tanner that has not been conducted in an appropriate manner. This deals specifically with the circumstances surrounding Tanner's placement into an Interim Alternative Educational Setting (initially homebound instruction) and continuing with his placement into the Children's Square Program. Mr. Thornton, on behalf of the AEA and LEA, asserted that the use of these interim settings was not related to a change of placement. In referring to the behavioral contract with Tanner and his parents Mr. Thornton stated:

When the school entered into that agreement with the E. family, it was clear the understanding was that if any part of that was violated that then that would initiate what was held in abeyance, that being the expulsion.

When that happened, the expulsion proceedings started. All the requirements that were required to be done as far as the process and

procedures were followed. The family was notified. There was the 10-day suspension, kicked in the 45-day alternative placement. That's what started the homebound process. (pp. 21-22, Transcript)

Ms. E., Tanner's mother, was asked during her testimony as to her understanding of what occurred and the part of the of the drug incident leading to homebound instruction. In response to cross-examination she responded in the following manner to questions from Mr. Thornton:

Q. And Tanner certainly understood the consequences of using drugs, did he not?

A. Yes, he did.

Q. And at that point because of the drug incident, the school informed you that he was going to be placed on a 45-day homebound program.

A. Until we got through this.

Q. Right. That was – the initial step was a homebound, then we would go through—since you objected to No.4, that that would kick in a process to have that reviewed.

A. Correct.

Q. And you understood that the day you left, that that was what was going to proceed from there?

A. Correct. (p. 360, Transcript)

During these proceedings there was also extended discussion regarding the criteria that must be satisfied in choosing an Interim Alternative Educational Setting (pp. 209-210, Transcript). The Appellants asserted that the criteria for selecting an alternative setting, specifically that criteria dealing with addressing the behavior of concern, was not met with homebound instruction and that the Children's Square Program failed to adhere to least restrictive program expectations.

#### **Issues of Necessary Program Components for Students with Disabilities Facing Disciplinary Action**

In regard to the procedures to be followed in discipline matters involving students with disabilities there are a number of specific elements that came to light during these proceedings. This includes the process of manifestation determination, which, among other things, includes a consideration of the adequacy of a student's IEP in relation to the behavior leading to disciplinary action and other elements such as the use of functional behavioral assessments and behavioral intervention programs.

Testimony was provided that the IEP team did review the questions regarding a manifestation determination in regards to Tanner's drug offenses. These questions include:

1. In relationship to the behavior subject to disciplinary action, the eligible individual's IEP and placement were appropriate and the



special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the eligible individual's IEP and placement;

2. The eligible individual's disability did not impair the ability of the individual to understand the impact and consequences of the behavior subject to disciplinary action; and
3. The eligible individual's disability did not impair the ability of the individual to control the behavior subject to disciplinary action. (281--Iowa Administrative Code 41.72 (1) (c) (2).

From testimony provided it would appear that the IEP team did not reach consensus regarding the manifestation questions. Specifically, Tanner's mother did not concur with the conclusion of other team members regarding question #4 and in further testimony she challenged the notion of whether the other questions had been posed in an appropriate manner.

The complexity of whether Tanner understood the consequences of his drug use is exemplified in the testimony of Mr. Stubbs, his substance abuse counselor, who responded to a question in relation to this concept.

I think that Tanner understood the consequences of his use probably early on in his involvement with the student assistance program. He was able to verbalize the consequences that he'd suffered to that point. (pp. 167-168, Transcript)

At the heart of the challenge IEP teams have in answering such questions is trying to assess and student's ability to move beyond the mere act of verbalizing what the consequences are to understanding consequences in the immediate circumstances and the relationship of various disabilities such as learning disabilities or attention deficit/hyperactivity disorders on such abilities.

The Appellants furthermore assert that the functional behavioral assessment and behavioral intervention plan were not done in an appropriate manner. A significant issue is the focus of the behavioral intervention program designed for Tanner. The behaviors of concern as identified in his behavioral intervention program included "Being tardy to classes, not doing independent work without being prompted, possessing drugs and/or drug related materials at school." (Pg. 311, Record). However, as it became clear during questioning of various witnesses during these proceedings, the Behavioral Intervention Program on March 8, 2004 did not refer to Tanner's drug related behaviors. For example, under the Positive Behavior Interventions the following strategies are listed:

Weekly progress monitoring with teachers through e-mail. A summary of these progress monitoring results will be sent to parents.

Positive verbal reinforcement for assignment completion

In class, progress monitoring

Tanner will be allowed to go to Pottery room, when assignments are completed and with teacher permission.

If Tanner is having more difficult time maintaining behavior in the classroom, he will be asked if he wants to go talk to someone in guidance.

If teacher is recognizing that Tanner is getting frustrated, he will be given a pass to guidance to talk to someone. (Pg. 311, Record)

Under consequences, however, is what could be considered a reference to Tanner's drug related behavior, "Tanner is on a behavioral contract with the principal. Violation of the contract will result in predetermined consequences agreed upon by administration and parents." (Pg. 311, Record). The following series of questions and responses took place between Mr. Systma and Ms. Thies on this matter:

Q. And so then we have a plan of action. The desired replacement behaviors have nothing to do with drugs or drug-related material, do they?

A. No.

Q. The strategies, the one-on-one conferences with teacher and Tanner, reminders during classroom, and teaching direct study schools.

Again, nothing to do with the drug-related behaviors?

A. Correct

Q. The positive behavioral interventions that encourage responsible student behavior all appear to be related to assignment completion, finishing his work. When assignments are completed, he can go to the pottery room, et cetera.

A. Correct.

Q. But the consequences when he exhibits behaviors of concern now abandons all the stuff – on tardiness and independent work and says we're going to enforce the behavioral contract with the principal?

A. Correct (pp. 186-187, Transcript)

A similar series of questions were posed to Ms. Thies regarding the functional behavioral assessment and specifically why this assessment did not address the drug related behaviors of concern. Ms. Thies indicated that a major reason for not doing so was because the parents had not openly shared information on this behavior with the staffing team (p. 189, Transcript).

Mr. Reznicek, the School Psychologist, had a major role in developing the FBA and BIP. When asked why this assessment and behavioral plan did not address the drug related behaviors the following exchange occurred:

Q. The precipitant for the functional behavioral analysis was the drug-related activity?

A. Yes. At that time as we did that after the contract was made, yes.

Q. If that was the behavior of concern, why does not the functional behavioral analysis address the issues of drug-related activities, causes, motivation, things that could be done to alleviate it or help Tanner stay sober and clean like we want him to?

A. Okay. Well, that was probably an error on our part with developing—you're talking about the assessment?

Q. Yes.

A. Yes. We were using that. We going over files and things like that, and we took out the discipline things that were in things that he had previous referrals for, and that, yeah, we just listed those behaviors, but we did not get into detail about the specific causes about what might be happening. (pp. 515-516, Transcript).

### **Program Appropriateness/Expectations for Adequate Progress**

According to the Appellants another significant issue in this Appeal is whether Tanner has, over an extended period of time, been receiving an appropriate education. As stated in the Appeal:

... for a period of more than two years, the School District and the AEA have violated Tanner's right to a free and appropriate public education in one or more of the following ways: They have failed to evaluate him in all areas of suspected disability, they have failed to adopt and implement accommodations, modifications, and related services necessary to address his learning disabilities, and/or they have failed to adopt and implement accommodations, modifications, and related services necessary to address the underlying causes of his problematic behaviors. (p. 3, Appellant Appeal)

Two major threads of discussion regarding program appropriateness emerged during these proceedings. First, there is the issue of whether Tanner's special education program has adequately addressed his learning needs for an extended period of time. Secondly, there is the issue of whether Tanner was progressing in such a way as to be receiving benefit from his special education program over an extended period of time.

The Appellants assert that Tanner's program has failed to address his specific learning needs as a result of his learning disability. Specifically they assert that Tanner requires a multi-sensory approach to his instruction (pp. 13-14, Transcript). A number of references were made to his IEPs over the past several years and whether the implementation of these IEPs demonstrate the use of instructional strategies individually tailored to meet Tanner's needs.

According to Tanner's mother, his needs have not been met for an extended period of time. She expressed her opinion that the Lewis Central Schools continued using the same strategies even when these were not producing desired outcomes (p. 267, Transcript).

On the other hand, school personnel asserted that Tanner's learning styles and Learning Disabilities have, in fact, been consistently addressed by the professionals working with him and through his IEPs. For example, Ms. Thies stated that a variety of approaches, including multi-sensory approaches, are commonly used in special education programs in Lewis-Central (p. 73, Transcript). This perspective was supported in the testimony of Ms. Kern, Tanner's High School Case Manager (p. 454, Transcript).

The second aspect of program appropriateness emphasized in these proceedings are questions raised regarding whether Tanner was receiving benefit from his special education program over an extended period of time and the assertion by the Appellants that IEP participants should have taken more assertive steps in meeting Tanner's needs. At the core of this assertion are questions that were raised in regard to the discrepancy between Tanner's level of functioning in various skill areas receiving attention has become more discrepant from his peers across recent years and that IEP team member failed to adequately respond to such discrepancies in a timely manner.

Ms. Thies stated that seeing more a discrepancy from peers is not uncommon for students with disabilities as they move through the system (p. 87, Transcript). The Appellants challenged this notion and posed questions regarding why there were not changes made in Tanner's IEP as his academic discrepancies increased. In a general response to these questions Ms. Thies stated:

Q. . . . What did the school or IEP change to make the program more effective when these kind of results came in?

A. I don't think you'll probably see all of the evidence in all of the IEP documents. I think that teachers make decisions every day in their classroom based on assessments in kids' progress, and I think they alter those decisions.

I think they change instruction frequently, and it isn't always documented that they used a different approach in an IEP, but I think there's been ongoing communication with teachers relative to progress toward the goal on a consistent basis. (pp. 89-90, Transcript)

Ms. Thies also indicated that such strategies as modifications in assignments, tests, etc. had been used for a number of years with Tanner (p. 111, Transcript).

As stated above, Tanner's mother indicated that she had expressed a number of concerns regarding Tanner's progress.

The concerns were that we continually set goals, and I continually asked, "What good are goals if the child never reaches them?"

And yet we continued to set them, and I would be told he was making progress, but you really couldn't see it.

And I was very concerned over the fact that - I'm terribly concerned over the fact that he's where he's at and yet we've tried.

I mean, he's had all these goals and have never reached one that I know of. (p. 267, Transcript)

Another point of contention in these proceedings is the lack of emphasis within the IEP process (and specifically the functional behavioral assessment and behavioral intervention program) on Tanner's drug related behaviors. The school's position appears to be that Tanner's parents did not assert a need to deal with this area and may have even withheld information regarding Tanner's needs in this area. As stated in an exchange between Mr. Thornton and Ms. E.:

Q. . . . you never as the active parent said, "Hey, there's something really going on with Tanner's drug use. We got to get a handle on that, on how it's affecting drug use.

You never made a statement like that, did you?

A. Requesting for help or – their help or –

Q. Either requesting their help or even raising it as an issue in the IEP or in any of the conferences with Dr. Radtke.

A. I did not—if someone could point out to me where the school had ever told me there was something that they could help. I'm not sure.

You know. I would have taken anybody's help. . . . (pp. 339-340, Transcript)

In this exchange, Ms. E. recalls that she did inform the school that Tanner was seeing a drug counselor but did not recall indicating that this meant the family was taking care of the substance abuse issue (p. 340, Transcript).

### **Provision of a Continuum of Programs and Services**

A final area addressed in these proceedings is the responsibilities of the Lewis Central School District to provide a full continuum of options for Tanner and the related responsibilities of the Iowa Department of Education to assure that such a continuum of options is available for students with disabilities. This latter point was asserted by the Appellants in their original Appeal as follows:

The Iowa Department of Education has violated the IDEA by failing to adopt policies and procedures that will ensure a full continuum of service options to children like Tanner E. As a consequence, Tanner does not have the option of an Alternative High School, and his IEP Team cannot offer him that option. (Appellants Appeal, p.4).

In relation to the actions taken as a result of the Iowa Department of Education Continuum Task Force, Ms. Scase, representing the Department of Education stated the following in regard to the recommendation to develop a process for districts and parents to access services outside of a resident district:

. . .the primary follow-up action was a determination that within the parameters of Iowa's current statutory provisions, there is very little the agency can do beyond what is currently outlined within the special education administrative rules. (p. 240, Transcript).

Ms. Scase later stated:

. . . I by no means want my statement to be interpreted to indicate that the Department has done nothing but look at the law and say we can't do anything.

I think they've done—have taken significant steps and continue to take significant steps to improve the availability of services and to study and look at what can be done in the future and any further improvements.

With regard to the very specific absence of mechanisms by which one local school can require or the Department or an AEA, anyone, can require a local school district to accept a special education student into their program, it's not a student of residence. That's—that's the statutory barrier that we're bumping up against. (pp. 259-260, Transcript).

Regarding the consideration of a number of options beyond Children's Square, Mr. Thornton, on behalf of the AEA and LEA asserted that a number of options were considered (p. 23, Transcript). It was indicated in testimony that options in the Council Bluffs District could not be seriously considered because of what was reported as a policy position taken by Council Bluffs not to accept transfer students from Lewis-Central (pp. 234-235, Transcript).

A major point of contention in these proceedings is whether the Children's Square program, did, in fact, constitute an appropriate program for Tanner. There was no evidence indicating that prior to the drug incidents that the local IEP team had considered the need for a self-contained program focusing on students with significant behavioral needs for Tanner. Ms. E. stated firmly her belief that Tanner's behavior did not rise to a threshold level necessitating this restrictive a placement (p. 337, Transcript). Ms. Klein-Lombardo, the educational coordinator at Children's Square, disagreed with this opinion and responded in the following manner to questions raised regarding the appropriateness of this setting for Tanner:

Q. What did you perceive to be Tanner's behavioral needs?

A. Tanner's behavior needs would be that he did not speak up and advocate for himself when he needed something. If his legs hurt he didn't tell us.

If he needed a break, he didn't tell us.

Q. Is that why you think he was sent to you, lack of self-advocacy skills?

A. That would be one reason. Doesn't advocate for himself. Doesn't necessarily let you know what's going on.

And then of course all of his academic needs. You know, it's hard to know what Tanner wants or what Tanner needs if he's not communicating with you.

And the motivation. You know, that's difficult. And that would be another thing the motivation that we would—you know, it's hard to say what motivates Tanner if we didn't have him very long, didn't get to know him very well. (pp. 491-492, Transcript).

There were also questions raised regarding the IEP developed for Tanner while he was served at Children's Square. It included the use of therapeutic crisis intervention (TCI); a technique for managing combative physical aggression. When asked if there was any indication that Tanner would need such a procedure Ms. Klein-Lombardo indicated that although there was no history of Tanner displaying such behaviors, ". . . if he did have any kind of aggression, we would use this." (p. 497, Transcript).

## II. Conclusions of Law

### Issues of Expulsion/Change of Placement

At the heart of the discussion regarding the use of expulsion with Tanner is the nexus of several expectations in relation to expulsion procedures with students with disabilities including when such procedures are appropriate, the role that the manifestation determination process plays and those circumstances in which an interim alternative educational setting may be used. It is important to address each of these interrelated areas.

While testimony during these proceedings suggested several incidents of drug related behavior on the part of Tanner, the specific incident leading to this Hearing occurred on May 7, 2004 at which time a failed drug screening for Tanner was reported to his parents and school officials. This report led the school to feeling compelled to enforce the contract developed between Tanner, his parents, and school officials in March, 2004 (p. 314, Record).

As stated earlier, there are a number of expectations within the Iowa Rules of Special Education (2000) that must be answered during the manifestation process regarding the IEP and placement, the understanding a student has of the impact and consequences of the behavior of concern and the ability of the student to control the behavior of concern (281—Iowa Administrative Code 41.72(1), (c), (2)). The issue of the appropriateness of the IEP and placement in relationship to the behavior subject to disciplinary action will be discussed below.

According to the 281—Iowa Administrative Code-41.72, and consistent with IDEA requirement, the IEP team is expected to review all relevant information such as evaluation and diagnostic results, including information supplied by the parents, observations of the student and the current IEP and program and determine that:

1. In relationship to the behavior subject to disciplinary action, the eligible individual's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the eligible individual's IEP and placement:
2. The eligible individual's disability did not impair the ability of the individual to understand the impact and consequences of the behavior subject to disciplinary action; and
3. The eligible individual's disability did not impair the ability of the individual to control the behavior subject to disciplinary action.

It is expected that the IEP team will, in fact, come to a consensus regarding whether the behavior leading to the disciplinary action was or was not a manifestation of the student's disability. If the response to these questions leads to a conclusion that the behavior was not a manifestation of the disability then "... the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities . . . " (300.524 C.F.R.).

A manifestation process did take place on May 7, 2004 with the IEP team, including Tanner's parents. It is questionable as to whether the team reached consensus as to the relationship between Tanner's drug-related behavior and this disability (p. 339, Record). On the one hand, as described by Mr. Thornton agreement was reached with one lone dissension:

At the meeting, the IEP Team, including all of the E., did unanimously agree that Tanner's illegal drug use at school was not a manifestation of his disability with regard to all criteria, except for Mrs. Es' dissent to the last criterion, which concerned whether Tanner's disability impaired his ability to control his illegal drug use on school grounds. (p. 6, Appellee's Brief). (emphasis added)

For the purposes of the manifestation determination process in relationship to Tanner's impending expulsion it is significant that the IEP team, including the parents did not reach consensus on whether Tanner's behavior was a manifestation of his disability. Specific disagreement was expressed by Ms. E. in relation to the last question of whether Tanner's disability impaired his ability to control the behavior subject to disciplinary action. In such situations it seems appropriate that the LEA/AEA would carry the burden



of proof if a parent challenges the conclusions being made. As stated in 34 CFR 300.525 (b) (1999):

In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of 300.523(d).

It appears in this particular situation with Tanner that the IEP team proceeded with placement into an alternative educational setting without reaching consensus in the manifestation process.

In regard to the selection of the interim setting there would appear to be some additional concerns that warrant review. It is important to carefully examine the extent to which the criteria required for selecting an interim alternative educational setting was adhered to and, from a more basic perspective, whether Tanner's behavior fell under the auspices of the intended use of such settings.

In relation to determining the appropriateness of a proposed interim alternative setting it is expected under 41.71(4) that such a setting:

- (1) Be selected so as to enable the eligible individual to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the individual's current IEP, that will enable the individual to meet the goals set out in that IEP; and
- (2) Include services and modifications to address the behavior described . . . that are designed to prevent the behavior from recurring.

It is critical that the alternative setting address directly the behaviors that led for the need for such a setting of in such a way as to reduce the chances of such behaviors reoccurring. (Hemphill School District, 1997, 27 IDELR 406).

In situations involving the use of interim alternative educational settings and drug related behavior the Iowa Administrative Code state the following criteria:

The eligible individual knowingly possesses or used illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a state or local educational agency.  
(41.71 (2) (2) 2)

It would appear in this situation that it was not established that Tanner met such a criteria for the application of an interim alternative setting. While the positive test for drugs did appear inconsistent with the contract agreed to with the school, the testimony and records presented in these proceedings did not establish that he used such drugs ". . .while at

school or a school function . . .". The AEA and LEA assert, however, that this option was appropriate at this time (May 7, 2004).

From the Appellee's perspective this difference in the definition of possessing or using illegal drugs may seem relatively unimportant. From this ALJ's perspective, however, the specific circumstances surrounding this authority given to school officials would appear to be quite important.

The specificity of consequences related to failing the drug screening was directly related to the "contract" as agreed to by the parents, Tanner and school personnel. The application of a 45 day interim alternative educational setting would seem questionable in its application to this situation as opposed to those situations carefully defined in the 1997 IDEA amendments. The implications of this possible misapplication are significant. For example, the application of "stay put" provisions, as discussed in these proceedings are significant in contrasting the application of such under typical situations versus in those situation in which an interim alternative educational setting is being used under IDEA 97 provisions.

The IDEA does not discourage those situations in which parents and school officials may mutually agree on a change of placement outside of the defined discipline procedures. In this situation, however, it appears that the parents were presented with this interim program as the only option while they resolved how to proceed with the lack of consensus with the manifestation determination process.

This ALJ could also proceed with further analysis of whether the "interim" setting as delivered for Tanner in the homebound setting did, in fact, meet the criteria to be delivered in such a setting. While this may seem to be moot point in light of questions regarding the appropriateness of this use of the concept it is important to also clarify that this ALJ did have questions regarding whether the homebound program did, in fact, meet this criteria. Specifically I have concerns regarding whether this setting included services and modifications to designed to address the behavior that led to such disciplinary action (300.522 (2), CFR, March 12, 1999).

### **Issues of Necessary Program Components for Students with Disabilities Facing Disciplinary Action**

Beyond the question of the procedures to be followed when a student with disabilities is facing expulsion proceedings this Appeal brings up several related expectations regarding the specific practices to be followed when a student with disabilities is facing disciplinary action. This includes the practices of conducting functional behavioral assessments and developing behavioral interventions programs in relationship to a student's IEP.

### **Functional Behavioral Assessment**

As described above, a functional behavioral assessment (FBA) was conducted in March, 2004 in regards to Tanner's behavior. Specific questions were raised during these proceedings regarding the adequacy of the functional behavioral assessment developed for Tanner. The Iowa Rules of Special Education (2000), similar to federal regulations, does not provide a detailed description of the FBA but do speak to the circumstances under which this assessment is required:

If the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention and implement a behavioral intervention plan for the eligible individual before the behavior that resulted in the removal . . . the agency shall convene an IEP meeting to develop an assessment plan. . . (41.71(2), 2, b, (1))

It is also stated in both state and federal regulations that this information is to be used to ". . . develop appropriate behavioral interventions to address that behavior." Again, suggested within this phrase is that the behavioral interventions are directly addressing the specific behavior eliciting disciplinary action.

While a specific definition of a functional behavioral assessment is not provided in Iowa for federal regulations it is commonly accepted that this assessment seeks to identify the contextual factors associated with the behavior of concern and the functions served by this behavior of concern. As one state-level Hearing Office defined:

The general purpose of functional assessment of behavior is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with the child's education. The process involves some variant of identifying the core or "target" behavior; observing the pupil (perhaps in different environments) and collecting data on the target behavior, antecedents, and consequences, formulating a hypothesis about the cause(s) of the behavior; developing an intervention(s) to test the hypothesis; and collecting data on the effectiveness of the intervention(s) in changing the behavior. (*Independent School District No. 2310, 29 IDELR* (SEA MN 1998))

The focus of this definition as well as IDEA references is the completion such an assessment in relation to the "target" behavior. As described in *Farrin v. Maine*, "The purpose of the functional behavioral assessment is to explore the child's misbehavior and discover what, if anything, can be done to address it a prevent it from occurring again" (35 IDELR 189, U.S District Ct., Maine, 2001, p 3). That seems to be a deficiency in relation to the functional behavioral assessment completed for Tanner. The Appellees seem to assert that the drug related behavior was being dealt with otherwise through the student assistance program and thus was not the focus of the FBA. This does not seem appropriate in this ALJ's opinion. A similar question could be raised in situations involving weapons violations and the applications of functional behavioral assessments

and behavioral intervention programs with these behaviors. Analogous in such a situation would be the realization that weapons violations may very much involve outside agencies such as law enforcement rather than just being dealt with by schools alone. Indeed, it would appear to this ALJ that we are expected within our school settings and IEP process to partner with other relevant entities whether it be drug treatment programs, law enforcement or mental health in conducting assessments and planning needed programs. Earlier cases held at the Circuit level (see *Kruelle v. New Castle*, 552 IDELR, Third Circuit, 1981, for example) have addressed the interrelated nature of academic and non-academic behaviors.

### **Behavioral Interventions Program**

Similar to expectations regarding functional behavioral assessments the IDEA and Iowa Rules of Special Education (2000) refer to an expectation regarding the development of behavioral intervention programs for students facing disciplinary action. From even a broader sense the IDEA requires that whose behaviors interferes with their learning or the learning of others that the IEP team will address such behaviors at the time of IEP development.

While relevant federal or state rules and regulations may not define behavioral interventions programs specifically, the Iowa Department of Education has defined a behavioral intervention program in the following manner:

[A] written, specific, purposeful and organized plan which describes positive behavioral interventions and other strategies that will be implemented to address goals for a student's social, emotional and behavioral development. In addition, for students whose behavior prompts disciplinary action by the school, the behavioral intervention plan addresses the behavior(s) of concern that lead to conducting a functional behavioral assessment (Iowa Department of Education, 1998, *Their Future . . . Our Guidance*, p. 41)

In a recent hearing decision in Iowa (Mason City Community School District, 36 IDELR 50) ALJ Susan Etscheidt notes, that while federal statutes and regulations fail to specify the components of behavioral intervention plans (BIPs) necessary for implementing such strategies, an analysis of administrative and judicial decisions would suggest that the following criteria should be examined in reviewing the appropriateness of such plans:

- The BIP must be based on assessment data
- The BIP must be individualized to meet the child's unique needs.
- The BIP must include positive behavior change strategies.
- The BIP must be consistently implemented as planned and its effects monitored.

Much was discussed within this Hearing regarding the adequacy of the behavioral Intervention Program designed for Tanner and particular the absence of focus within the BIP or Tanner's IEP of the school on concerns regarding drug related behavior. This ALJ

has significant concerns regarding the adequacy of this plan while he recognizes that the criteria listed above can merely provide some direction to us but does not represent substantive provisions as recently commented upon by the Seventh Circuit Court of Appeals (*Alex R.*, 41 IDELR 146, Seventh Circuit, 2004).

In Tanner's situation, the team had completed a behavioral intervention plan and a functional behavioral assessment after the March incident. It would appear that the following expectations from the Iowa Rules of Special Education (2000) would therefore apply:

If the eligible individual already has a behavioral intervention plan, the IEP team shall meet to review the plan and its implementation and modify the plan and its implementation as necessary to address the behavior. (emphasis added) (281—Iowa Administrative Code 41.71(2), 2 (b) (2).

In relation to the term behavior, it should be noted that this is referenced in the above context as "behavior that resulted in the removal". In this case it would appear that drug related behavior would be the behavior in question. It should be noted that the Appellees assert that they did not address Tanner's drug related behavior because of parental wishes. This raises the larger question of whether parental preference should govern the areas to be addressed in an IEP or in a Behavioral Intervention Program.

The Appellees in this matter (Lewis Central School and Loess Hills AEA) assert that for the IEP team to have advocated for needs beyond those being brought forth by the parents would be overstepping their bounds:

The United States Supreme Court has so consistently held parenting, i.e., the right to choose the standards by which to raise a child, to be a fundamental right, that for the IEP Team to have been extraordinary, and whether such action would meet the applicable strict-scrutiny test is doubtful at best. See e.g. Lawrence v. Texas, 539 U.S. 558 (2003); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (p. 8, Appellee's Brief)

Despite this position of parental decision making the Appellees go on to assert that the parents do not have veto power over decision making of the IEP team. They state, "... the IEP Team has never given Tanner's parents a "veto" over the IEP Team's decision-making-authority, an essential function of the IEP Team's authority, and IDEA does not statutorily grant such a right (Appellee's Brief, p. 12). This seems to present somewhat of a paradox to this ALJ. On the one hand the overriding responsibility of Tanner's parents to have brought the drug issue before the IEP team is asserted. At the same time the assertion is being made that the parent's must keep their place as far as the IEP team decision-making process.

The Appellees further assert that AD/HD has not been identified as a disability under IDEA (Appellant's Brief, p. 9). It should be noted that the regulations implementing the

amendments to IDEA in 1997 (300.7 C.F.R., March 12, 1999) clearly specify the inclusion of students with AD/HD with special education needs under the category of "other health impaired". Furthermore the Appellees seem to insert a complex logic into their assertion that Tanner's drug use should not be considered in the expulsion process.

Other than having drugs at school, there is not evidence the drug use affected his educational program. To then conclude that drug possession resulting in an expulsion constitutes an affect on his educational program is circular logic, at best. (p. 10, Appellee's Brief)

### **Program Appropriateness/Expectations for Adequate Progress**

Related to this discussion above are expectations within the IEP process that lead to an appropriate program for a student with disabilities. At the heart of much of the discrepancy between the parties involved in these proceedings as to their perceptions of expectations of what should be the focus of Tanner's program and other issues such as the least restrictive notions.

In a decision of the Eighth Circuit Court of Appeals (Independent School District 284 v. A.C. 35 IDELR 59, 2001) the role of the IEP in addressing behavior is addressed. This court has reinforced the balancing of student needs that seems to be highly relevant in these proceedings:

... the Department ... instructs schools that suspension or expulsion is not normally appropriate as a first-line response to behavior problems resulting from a student's disability, even if the conduct in question violates school rules ... Instead, the student's IEP team should address the behavior ... using disciplinary measures only if appropriate in the context of the IEP ... This does not mean that the IDEA has obliterated the concept of personal responsibility, or that children with disabilities cannot be punished for simple misbehavior. It merely reflects the Department's judgment that sometimes, with certain children, what looks like simple misbehavior is actually a more complicated problem whose remedy should be integrated into the child's overall program of special education. (p. 5)

This Court goes on to state:

If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is "educational" or "non-educational," but whether it needs to be addressed in order for the child to learn. (p. 6)

More recently the Eighth Circuit again has dealt with issues regarding the relationship of academic and behavioral student needs in a case involving a student with behavioral

challenges (*CJN*, 38 IDELR 208, Eighth Circuit, 2003) and has again confirmed that both academic and behavioral progress must be considered in looking at the appropriateness of any IEP. While the Court in *CJN* did not address drug usage, in Tanner's case we are dealing with a problem that is obviously affecting his learning process as evidenced by the outcomes affected by his drug related behavior and the seriousness of these behaviors as indicated by school officials.

School personnel, in the case of Tanner, have also asserted that they did not address specifically Tanner's drug related behavior because of the parents failing to advocate for such services or perhaps even being opposed to such needs being address by the school. In this ALJ's opinion such a position, even if factually accurate, which was contested in these proceedings, would not negate the IEP team's responsibility to address all relevant areas related to a student's special education needs. In this case, Tanner's drug related behaviors were specifically at the heart of the disciplinary proceedings in which he was involved. As stated in an earlier ALJ opinion in Iowa (*Pleasant Valley Community School District*, 28 IDELR 1295), 1988) involving a student with mental health needs who had not been referred for evaluation:

The school cannot wait for a parent to bring a child's problem to their attention. The school has the responsibility to find and meet the needs of students, based upon the assessment data, even if a parent does not agree.  
(p. 10)

This leads us to the question regarding whether Tanner has, in fact, been receiving a free, appropriate, public education (FAPE). The appellants argue that Tanner had not been receiving such and that this is related to what has occurred around the disciplinary actions. They also see this as relating back to the failure of his special education program to provide meaningful benefit to Tanner over an extended period of time. They brought forth testimony and documents in these proceedings dealing with the discrepancy between Tanner's achievement and that of his peers increasing steadily over the last several years while the school's position seems to be that such a trend pattern with students with disabilities is to be expected.

Much of legal standard regarding program "appropriateness" and "benefit" originates with the *Rowley* Supreme Court decision in 1988 which does support the notion that a school's responsibility does not stretch to the point of maximizing benefit for all students with disabilities. As reflected in a decision of the U.S. Court of Appeals, Third Circuit (*Polk v. Central Susquehanna*, 441 IDELR 130, 1988), the Supreme Court was not "expousing an entirely toothless standard of substantive review" and expected more than de minimus benefit. As quoted from the *Rowley* decision:

By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did no impose upon the States any greater substantive educational standard than would be necessary to make such access MEANINGFUL. (Emphasis added) (p. 7)

Several Courts (*Cypress-Fairbanks*, 26 IDELR 303, 5<sup>th</sup> Circuit, 1997, *Adam J. v. Keller*, 328 F.3d, 804, 810 5<sup>th</sup> Circuit, 2003, *Lewisville Indep. School District v. Charles W.*, 40 IDELR 60, Fifth Circuit, 2003) and have provided direction regarding the operational criteria for ascertaining whether a program is, in fact appropriate. These criteria go beyond the basic criteria of *Rowley* which delineated the expectation that relevant procedure have been followed and that the proposed program is “reasonably calculated to confer educational benefit”. These latter court standards address the questions of how to assess the appropriateness of a program after a student has been involved in the program for a period of time rather at the initial program planning stage which seems most applicable to Tanner’s situation. As stated by the Fifth Circuit:

In determining whether an IEP provides a free appropriate public education, we consider four factors: (1) whether the program is individualized on the basis of the student’s assessment and performance; (2) whether the program is administered in the least restrictive environment; (3) whether the services are provided in a coordinated and collaborative manner by the key “stakeholders”; and (4) whether positive academic and non-academic benefits are demonstrated. (*Lewisville Indep. School District v. Charles W.* 40 IDELR 60, U.S. Court of Appeals, Fifth Circuit, 2003, p. 3)

It would seem important to view each of these criteria in relation to Tanner’s special education program. In regard to the question of individualization, there are significant questions that have been raised during these proceedings as to whether critical aspects of the IEP, such as Tanner’s annual goals were changed on the basis of lack of significant success in academic or behavioral areas. The functional behavioral assessment and behavioral intervention plan, as discussed above, and noted in testimony, seems weak, particularly in its failure to directly address the primary behavior of concern leading to the disciplinary action.

The question of whether the program is delivered in the least restrictive environment is also a significant concern in Tanner’s situation. As will be discussed earlier, the applicability of an interim educational setting is questionable in this circumstance. The question of whether Tanner requires a specialized program for students with severe behavioral disorders seems questionable based on the information presented in these proceedings. Other issues surrounding the expectation of a continuum of services will be discussed below.

The criteria of delivering services in a coordinated and collaborative manner with key “stakeholders” seems particularly applicable with Tanner’s needs. From this ALJ’s perspective coordination among key stakeholders includes coordinating the special education programs and services delivered within the special education program with those providing substance abuse assessment and treatment associated with Tanner’s needs. With a contractual relationship between the school it would seem that such coordination would have been easy to achieve. There appears to be a strong foundation



that substance abuse is not a behavior that, in and of itself, qualifies a student as requiring special education. Also, in this ALJ's opinion, there is not a rationale that would establish that special education would be the umbrella under which substance abuse programs are delivered. However, the concepts of coordination and collaboration between substance abuse treatment and the IEP team seems important, particularly when questions of substance abuse are a major contingency impacting a student's continued enrollment in a program that the IEP team considers otherwise appropriate. It also seems logical that the coordination and collaboration of such efforts across special education and substance abuse treatment would indeed be a significant process in partially defining what constitutes an appropriate program for such a student. This expectation seems critical as our schools are faced with serving more students with complex learning, social, emotional and behavioral needs that may warrant an array of services from various providers across the domains of juvenile justice, mental health, substance abuse treatment and education.

The final criteria of whether positive academic and non-academic benefits are provided for a student was also an issue of contention in these proceedings. Ever mindful of the caution offered by the Eighth Circuit, "When a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEP's were at the time of their adoption" (*CJN*, 38 IDELR 208, U.S. Court of Appeals, Eighth Circuit, 2003).

With this caution in mind, this ALJ does believe that Tanner's program comes up short on this fourth criteria as well. The Appellants pointed out the growing discrepancy between Tanner and his peers across time, as one reviews his IEPs and the conclusions reached by IEP teams. While such a criteria may, in fact, reflect a trend that affects many students with disabilities, it seems imperative, in this ALJ's opinion, that all of us must reexamine those situations in which students are not progressing at an acceptable rate. A widening discrepancy would seem to be prime trigger for such an examination. This seems similar to a recent decision by the Sixth Circuit in a case involving a 24-year old student with cerebral palsy in which the court stated that the educational benefits provided must be more than de minimus to be appropriate and state, in reference to the student involved in this case:

The record demonstrates that when Adam failed to reach the goals set forth in his IEPs in any given year, the school district did not recommend, let alone adopt or implement, any approaches to his instruction different from those already demonstrated to have failed. (*Barnett v Memphis*, 42 IDELR 56, U.S. Court of Appeals, Sixth Circuit, 2004)

The Appellees here seem to admit to certain procedural errors in the provision of an appropriate program but believe that these do not constitute a significant series of errors in providing FAPE for Tanner. In deciding whether such mistakes rise to a threshold of a substantive loss of FAPE this ALJ has to make a judgement such as that referenced by the Court in *Farrin*:

When the crux of an appeal is . . . procedural . . . by a school in applying the IDEA, a harmless error standard applies. The Court must ask whether the misstep impacted the child's access to FAPE, hampered his parents, ability to participate in developing the child's program and placement, or caused a loss of educational benefits. (*Farrin*, 35 IDELR 189, U.S District Court, Maine, 2001)

In Tanner's case, this ALJ believes that the missteps taken in planning and delivering his program have, in fact, led to a loss in meaningful educational benefit.

### **Provision of a Continuum of Programs and Services**

The basic elements that define the expectations for serving students with disabilities in the least restrictive environment have been in place since the passage of the Education of the Handicapped Children's Act in the 1970s, later to be the IDEA. The act requires that each public agency shall ensure:

- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
- (2) That special schools, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (CFR 300.550)

The Iowa Rules of Special Education (2000) build on this basic foundation and add the expectation that, ". . . Whenever possible, hindrances to learning and to the normal functioning of eligible individuals within the general school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education (emphasis added)(281---Iowa Administrative Code 41.37(2)(b)). These Rules also provide guidance regarding the expanded procedures that are to be followed when considering a circumstance in which a special school setting is being considered by posing the following questions to be answered by the IEP team:

- What are the reasons that the eligible individual cannot be provided an educational program in an integrated school setting?
- What supplementary aids and services are needed to support the eligible individual in the special education program?
- Why can't these aids and services be provided in an integrated setting?
- What is the continuum of services available for the eligible individual?

Closely related to the question of least restrictive setting is the notion of a continuum of alternative placements. The concept of a continuum of alternative placements (emphasis

added) is described in the Code of Federal Regulations (C.F.R. 300.551) and have been a part of the basic foundation of special education since the passage of 94-142. This expectation is to:

- (1) Include the alternative placements listed in the definition of special education under 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

The Code goes on to state that this continuum must be available “. . . to the extent necessary to implement the IEP for each child with a disability.” (300.552(b))

In a memorandum issued by the U.S. Department of Education in 1994 the concept of a continuum of alternative placements was discussed in more detail by Dr. Judith Heumann, then Assistant Secretary. She states, in part:

This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each student with a disability. . . . The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student. (emphasis added)(21 IDELR 1152)

The Iowa Rules of Special Education (2000) puts a similar focus on this concept but chooses the language of continuum of services (emphasis added) and states:

Each agency shall ensure that a continuum of services is available to meet the needs of eligible individuals for special education and related services. (281---Iowa Administrative Code - 41.38)

There are two threads related to the provision of a continuum of services present in these proceedings. This includes the provision of a program for Tanner and the responsibility of the Lewis-Central School District to “provide or make provision” for an appropriate program for Tanner based on a number of options from which such an appropriate program is selected. IEP Teams are expected to apply the criteria cited above in arriving at such a program in the least restrictive environment. The AEA Director of Special Education is charged with the responsibility for assuring all students with disabilities are, in fact, receiving an appropriate program, which includes the consideration of least restrictive environment. As stated above, this ALJ questions whether the application of an interim alternative educational setting applied to Tanner’s situation was appropriate. In

considering this situation it becomes even more important to consider the question of whether Tanner's program since leaving the Lewis-Central School District has reflected an appropriate consideration of least restrictive environment. This ALJ has concerns regarding whether his consideration has been established in Tanner's case.

First, testimony presented in the proceedings (p. 453, Ms. Kern's Testimony, Transcript) provided the opinion that Tanner could be served in the Lewis-Central Schools if not for the consequences to be dealt with regarding the substance abuse issues. It should also be noted that other testimony presented during this Hearing asserted that the program at Children's Square was "most appropriate" for Tanner. It would not be appropriate for this ALJ to substitute his opinion regarding the least restrictive setting in which Tanner should be served for that to be made by an IEP team. With this in mind, however, it should be stated that the records and testimony presented in these proceedings do not, in this ALJ's opinion, support Tanner's placement into a specialized setting for students with significant behavioral disorders as being an appropriate program for him with a consideration of other, less restrictive, appropriate options.

The second prong of the continuum of services construct within this Hearing is the assertion that the Iowa Department of Education has not met its responsibilities in assuring that a continuum of services is available to students with disabilities regardless of where they live in the state.

According to the federal regulations, similar to the Iowa Rules (2000) governing the implementation of IDEA, "Each public agency shall ensure that that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" (CFR 300.551 (a)). In addition to supplementary aids and services this includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospital and institutions.

As cited in a 1998 decision in Illinois (*Corey H.*, 27 IDELR 713, U.S. District Court, Northern District of Illinois, 1998) the original Senate Report of P.L. 94-142 included the following statements regarding SEA responsibility in assuring that students with disabilities have their needs met:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that the implementation of all provisions of this Act and in carry out the right of handicapped children, the State educational agency shall be the responsible agency . . .

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many states, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of

handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.

In referencing the responsibility of SEAs in enforcing the continuum expectations the *Corey H.* Court went on to reiterate the responsibilities of SEAs under the federal IDEA regulations (34 C.F.R. 300.555) to ensure teachers and administrators in all public agencies are informed of their responsibilities in implementing a continuum of services and are provided the technical assistance and training necessary to do so.

This assertion of the responsibility of state education agencies was reiterated in the Third Circuit (*Kruelle v. New Castle*, 5552 IDELR, U.S. Court of Appeals, Third Circuit, 1981), and is referred to as the state's general supervision responsibility. More recently, in a class action suit from Hawaii (*Felix v. Waihee*, 1994) a class of individuals with disabilities from birth to age 20 who were eligible to receive mental health services as part of their program asserted that the state had not met its obligation under IDEA. The plaintiffs alleged that the state failed to provide a continuum of mental health services and programs, failed to develop IEPs responsive to the behavioral and mental health needs of these youth and failed to provide mental health services in the least restrictive environment. This suit led to a Consent Degree that has continued to be contested as to whether the state has moved with adequate action to meet the expectations.

In the Decree, the State of Hawaii was ordered to design and implement a seamless system of care which "consists of (1) a system of care of programs, placements and services, and (2) organizational and managerial infrastructure capable of supporting the system, and which, at minimum ensures that the requirements of the IDEA and Section 504 and the principles and standards of this Decree are satisfied. (*Felix v. Catetano*, 32 IDELR 230, U.S. District Court, Hawaii, 2000)

In a more recent decision in the Eighth Circuit (*John and Leigh T. v. Iowa Department of Education*, 2001) the Court reiterated the state's responsibility to assure implementation of IDEA and reiterated that several circuits have held SEAs responsible when they have failed to ensure LEA implementation of IDEA requirements.

In these proceedings, the Iowa Department of Education submitted a list of activities conducted since the work of the Continuum Task Force in 2002. After reviewing this material it does not appear, in this ALJ's opinion, that significant progress has been made in developing a process for districts and parents to access services outside of their resident district or developing a set of criteria that LEAs and AEAs must use to demonstrate that they have a genuine continuum of services system.

### III. Decision

This ALJ finds that the Appellants have prevailed in each of the elements asserted in their Appeal. He finds that Tanner E. has been denied an appropriate special education program across several dimensions, including the key program elements of an individualized education program based on a functional behavioral assessment and a behavioral intervention plan designed to address the behaviors of concern significantly impacting Tanner's educational program and likelihood of facing disciplinary actions. These shortcomings would seem significant enough to question any determination of a lack of relationship between Tanner's disability and his drug related behavior. The current use of an interim alternative educational option does not appear appropriate.

Tanner's IEP team should meet within two weeks of this decision to develop a revised IEP for Tanner. Unless another setting is agreed to by the IEP Team, including his parents, Tanner's current placement should be considered to be delivered through programs and services provided at the Lewis Central High School. The IEP process should lead to the particular program model needed in this setting to meet his needs.

This ALJ further finds for the Appellants in their action against the Iowa Department of Education in relation to the state's general supervision responsibility in assuring least restrictive environment provisions for students with disabilities through the provision of a continuum of special education programs and services regardless of where a student resides in the state. The progress that has been made in implementing the recommendations of the Continuum Task Force seems minimal. A new settlement agreement is to be submitted to this ALJ within one month of this decision delineating the steps, timelines and measurable outcomes that will be initiated by the Department of Education to more assertively meet these recommendations. This ALJ also requests that specific attention be directed to the Approval of Settlement Agreement from 6/2/01 in the *Jessica D.* Decision which stated, in part:

The Settlement Agreement as submitted by the parties in this matter on May 24, 2001 is accepted. It is understood, as stated in the Agreement, that the recommendations of the Continuum Task Force (CTF) will be submitted to the Iowa Department within nine months of its first meeting. In addition, this ALJ requests that these recommendations be submitted directly to the Iowa Special Education Advisory Committee, Governor Vilsack, Lieutenant Governor Pederson and legislative leaders.

Successful accomplishment of the provision of a continuum of special education options for students with disabilities in Iowa is a systemic challenge that requires the attention of leadership including, but not limited to the Department of Education.

1/9/05  
Date (January 9, 2005)

Carl R. Smith  
Carl R. Smith, Ph.D.