Iowa Department of Education

(Cite as 23 D.o.E. App. Dec 136)

IN RE: Benjamin S., Ronald & Nancy S., Appellants vs. Ames CSD Heartland AEA 11 and Iowa Department of Education, Appellees	Decision (Admin. Doc. SE-296)

#142

The above entitled matter was heard by Administrative Law Judge Carl R. Smith on January 6, 7, 10, 17, 18, 27 & 31, 2005 at the Heartland AEA offices in Johnston and Ames, Iowa and the Belin Law Firm in Des Moines, Iowa. An additional conference call to complete this phase of the Hearing was held on February 2, 2005. 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 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. Ms. Sue Seitz represented the Heartland AEA 11 Agency and Mr. Ronald Peeler represented the Ames Community Schools. The Iowa Department of Education was represented by Ms. Christie Scase, Assistant Attorney General for the State of Iowa.

This Appeal was brought on behalf of Benjamin S. who is a student with disabilities and medically diagnosed with Asperger's Syndrome, an Oppositional Defiant Disorder, and a Dysthymic Disorder. The Appellants describe Benjamin as student with exceptional academic skills but requiring very specialized services to meet his needs in areas such as social interaction, basic social communication, and personal and community living skills. As described, in part, by the Appellants:

> . . . owing to the nature and severity of his disabilities, Benjamin could not learn and generalize social interaction skills, social communication skills, or personal and community living skills without consistent specialized instruction in those skills across environments and throughout the

> extended day, the extended week, and the extended year. His need for specialized instruction in fundamental skills was metaphorically identified as a "critical mass" of instruction. (p. 2, Appellant's Appeal)

Perhaps the best way of capturing a description of Benjamin's disability and needs was provided by his father in these proceedings:

> Ben has a disability where his primary needs are being able to understand other people and their intentions, being able to understand basic social and emotional issues. He has – very definitely has emotions.
>
> He doesn't always understand what they mean or how to deal with them and that he also doesn't know how to express them appropriately. And most of the time Ben is not going to hurt somebody on purpose, but he may hurt them through a meltdown situation and fear and panic.
>
> That can be different if he's under prolonged stress because we've seen how under prolonged stress conditions his thinking patterns become more distant from reality, and we have evidence that he has made lists about people to hurt. (p. 793, transcript)

The primary issues brought forth in these proceedings are related to the unilateral placement of Benjamin in a specialized out-of-state facility serving student with Asperger's Syndrome. According to the Appellants this placement was a result of the lack of planning for an appropriate program for Benjamin for the 2003-2004 academic year including the need to consider a full continuum of options to address Benjamin's academic and behavioral needs and providing programs and services to deliver the various social interaction, communication, personal and community living methodologies required in order for Benjamin to receive an appropriate special education program. The Appellants listed a number of alleged substantive denials of a free appropriate public education (FAPE) related to the IEP developed for Benjamin in April and May, 2003 including assertions that his IEP:

- Was not calculated to meet Benjamin's individual needs by failing to address extended day service needs.
- Devoted such a significant period of the school day to social skills and homework instruction that it did not adequately address his academic needs and transition needs.
- Lacked a foundation in applicable research findings to support the intensity of instruction in areas such as social interaction skills, communication skills, and personal and community living skills to acquire such skills and generalize such for a student diagnosed with Asperger's Syndrome.
- A lack of objective measurement of goals and objectives in the area of social skills.
- An inadequate Behavioral Support Plan for Benjamin because, ". . . it failed to address how social skills data will be summarized, it failed to specify how many

> data points or length of time would be needed before decision making, and it failed to identify the decision rule to be used to make decisions about the data." (p. 5, Appellant's Appeal)

On the basis of these concerns the Appellants assert that it was necessary for the parents to place Benjamin in an out-of-state program, the Montcalm School in Albion, Michigan and subsequently requested reimbursement for the tuition, travel, residential, therapeutic, and related costs they have incurred to provide an appropriate education for their son during the 2003-2004 academic year.

The Appellants have also brought this action against the Iowa Department of Education. They assert that the SEA failed to insure a continuum of alternative placements for students with needs similar to Benjamin. As stated in the Appeal:

> On information and belief, no facility in the state of Iowa was designed to address the needs of highly intelligent children who need not only challenging academic training, but simultaneous and intensive training in social interaction skills, social communication skills, and personal and community living skills. Moreover, even if one or more such facilities existed, they were not made "available" to meet Benjamin's needs. (p. 6, Appellant's Appeal).

The District and AEA also submitted Affirmative Defenses prior to the beginning of this Hearing asserting, in part,:

> . . . the Ames Community School District and Heartland Area Education Agency 11 seek a ruling that the 2003 IEP offered Benjamin S. a free appropriate public education in the least restrictive environment, and therefore, the parents are not entitled to reimbursement for any expenses of their unilateral placement of Benjamin at Montcalm School. In the alternative, the District and the AEA seek a ruling that Montcalm School in Michigan was not an appropriate placement, and therefore, the parents are not entitled to reimbursement. The District and AEA also seek a ruling that the parents failed to timely give the required notice, including of their intent to make a private placement at public expense, and thus are not entitled to reimbursement. The District and AEA request a ruling that they are prevailing parties for purposes of determining payment of attorneys' fees. (pp. 5-6, Affirmative Defenses)

Prior to the beginning of this Hearing the parties requested that the issues in the Appeal be separated in the following manner. The initial aspect, as reported in this Hearing Decision, relates to the question of whether the Ames Community School District offered an appropriate program for Benjamin as outlined in the Spring, 2003 IEP to be delivered at the Ames Community High School. If it were determined, as a result of this Hearing, that FAPE was not offered, the parties would proceed to a second phase of hearing dealing with the appropriateness of the out-of-state placement at Montcalm School in

Albion, Michigan. It was also agreed that this ALJ would rule on the question of adequate parental notice within this phase of the Appeal. It was also agreed that the action against the Iowa Department of Education would also be considered if the Hearing proceeds into the second phase.

I.
Finding of Fact

The Administrative Law Judge finds that he and the State Board of Education have jurisdiction over the LEA and AEA parties and the subject matter involved in this 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 expand on the over 1400 pages of record referred to during the seven-day hearing. These witnesses included:

- Mr. S. (Benjamin's father)
- Dr. S. (Benjamin's mother)
- Ms. Marilyn Finn (AEA Autism Resource Team)
- Ms. Chris Rial (Social Worker – AEA Autism Resource Team)
- Ms. Wendy Kaiser (Challenging Behavior Specialist – AEA)
- Dr. Martin Ikeda (Supervisor of Research, Autism and Behavior Teams – AEA)
- Ms. Diane Sorensen (Consultant – AEA Autism Resource Team)
- Dr. Cindy Yelick – Director of Special Education and Assessment – Ames School District

Benjamin S. is a 17-year old student who is currently residing and receiving his education in an out-of-state program purported to serve students with significant special education needs. Benjamin was first diagnosed as a student with Asperger's Syndrome in 1998 while the family resided in the state of New York. In a 1999 Pediatric evaluation his needs were described in the following manner:

> Ben will need continued medical supervision by a pediatrician, a child psychiatrist, a counselor and in the school setting a very carefully organized and supervised program to allow him to develop his superior intellect but provide for his safety and that of the students and teachers with whom he works. (p. 11, ed. rec.)

Benjamin's parents moved to the Ames School District from New York prior to the 1999-2000 school year. During his first year in Ames he attended Mitchell Elementary and was successfully served in a regular education setting. The following year Benjamin attended Ames Middle School and was identified as a student with special education needs at the end of his seventh grade year.

A full and individual evaluation was completed for Benjamin in May, 2001. According to the behavioral assessment completed by the Heartland AEA Consultant:

> Ben has at or above academic skills in all areas. I do feel that his Asperger's characteristics and oppositional behaviors cause his difficulties in the school setting and he may benefit from special education services (p. 60, ed. rec.)

The first IEP for Benjamin was developed on 5/22/01 and dealt with coping skills and assignment completion. It was also agreed that he would be served in a Level I – Resource Room model for the 2001-2002 school year.

Prior to the beginning of his eighth grade year Benjamin presented significant behavioral problems in the home setting and was subsequently placed into a hospital setting on an emergency basis. He did begin the school year at Ames Middle School but shortly into the school year again faced a crisis situation leading to his placement into Orchard Place, a residential psychiatric facility located in Des Moines. Mr. S., Benjamin's father, was the first witness in these proceedings. He provided extensive testimony regarding the history of Benjamin's behavior at home and at school. Mr. S. noted the serious challenges he and his family have faced in trying to provide a safe home setting and school program for Benjamin. As he described:

> I think the easiest way to describe Ben is Dr. Jekyll and Mr. Hyde. Ben has a lot of kindness. Ben is a good boy. Ben could at a snap of finger turn into raging violence, and it's part of what makes describing Ben to other people so difficult because he really has these two types of behavior that are real. (p. 86, Transcript)

Mr. S. also recalled physical threats Benjamin has made to his parents (p. 121, Transcript) to teachers (p. 144-145, Transcript) and his sister (p. 195-196, Transcript). When asked to define what is meant by a meltdown in Benjamin's behavior he described this as, "A series of progressions from things like baby talk, staring, grunting into leaning, grabbing, pinching into cursing, spitting, hitting, biting" (p. 268, Transcript). Mr. S. related the series of incidents that led to Ben being identified as a student with special education needs and the serious behavioral incidents in the home setting that led to his placement into the Mercy Franklin Hospital and the Orchard Place setting.

Benjamin subsequently ended up being serviced in the Orchard Place residential setting for much of the 2001-2002 school year and all of the 2002-2003 school year.

In seeking intensive mental health services for Ben, his parents, like many other families in Iowa, were faced with the necessity of seeking court intervention in order to pay for such services under what is know as a Child In Need of Assistance (CINA) petition. As described by Mr. S, in reflecting on the challenges faced by he and his wife at the time of Ben's initial extended residential stay:

> We –Nancy and I were under a learning curve at this point, and we were dealing with several systems. We were dealing with CINA, Child In Need of Assistance, which as I understand is about custody.
>
> We were dealing with Medicaid, which as I understood it was a provider-driven system. In other words, for Ben to be placed in a particular place, that needed to be certified by the State of Iowa as a Medicaid provider. And then we had IDEA that we were trying to understand, which is a needs-based system.
>
> The Medicaid, basically if they were certified to receive Medicaid funding, they were certified, and what – what the specific needs of the child were, one tried to match up, but it wasn't as a needs-driven as far as I understood it. (pp. 478-479)

According to the CINA petition filed by the Assistant Story County Attorney in October, 2001, Benjamin's behavior at the time of placement into the Orchard Place program was described in the following manner:

> The child has previously been diagnosed as suffering from Dysthymic disorder, oppositional defiant disorder as well as Asperger's disorder. The child is currently in the Mercy Franklin Hospital Adolescent Unit, where he was taken for treatment due to an escalation of aggressive behaviors in the family home in Ames, IA.
>
> The hospitalization is his second, having previously been a patient in June for approximately six days for the same assaultive behaviors. During his current hospitalization his behavior has continued to be extremely oppositional with numerous quiet time placements within the unit. His emotional mood seems quite labile with uncontrollable crying, following an oppositional incident and threats to staff. The recommendation from Dr. Kavalier, who confirms the child's previous diagnosis is that an out of home placement in a PMIC type setting is necessary. A placement in shelter is also recommended should he need to be moved to a temporary placement pending the availability of a PMIC. As home is not recommended at this time. (p. 191, parents record)

This description is consistent with the Iowa Case Permanency Plan filed in November, 2001 by Nicole Facio, a social worker with the Iowa Department of Human Services, who stated, "Ben has specific needs due to his mental health diagnosis that cannot be met at home. He has become very aggressive and is not longer safe at home." (p. 213, parent's record) It should also be noted that the parents were expressing concerns

regarding Benjamin being returned to the Ames Community School District even at this time. As stated by his father in an e-mail (1/20/02) to Ms. Fazio:

> We have serious concerns about Ames High School being able to give an appropriate education to Ben that would be Asperger's specific. Our experience has been that Ames Schools are understaffed in special education and poorly trained for Asperger's Syndrome individuals. (p. 230, parent's record)

As stated above, Benjamin stayed in residence at Orchard Place for the remainder of the 2001-2002 school year and all of his ninth grade year in 2002-2003. While at Orchard Place, the Ames School District provided for his education through a contract with the Des Moines School District. The Inter-Agency Contract between the Ames Community School District and the Des Moines Community School District read, in part,:

> At all times, the resident local education agency and resident area educational agency shall remain responsible for providing the student listed above or other qualified resident students a free appropriate public education (FAPE), including special education and related services. Des Moines shall not be responsible for providing FAPE to the student listed above or other students who are not residents of the Des Moines Independent Community School District.
>
> Representatives of the resident local education agency and resident area education agency shall attend and participate in IEP meetings and other meetings regarding the student identified above and shall be responsible parties in any dispute relating to the provision of special education and related services. (p. 163, ed. rec.)

In the initial IEP developed at Orchard Place (1/9/02) focus was on the goal areas of coping skills and homework completion. In relation to questions as to whether Ben could be served in a general education setting, the team concluded, "The general education environment presents too much stimulation and not enough structure for Ben to cope." (p. 201, ed record)

In the 2002-2003 school year Benjamin was integrated from the self-contained setting into a horticulture class offered in a comprehensive school setting by Des Moines. Overall this was reported as a successful experience with Benjamin being described as enjoying the content and challenge of this class. While experiencing success in the program, there were what appeared to be significant behavioral challenges still faced by him in the residential living setting. As affirmed in the testimony of Benjamin's father (p. 508, transcript) there were troubles with "kicking walls, spitting on staff, throwing chairs, throwing food at the window". In addition, his mother described Benjamin's behavioral regressions at this time as follows:

> . . . And the other equally worrisome for Asperger's behavior is the depressive withdrawal, what they call in the literature the dark thoughts and obsessing on them because there's an obsessive-compulsive component, plotting how he'll do things to his roommate, that they're against him.
>
> So the withdrawal is not passive. It's active, but it's in the mind, and it leads to a lot worsening condition of depression, and it leads to the delusional thinking that can pop up in some diagnoses as kind of a psychoses, and we didn't want to go back there. We were really worried that that was starting to resurge. (p. 865, transcript)

Plans to finalize the process for Benjamin leaving Orchard Place were begun in earnest during the second semester of the 2002-2003 school year. Personnel from Heartland AEA conducted observations and other evaluations at Orchard Place. A staffing was held in January, 2003 involving both Orchard Place and Heartland AEA staff and Ben's parents. According to the IEP developed at this time Ben continued to need a special school setting (p. 458, ed record). The Justification for Special School Placement form, stated the same reasons for why Ben could not be served in an integrated setting contained in his 1/9/02 staffing. This IEP also described several supplementary aids and services needed to support Ben including a classroom associate, a highly structured management system, low levels of stimulation and anxiety and crisis intervention. In response to the question of why these aides and services could not be provided in an integrated setting, the team noted, "An integrated setting does not offer the high level of structure and low level of stimulation needed for Ben to be successful." (p. 760, ed. record)

During the Hearing staff from the AEA identified that they attended the IEP meeting held at Orchard Place as "observers" rather than "participants" (pp. 1359, p. 1895, transcript). Records and other testimony substantiated that five persons from the Ames schools or Heartland AEA attended this staffing. When Ms. Rial, the school social worker, was cross-examined regarding the role taken by AEA or Ames Community School personnel she indicated that if anyone from the Ames contingency spoke it would have been Dr. Yelick but didn't recall whether Dr. Yelick, had, in fact, done so. (p. 1392, transcript) Later testimony by Dr. Yelick (p. 2043, transcript) indicated that she saw herself as a member of the IEP team representing the Ames Community School District.

The conclusions reached at this IEP meeting supportrd the need for continued programming in a specialized program such as Orchard Place and perhaps an even more specialized setting designed to meet the needs of students with Asperger's Syndrome.

The conclusions of this IEP meeting seemed confirmed in a the quarterly report, dated 5/8/03, written by Mr. Tom Garner, Benjamin's Casework Therapist from Orchard Place:

> . . . Ben will need either a full day treatment program with respite care on alternate weekends or a residential care facility that can work with Aspergers syndrome children who are also aggressive and make frequent visits home or have the family visit him. It is not recommended that Ben

> go into a foster home unless the foster home is therapeutic level and can handle the probable aggression. (p. 574, parent's record)

It should also be noted that the parents and school officials participated in a mediation conference on February 3, 2003 leading to an agreement to gather more specific information on Ben's needs demonstrated in his Orchard Place setting and an independent evaluation to be conducted by someone agreed to by both parties. This agreement led to the Heartland AEA visitation to the Orchard Place program and evaluation occurring in April, 2003. The independent evaluation component resulted in an evaluation by Dr. Kerri Kinnard, of the Child Guidance Center, dated April 7, 2003. Dr. Kinnaird was asked to respond to three questions crafted by the parties:

a. What are the risk factors of Benjamin harming himself or others?
b. What are the factors in school that may be contributing to Benjamin harming himself or others?
c. What educational programming considerations are important to Benjamin's mental health and why are they important?

Dr. Kinnaird's summary responses to the questions posed to her indicated that she did not consider Ben suicidal but that Ben does not promise to refrain from violence. She also concluded that, "It is clear that Ben can be defiant and threatening, and this is more likely to occur in a nonstructured residential or home setting that in a classroom." (p. 551, ed record) In relation to the questions posed regarding the educational programming considerations, Dr. Kinnaird's report seemed, in this ALJ's opinion, to lack specific recommendations but rather focused on the importance of planning a smooth transition from the Orchard Place setting to his subsequent placement. She went on to state:

> Given Ben's worries about ongoing separation from home and family, I am most concerned that his withdrawal and depressive tendencies, along with anxiety, could be exacerbated by placement in a distant residential program. He is trying to communicate his desire for any opportunity to live in his family in the most appropriate way he can, through the appropriate channels. (p. 552, ed. rec.)

As Benjamin's discharge came closer the AEA and Ames Community Schools convened a series of three meetings across April and May, 2003 to revise his IEP and focus on Benjamin's program needs when he would leave Orchard Place. It should be noted that there were no representatives from the Orchard Place setting that were apparently invited to be participants in this revised IEP and a concern regarding this was indicated during Mr. S's testimony (pp. 537-538, transcript). Earlier e-mail correspondence from Dr. Yelick to Ben's parents (p. 733, ed record) had indicated that the IEP team could include the parents, DHS representatives, AEA staff, Orchard Place staff and Ames Community School District staff. This was apparently a very important component of the IEP process for the parents. When questioned regarding this during cross-examination, Benjamin's mother responded:

> Q. Is it your understanding that when students change school districts that the former school district sends people to the new IEP meeting?
> A. It's my understanding that when you have a kid with special problems and that's been pointed out to you and in the ways we did it, it was clear that this wasn't an ordinary situation, that there be ways that people find out their best information . . . (p. 1008, transcript)

The specific rationale as to why school or clinical staff then currently working with Benjamin were not included in this April-May, 2003 IEP process are not clear to this ALJ. However, Dr. Yelick testified that there were members of the team that were aware of Benjamin's current progress but there was an absence of formal progress monitoring information from Orchard Place available to team members (p. 2063, transcript).

At the initial meeting there were 16 participants that included the parents and representatives of the Ames Community Schools, Heartland AEA, Ben's Guardian ad litem, a representative of the Story County Attorney's office and Ben's caseworker from the Department of Human Services. As noted above there were not any representatives of Orchard Place in attendance although these meetings occurred at a time when Ben still resided at Orchard Place.

Benjamin's father indicated his concern regarding the large number of persons attending the first session of the April-May, 2003 IEP meeting:

> Q. What did you mean when you said you had to say things that were humiliating?
> A. To talk about your own child as I had – and I've been doing here. When you have a child with the types of behaviors that Benjamin has and you have to share that with a bunch of people that you don't know, may not even be your friends, it is humiliating to talk about that time and time and time again. (p. 548, transcript)

It should being noted that following the first meeting that Dr. Yelick worked with the parents in reducing the size of the IEP group. The second meeting involved 10 participants with the parents and representatives of Ames Community Schools, Heartland AEA and Ben's Guardian ad litem. The final meeting including similar representation as the second meeting with the exception of Ben's caseworker from the Department of Human Services being present and his Guardian ad litem being absent.

During these proceedings there was also considerable testimony indicating that, despite the protests of the parents, the team did not spend any substantive time discussing the relative needs of Ben to be served in a specialized program versus Ames High School. Testimony from several witnesses indicated that after the team had written an IEP that they believed could be delivered at Ames High School that further consideration of more intensive interventions were not seriously considered (p. 1442, testimony of Wendy Kaiser, for example). The parents, on the other hand, had definite opinions regarding

Ben's needs beyond a traditional program offered in the comprehensive school setting as delineated in the IEP of April-May, 2003:

> . . .Ben does need extended-day services. He needs it for the generalization of the behaviors that he's going to learn, and if he doesn't have this integrated, long-term method of teaching, he begins to move backwards. He begins to show a pattern of increasing aggression, sometimes through withdrawal, sometimes through threatening stance, and then other things. (p. 795, transcript).

At the center of this Appeal is the question of whether the IEP developed at this meeting provided a reasonable structure for delivering an appropriate program for Ben. Thus, it is important to carefully review the structure of this IEP. As stated above, the IEP development entailed three meetings lasting over three different dates (April 21, 25 & May 21, 2003).

On page 3 of the IEP (p. 591, ed record) are several notes regarding the parent's wishes regarding Ben's program. Within the section dealing with parent concerns for enhancing their child's education it is stated:

> Parents want Ben's special interests to be used to focus attention and access instruction. His above average abilities should be acknowledged in his education as well as his unique needs because of his Aspergers. They feel it will take more than good teachers to make Ben successful; they feel Ames School District is not ready for Ben.

On the same page, it is noted that Ben will require behavioral supports, transition services, a functional behavioral assessment and a behavioral intervention plan. It is also noted that, "Parents requested instruction for Ben that is consistent across settings, curriculum, teachers, and years in both the academic and affective domains."

This IEP contains six goals across five areas. These include:

1. Responsibility & Independence
2. Copes effectively with personal challenges, frustrations, & stressors (2 goals)
3. Computation (Basic math skills)
4. Participates in community actives as an active group member
5. Self-advocacy

In light of the extensive discussions in these proceedings regarding the adequacy of these goals, it would seem valuable to point out in more detail several of the goal areas listed. The two goals specifically listed within the coping area goal were:

a. By 4/21/2004, given school setting, Ben will develop and use appropriate coping strategies (seek out staff/appropriate help) when unsure, frustrated or anxious with

no more than 1 incident of not using coping skills and 0 incidents of violent behavior per nine week period (quarter). (p. 595, ed. rec.)

b. By 4/21/04, during personal development/social skills class and during unstructured times in the school setting, Ben will initiate positive social interactions with peers 4X/day. (p. 596, ed rec.)

In the "Participates in community activities . . ." goal area is a note that the parents see this as a critical dimension related to Benjamin's needed development in the area of empathy. The specific goal listed by the team in this area reads:

> By 4/21/2004, given a variety of clubs/organizations/activities, Ben will participate at least twice per quarter. (p. 598, ed rec.)

In the self advocacy goal area the team stated:

> By 4/21/2004, given a variety of sensory information, Ben will explore his tactile reactions and find and adopt acceptable responses within the school setting. (p. 599, ed. rec.)

The question of what constitutes the "specially designed instruction" also seems particularly relevant in these proceedings. Benjamin's IEP reflected specially designed instruction in the area of math. In addition, in the behavioral area this specially designed instruction was described as:

> Ben will receive specially designed small group instruction in the area of social/emotional behaviors. He needs specific basic skill instruction to remediate deficits; he needs daily practice to improve his skills and to learn generalization. He needs reteaching opportunties, frequent teacher monitoring, extensive/corrective/immediate/positive correction, and few distractions for his learning environment. (pp. 600-600a, ed. rec.)

The special education services portion of the IEP also noted that, under the supports for school personnel, that "Selected teachers will receive training and support specific to autism and/or Asperger's Syndrome" (p. 601, ed. rec.). The IEP also contained a behavioral support plan including the following:

> If Ben should happen to demonstrate any major physical threats (picking up furniture, swinging objects towards others, entrapment of staff or peers) or aggressive physical contact with others (hitting, stepping on feet, contact with objects) staff should again remain as calm and neutral as possible. The classroom should immediately be cleared of all staff and peers and Ben told that you will re-enter when he shows that he is ready (as indicated above). An administrator should be notified of the room clear. While the room is cleared and until Ben demonstrates that he is ready staff will calmly and neutrally remind him of his expectations at one minute intervals. He will be given no other attention until he demonstrates

> that he is ready. Once Ben demonstrates that he is ready by being calmly and quietly in his designated seat, staff only will re-enter the classroom and assist Ben with getting back on task with the assigned demand. Once he has been calmly on task for 2-5 minutes, peers will return to the room and proceed as scheduled. (p. 609, ed. rec.)

Within the section of this IEP dealing with the Least Restrictive Environment Considerations it is noted that Ben would attend the school he would attend if nondisabled. A parent notice page (p. 604, ed. record) does indicate that his parents had requested that Ben's IEP be provided in a residential educational program. The explanation given for rejecting this option was that the residential educational program was not the least restrictive program and that Ben could receive a free, appropriate public education in his home community neighborhood school. In a letter, dated April 23, 2003, written by the parents after the first session of the IEP process, Mr. & Mrs. S. wrote to Dr. Yelick:

> We appeal to your good sense: in spirit, it not only a good time to discuss placements, it is an **essential time**. The active refusal to allow us to discuss placements at the meeting, and for Ames and AEA Heartland 11 to now state that *they refuse to research placements*, makes not sense. We are told 'no' in light of a dire time table, of which the district is fully aware. Ben will be discharged very soon (a date in June), and Ames and AEA and Orchard Place-Des Moines School staff stop working for the summer in a matter of weeks. This is true as well for the (only) promising program in Iowa which we have requested be researched (Newton), and for some of the newly located suitable placements outside of Iowa (Montcalm and Brown Schools)—all of which you refused to research? (p. 637, ed. rec.)

In this same letter the parents went on to state:

> The Pre-Appeal conference was exhausting but encouraging for us. However, this recent refusal has upset us so much that we feel that we must again provide notice that if the school cannot, within 10 days, provide suitable FAPE placements for us to consider such that our son Benjamin can continue to advance, and not backslide, we will be forced by the district to consider placing him unilaterally at some suitable program and seek all necessary reimbursements from Ames Schools/AEA per our original notice provided in November 2002. (p. 638, ed. rec.)

The perception that the team did not carefully consider the option of a residential placement for Ben seems to be substantiated by the testimony of Marilyn Finn, a member of the AEA Autism team attending the April-May, 2005 IEP meeting who testified as follows:

> Q. Do you recall a point in the meeting when the S.s wanted to talk about residential programming and the IEP had not been completed that Mr. Pepper said "We're not going to talk programming now"?
> A. I do remember that.
> Q. Tell us exactly how that came out.
> A. If I recall, it was at the very end of the meeting.
> A. Of the third one, I think.
> Q. Okay.
> A. And we were – we had slugged our way through it.
> Q. Okay.
> A. And at the very end, I believe the Ss said "Doesn't anyone want to hear about our residential options?" or something like that. . . . And then I –Mr. Pepper said "We won't discuss that at this time."
> Q. And what was your understanding of why you were not going to discuss the residential options at the end of that third meeting?
> A. From a personal standpoint it was "Oh, my goodness, we need to be done."
> Q. And was there already a decision that it could be offered in the same—in the same program where nondisabled peers would attend?
> A. Yes (p. 1256, transcript)

It should also be noted that the treatment team at Orchard Place had concluded that Ben's needs suggested the need for an intensive program. According to the Discharge Summary, dated July 5, 2003, sent to Nicole Fazio from Tom Garner:

> It is the treatment team's recommendation that Ben attend a residential placement school that would meet his therapeutic need and his continued emotional and academic growth. This plan was developed by all concerned parties. If this plan should fail then a short return to Orchard Place would be considered. (p. 346, parent's record)

Subsequent to this date a number of other persons representing medical and mental health specialties also supported that need for a more specialized residential setting for Benjamin. This included Dr. Dewdney, Child Psychiatrist from Orchard Place (p. 343, parent's record), Dr. Michael Lelwica, private psychologist who have worked with Ben (p. 348, parent's record) and Dr. Jack Swanson, pediatrician from Ames (p. 350, parent's record).

The LEA and AEA seem to assert that the IEP and professional opinions of those working with Benjamin in the clinical setting, specifically as reflected in the last IEP prepared for him while he was a resident of Orchard Place, were not adequate:

> The reality of the situation must not be lost in legal positioning. The reality of the situation is that the "special school" determination from the January 2003 OP IEP meeting was not a considered study of Ben's

> needs and was in fact inconsistent with the integration into a regular setting that was already occurring successfully. The parents' support for this Orchard Place process to determine Ben's needs, while challenging a three-day process that occurred after the exchange and review of a significant amount of information and documents, undermines their arguments and indeed their credibility. (p. 69, Appellees Brief)

In this ALJ's opinion there are questions that can be raised regarding this assertion. There is, in the ALJ's opinion, a primary question that could be raised as to why none of the five persons attending the Orchard Place IEP meeting representing the Ames Schools or the AEA raised any questions regarding the conclusions of this staffing if reservations were present among these people at the time of the IEP meeting held at Orchard Place.

Benjamin returned to live with his parents in June, 2003. Consistent with the April-May IEP he received an extended year special education program during the summer in Newton, Iowa in a self-contained program involving an instructor and one other student. According to the position taken by the Appellants, this summer program was actually closer to a more specialized setting than a comprehensive school setting such as was being proposed to begin for Benjamin in the Fall of 2003. Apparently the summer program went reasonably well and Benjamin's progress was consistently reported to the parents by his teacher.

During Benjamin's stay at Orchard Place there were numerous communications between his parents and representatives of the Ames Community Schools regarding plans for when he would be leaving Orchard Place. A major point of contention in this Hearing was the extent to which the local district and area education agency adequately planned for the complexity of the transition challenges posed by a student with Benjamin's complex special education needs.

Mr. S indicated that he and Benjamin's mother had been quite assertive in contacting the Ames Community Schools while Ben was at Orchard Place wanting to carefully plan for his transition from Orchard Place back to Ames or another program. As stated in a September 15, 2002 letter from the parents to Dr. Yelick, Ames Director of Special Education:

> . . . The court has recommended discharge from Orchard Place in January 2003. This letter requests that the Ames Community School district begin the process necessary to determine an appropriate educational program for Ben to transition to upon discharge. (p. 276, ed. rec.)

Apparently the parents were not satisfied with the planning taking place and subsequently (November 26, 2002) notified the District and Area Education Agency that they would need to pursue out-of-district options if more responsive planning was not provided by the LEA and AEA. In this context they stated, "As we advised you more than two months ago, our son Ben S. will be discharged from Orchard Place Child Guidance Center in Des Moines in January of 2003. As we also advised you, Ben cannot suffer a lapse in

appropriate services. There is a great danger of severe regression if a lapse in appropriate services should occur. We cannot afford to risk that danger." (p. 320, ed rec.)

Mr. S. was also asked to provide his reasoning as to why Ben required a special program that extended beyond that which can be provided in a comprehensive school setting. He referred to the educational record (p. 204, ed. rec.) as providing a number of reasons why such a setting could not meet Ben's needs as delineated by the IEP team in January of 2003:

> Ben lacks coping skills to keep himself and others safe. An integrated setting provides too much stimulation. Ben is unable to handle the lower level of structure, and there's not sufficient supervision.

The validity of this observation and conclusions continued to be a major matter of contention in these proceedings, particularly in relationship to the time Benjamin left Orchard Place to move to another setting. As stated above, Benjamin remained at Orchard Place until the end of the 2002-2003 school year at which time he returned to live at home with his family. This length of stay apparently exceeded that which was originally anticipated by the parents. As referenced above, the parents had begun contacting the Ames Schools in early Fall of 2002 requesting that transition plans be made for Benjamin's leaving Orchard Place and returned home. Other documentation demonstrated the growing frustration experienced by the parents because they felt that the school district was not responding in the timely manner necessary to plan for the complexity of the transition they perceived as necessary for Benjamin to successfully transition from the Orchard Place program back into the Ames School District.

According to several witnesses for the LEA and AEA the Ames Community Schools were expecting Ben to begin school at Ames High School in August, 2003 consistent with the IEP drafted in April and May, 2003. On August 19, 2003, Benjamin's parents unilaterally enrolled him in the Montcalm School and notified school officials of this move two days prior to the beginning of the school year in Ames. According to the position taken by the Appellants, this action was a result of the position being taken by the District and AEA that Ben would be served at Ames High School as described in the April/May, 2003 IEP.

> The School District and the AEA apparently assume that Benjamin's parents would have rejected any program of extended day services that did not include a residential placement or 24-hour services. In fact, however, Mr. S. testified that he and his wife were open to hearing a number of options. [Transcript at 614]. If an option meeting Benjamin's needs had been made available to them, they would not have been forced to undertake the considerable financial risk of making a unilateral placement. (p. 21, parent's brief)

According to Ms. S. the parents concern regarding the Ames program was longstanding, at least since Fall, 2002. They believed that such a program would be similar to the

program that Benjamin had received prior to going to Orchard Place when he was a student at Ames Middle School (p. 484, transcript). The parents also believed strongly that their son required an extended day program that would coordinate Benjamin's day across school, living and community environments. It should be pointed out, however, that on cross examination that Mr. S. confirmed that neither he or his wife had made a request for reimbursement for the cost of Ben's private school placement prior to this Hearing (p. 612, transcript).

A number of witnesses for the Appellees testified to their reasoning as to why the proposed program developed in the IEP of April-May, 2003 was appropriate. Ms Marilynn Finn, a member of the AEA 11 Autism Resource Team indicated that approximately 12 students described as being high functioning students with autism attend Ames High School (p. 1114, transcript). She also indicated that students do not have to experience academic difficulties to qualify for special education.

> Q. And do you have evidence that you identify children for behaviors and not for academics?
> A. Well, we have children who are strictly on – that are entitled for special education based on social goals, which would be behavior. Certainly we have children with just behavior goals. (p. 1150, transcript)

Ms. Finn also testified to her participation in the evaluation activities relating the Ben in his Orchard Place setting prior to his return to Ames. She testified that, within the context of her classroom observations, that she did not see atypical behaviors compared to other students she sees in public school settings although she commented that the setting at Orchard Place would not be typical of public schools (p. 1223, transcript).

At the crux of this aspect of this hearing is the extent to which the program proposed at Ames High School was "reasonably calculated to confer educational benefit". This substantive standard established by the Supreme Court in *Rowley* is one of two primary criteria for judging whether a student is, in fact, receiving a free, appropriate, public, education. This concept was discussed from several different vantage points here.

One question raised with the Appellees was the extent to which those designing Ben's program considered relevant program standards proposed in Iowa to serve students with autism. Dr. Ikeda, supervisor from the AEA, indicated that members of the autism team are expected to be competent with these standards (pp. 1561-62, transcript). However, when Ms. Finn was asked to indicate whether the AEA follows these guidelines she indicated that they was little discussion of such standards in their work (p. 1262, transcript). Dr. Ikeda indicated that these guidelines were initially quite visible but had not been systematically reviewed throughout the state since 1997 (p. 1615, transcript).

There is also the question suggested in these proceedings of the importance of a condition such as Asperger's Syndrome on planning the special education program and services needed for a student such as Benjamin. Ms. Finn indicated that the AEA team does focus on students within the Autism Spectrum Disorder but does not specifically differentiate

programming for students with Aspergers. As she stated, ". . . we don't delineate "This is a child with Asperger's." And some parents will say "I want that information." And we'll say "Well, you know, it's not relevant." I mean it's not—it's not information that we have to have. (p. 1338, transcript) Dr. Ikeda seemed to indicate that the philosophy of the AEA tries to capture both generic and specific needs. According to him:

> . . . the philosophy of Heartland AEA is to focus on the problems that students are having and not necessarily the disability.
>
> And so with the autism team, we take that approach, but we also recognize that students who are on the autism spectrum have some unique characteristics and so we don't want the school-based teams . . . to lose sight of the fact that kids with autism present with different problems. (p. 1496, transcript)

Dr. Ikeda also testified to the complexities associated with the implementation of evidence-based interventions for students such as Benjamin. In response to questioning by Ms. Seitz he stated:

> Q. Is that true of – when you write IEPs for most most children, that you can't just take the whole IEP and say "Look, This IEP had research-based efficacy"?
> A. You would look for the components of effective practices embedded in the IEP. (p. 1608, Transcript)

In subsequent testimony by Ms. Diane Sorenson, Educational Consultant for Heartland AEA questions were raised regarding the specialized services proposed for Ben at Ames High School:

> Q. Did you have small classrooms that were designed for someone like Ben at that time?
> A. We don't put people in classrooms. We put – we serve them in special education. It could have been in another classroom that had a small number of students, and we could have served him there six periods a day. (p. 1868, transcript)

Another important aspect in this Hearing is the extent to which the staffing team convened in April-May, 2003 were, in fact, open to a range of possible alternatives for delivering Benjamin's services when he left the Orchard Place setting. The following exchange with Ms. Sorenson raises questions, in this ALJ's opinion regarding the open consideration of options:

> Q. And so you have his current treatment team, and that includes his therapist and his teachers and this parents, thinking he needs a residential school.

> Wouldn't that at least put someone – alert someone to the need to examine into whether a residential school was necessary for any reason?
> A. If a residential program states that they think a residential program is necessary, I probably thought that they were just trying to maintain their clientele. (p. 1882, transcript)

Ms. Sorenson also indicated in her testimony that she realized, at least as of December, 2002, that Benjamin's parents felt that a setting beyond that provided at Ames High School was necessary to meet his needs (p. 1885, transcript). In responding to questions regarding whether the IEP team in April-May, 2003 ever considered the possible need for a residential setting for Benjamin she stated:

> Q. Did the IEP team ever discuss whether Benjamin might need residential services?
> A. We prepared a parent notice to respond to that.
> Q. Apparently you would do the parent notice after you've made the decision, but I want to know when did the IEP team discuss the subject?
> A. . . . The people at the meeting thought that he could receive educational benefit with the options that were available at Ames High. (p. 1932, transcript)

Ms. Sorenson also indicated that she had never participated in a staffing where a special school was recommended for a student (p. 2011, transcript). Dr. Yelick, Director of Special Education for the Ames Community School District was asked a similar question by Mr. Peeler regarding the circumstances under which she would support a residential educational setting for a student and replied:

> I believe we would support – I would support that if a student was not receiving benefit from the program that Ames was providing, so they weren't making academic progress and/or that we had exhausted all possible options, that we had tried programming and adjusted and tried other options and he or she was not making progress or receiving benefit (pp. 2077-2078, transcript).

She went on to state that she did not perceive Benjamin as fitting into this category. Dr. Yelick also presented a perspective on the decision making process regarding the setting in which Ben would be served. In describing the decision making process regarding whatever setting was needed for him:

> Q. You say to whatever setting. Did you have it in mind that Ben must be returning to Ames High School upon his release from Orchard Place?

A. At that point we knew that Ben was going to be released from Orchard Place. We did not know it was to Ames High School or to another location because the IEP hadn't been developed to handle that transition yet.
Q. So that would be – the placement decision would be one that would be made in the IEP process? Is that what you're saying?
A. That is correct. (pp. 2037-2038)

In the Appellee's Brief (p. 14) is an explanation, from their perspective, on any leanings the team may have had toward Ames High School:

> The IEP was not developed in a vacuum. It is not surprising then that IEP team members not only made the legal presumption that Benjamin should be educated in the school he would attend if he were not disabled, but that they believed that persons responsible for his welfare believed his behaviors in the home that led to his placement in Orchard Place in the first place had been dealt with satisfactorily.

The position of the parents regarding their contention that the IEP team failed to consider the continuum options possible to serve Ben is summarized as follows:

> . . . Benjamin's parents had specifically requested extended day services, preferably in a residential setting, and they had done so in writing. This request was supported by the recommendations of several experts, including the child's therapeutic team at Orchard Place. Under such circumstances, the duty to discuss whether the child needed such services is clear, and the failure to permit such a discussion was a procedural denial of FAPE. (p. 25, parent's brief)

Ms. Scase, representing the Iowa Attorney General's Office and the Iowa Department of Education, asked Dr. Yelick whether she had any ability to observe whether or not the program that Ames was proposing for Ben would be successful and Dr. Yelick indicated that she had not. Ms Scase then asked, in the absence of such information, the foundation for her conclusion that Ben could be served in Ames. Dr. Yelick responded:

> A. . . . One, I believe that when we looked at the recommendations delineated in Mr. Garner's report, those five recommendations, that we could meet those in Ames. We could provide those. . . .
>
> Secondly, from discussions with the Orchard Place staff, I understood that Ben had made progress while he was at Orchard Place, so for him to go from setting where he made progress to something more restrictive to me was not following the guidelines of IDEA. I felt because he was

> making progress at Orchard Place that that was – that was another valuable piece of information or important piece of information.
>
> I also looked at the evidence of – or the data from when Ben was in the Ames schools, and he did make progress. He was receiving educational benefit, so that was also important to me. . . . (p. 2090, transcript).

At the center of this Appeal is the question of whether the program described in the IEP developed for Benjamin in April and May, 2003 did, indeed, meet the appropriateness criteria as delineated in the Supreme Court Rowley standard as being "reasonably calculated to confer educational benefit" for Benjamin. The Appellants presented a significant volume of information describing the shortcomings of this proposed program in meeting Benjamin's needs, particularly in areas such as social functioning, social interaction and coping skills. On the other hand, the Appellees presented expansive information demonstrating what they believe to be the foundation of an appropriate program for Benjamin to be delivered at Ames High School. Reaching a conclusion regarding whether this proposed program meets standards regarding FAPE is the ultimate question before us here.

A counterclaim, asserted by the Appellees, is that Benjamin's parents did not provide sufficient notice as required under the IDEA in unilateral placement situations. As noted by the Appellees:

> The District and AEA . . . seek a ruling that the parents failed to timely give the required notice, including of their intent to make a private placement at public expense, and thus are not entitled to reimbursement. (p. 6, Appellees Affirmative Defense)

II.
Conclusion of Law

As agreed to by the parties in this Hearing, the two areas of focus for this phase of the Hearing deals with two primary issues. First, did the IEP, as prepared in April-May of 2003 provide for a free, appropriate public education for Benjamin and second, did the process the parents followed in this sequence of events negate their claim for possible payment for educational services for Benjamin in the out-of-state program. It was agreed to by the parties at the outset of these proceedings that if the program proposed by Ames High School, did, in fact, provide FAPE and that the parents had not followed procedures as suggested by courts in reviewing unilateral placements, that the second phase of these proceedings would not be necessary. Furthermore, it was agreed that the assertions made regarding the responsibilities of the Iowa Department of Education would be moot if it were determined that the proposed Ames program met the expectations regarding FAPE.

This particular case presents complex dynamics regarding these seemingly explicit standards for reviewing a program proposed for a student such as Benjamin. This crosses over both the FAPE expectations in judging the program proposed by the Ames Community Schools and the expectations regarding parental notification within the unilateral placement procedures to be followed in such situations. It is also quite difficult to synthesize the many hours of testimony provide in this Hearing and the volumes of records, briefs and transcripts into discrete legal conclusions or an easily understood, succinct decision. Yet, this ALJ is faced with this responsibility all the while realizing that all of the richness of these proceedings and the reasoned positions taken by the parties may be quite difficult to easily express.

There are significant disagreements across the parties involved in these proceedings about who carries the burden of proof in a case such as this. In a recent case decided by the Fourth Circuit (*Weast v. Bd of Ed.*, 2004, U.S. Court of Appeals, 41 IDELR 176) it was concluded that the party initiating the proceeding bears such a responsibility. However, this Court did point out that:

> The IDEA is silent about which side bears the burden of proof in a state administrative proceeding brought by parents to challenge the adequacy of an IEP. (p. 3)

This case is currently under review by the Supreme Court. This ALJ will note if this issue of burden of proof affects the ultimate conclusions or decisions in this Hearing.

Free Appropriate Public Education (FAPE)

As stated recently in the Sixth Circuit (40 IDELR 31 *Berger v. Medina City School District*, October 29, 2003), a procedural violation does need to reach a substantive threshold impacting the IEP process:

> . . . a procedural violation will constitute a denial of FAPE only if it causes substantive harm to the child or his parents, such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity. (p. 5)

As stated by the First Circuit in 1991, "Since *Rowley's* construction of EHA, a FAPE has been defined as one guaranteeing a reasonable probability of educational benefits with sufficient supportive services at public expense". (17 IDELR 751 *G.D. v. Westmoreland School District*, U.S. Court of Appeals, First Circuit, April 12, 1991).

As stated by the Fifth Circuit in 2003:

> 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)

The Appellants in this Hearing assert a number of procedural violations that they believe interfered with the provision of an IEP to meet the needs of Ben in the proposed Ames High School program. Chief among these are questions regarding whether the IEP developed under the auspices of Heartland AEA and the Ames School District in April-May, 2002 met the procedural and substantive expectations of this process. Parental preferences are certainly to be considered in this process but do not govern the overall outcome. As stated by the Eighth Circuit (*Blackmon v. Springfield*, 1999, U.S. Court of Appeals, 31 IDELR 132):

> . . . the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives. . . .Although the IDEA mandates individualized "appropriate" education for disabled children, it does not require a school district to provide a child with the specific educational placement that . . .parents prefer. (p. 8)

There were a number of other questions raised in these proceedings regarding the process followed at the April-May, 2003 IEP. At the heart of this question is whether the team

convened at this time met the criteria of persons with "knowledge or expertise" regarding the child (CFR 300.344) as expected in such situations. Quite frankly, this ALJ has significant concerns as to why there were no persons from the Orchard Place program involved with this IEP development. The Ninth Circuit Court of Appeals has concluded that it is imperative that schools consider "medical experts" when considering the placement needs of an individual student (*Seattle School District No. 1 v. B.S.*, 1996, U.S. Court of Appeals, Ninth Circuit, 24 IDELR 68). This was consistent with the position taken by the Sixth Circuit (*Babb v. Knox County*, 1992, 18 IDELR 1030) in citing the failure of professionals involved with a student to consult with other who had seen a student as affecting the appropriateness of a program for a student with significant disabilities. The importance of such "collective knowledge" would seem particularly important in bringing all informed participants to the table in planning a program for a student with as complex needs as Benjamin. As stated recently by the Ninth Circuit (*Shapiro v. Paradise Valley*, 2003, U.S. Court of Appeals, Ninth Circuit, 38 IDELR 91) in a similar type of situation:

> We have held that a school district's failure to include a representative from a private school that a child is currently attending violates the procedural mandates of the IDEA (p. 3)

In this same case the Court concluded:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. (p. 4).

The concept of least restrictive environment is to also be considered when viewing the appropriateness of a student's program. As stated in a U.S. Circuit Court in Maine:

> Even though IDEA does not mandate regular class placement for every disabled student, IDEA presumes that the first placement option considered for each disabled student by the student's placement team, which must include the parent, is the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids and services that if provided would facilitate the student's placement in the regular classroom setting must be considered. (39 IDELR 33 *Ms. M. v. Portland School Committee*, U.S. District Court, Maine, May 20, 2003, p. 17)

However, this by itself does not seem to negate the possibility of considering a segregated specialized programs in certain cases. As stated by the Sixth Circuit:

> . . . parents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place their child in a private school that specializes in teaching children with disabilities.. . . we would vitiate the right of parental placement recognized in *Burlington* and *Florence County* were we to find that such private school placements automatically violated the IDEA's mainstreaming requirement. (*Knable v. Bexley City School District*, 2001, U. S Court of Appeals, Sixth Circuit, 34 IDELR 1, p. 11)

Within the regulations implementing the 1997 Amendments to the IDEA it is stated that a number of considerations shall be completed in making determinations regarding educational placement including ". . . any potential harmful effect on the child or on the quality of services that he or she needs . . ." (CFR, 300.552(a)(d)).

In this Hearing we are looking at the question of program appropriateness at a point approximately two years after the decision was made to place Benjamin in a setting outside of the attendance center he would have normally been attending. We must do this, while considering the reality that it is difficult to second guess the trajectory of what would have happened in Benjamin's program had he returned to the Ames Community Schools. Benjamin's parents contend that they could not take a chance of his regression as a result of being returned to a comprehensive school setting such as Ames High School. School officials, on the other hand, assert that they were never given an opportunity to implement an appropriate program for Benjamin that would have met his needs. This ALJ is faced with the daunting task described in a recent case from Pennsylvania:

> Whether an IEP is reasonably calculated to afford a child educational benefits "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. *Fuhrmann v. East Hanover Bd. Of Educ.* 993 F2d 1031, 1040 (3d Cir. 1993).

Here the Appellees have asserted strongly that because the April-May IEP team seemed to reach a conclusion that Ben could be served in the Ames High School that there was no need to carefully consider a full continuum of options in this IEP process. The parents, on the other hand, assert that there was not any serious discussion regarding why Ben might require a more specialized program such as that into which they subsequently placed him. The 1999 Regulations implementing the IDEA state:

> If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. (CFR 300.302)

These regulations are similar to those preceding the 1997 IDEA amendments and were applicable in a case heard by the Ninth Circuit in 1996 involving a student with emotional and behavior disabilities in which the Court concluded, "The IDEA does not require A.S. to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option sort of residential placement." (*Seattle School District v. B.S.* , 1996, U.S. Court of Appeals, Ninth Circuit, 24 IDELR 68, 6).

Benjamin's parents contend that the program designed to be delivered at Ames High School was inadequate in that it did not describe the manner in which the behavioral skills needed by Ben would generalize to settings beyond the school day. It is obvious that schools are not obligated to maximize the benefits provided for students with disabilities in special education programs. However, the threshold for determining the point at which an appropriate program is not being proposed remains a challenge and a particular essential element in arriving at a decision in this matter.

Particularly troubling to this ALJ is the extent to which the IEPs developed for Ben in January and April/May, 2003 were looked upon as apparently totally separate planning efforts and that the teams working to plan Benjamin's program were seemingly separated by intent and in reality. This does not, in this ALJ's opinion, reflect a process taking into account the best thinking in weighing the options that should be considered in planning for Benjamin. This is not a situation, in this ALJ's opinion, of which team of professionals has the best knowledge base or who is right. It is rather a situation in which the professional stakeholders and parents who have various perspectives on meeting the needs of a student such a Benjamin should collaborate in a thoughtful process to develop the IEP including discussing a full array of options and program elements leading to an open consideration of the setting in which to provide such services. This planning also, in this ALJ's opinion, crosses over various agencies. This ALJ agrees with the following statement made by the Appellees:

> The IDEA contemplates a close relationship between local and state educational entities and departments of human services. This is in order to access appropriate services and to appropriately allocate scarce resources. (p. 13, Appellees Brief)

Unilateral Placement

As stated earlier, the Appellees filed a cross action in this Hearing contending that the parents had failed to provide appropriate notice regarding their intent to make a unilateral placement and therefore the school had not had an opportunity to resolve any differences they had with the parents. As stated by the Appelllees:

> There is nothing in the communications from the parents, or in the Preappeal process, that would have put the District or AEA on notice that

> the family was making a unilateral private placement at public expense because they believed the May 2003 IEP did not offer FAPE. Their communications spoke of "possibilities," not certainties. It is not unusal for parents to make IEP requests that are not granted, and yet the parents end up accepting the offered services. (pp. 19-20, Appellees Brief)

The Appellees further assert that had they did not have any chance to remedy the perceived deficiencies in this IEP, "The District and the AEA had no opportunity to discover and attempt to remedy any and all parent concerns regarding the May 2003 IEP prior to the unilateral placement, either through a further IEP meeting or the reinstitution of the Preappeal process." (p. 21, Appellee's Brief). In regard to the harm that the LEA contends took place as a result of the parent's lack of notification they stated:

> . . . the District has been prejudiced by the family's failure to give notice, because the District has been unable to include Ben in its enrollment counts for the 2003-2004 and 2004-2005 school years. When the family withdrew Ben from Ames schools, without making claim for reimbursement, the District had to treat him as any student whose parents elect private education instead of public education. Ben has not been counted in the enrollment counts taken in either 2003 or 2004, and therefore, has generated no money for the District based upon his attendance. (Tr. 2075-2077). If the parents had sought a Preappeal or due process resolution at the time of the May 2003 IEP, or even given notice of their views of how the May 2003 IEP was deficient, it is possible that the matter would have been resolved so that the District could have generated money for his programming, if necessary. The parents' failure to give notice that they were making the placement at District expense, and their failure to file their claim for reimbursement for 18 months, has caused significant financial prejudice to the District. (p. 23, Appellees Brief)

While this ALJ certainly is concerned about the result of the LEA not generating monies to possibly support Ben's program he questions whether this responsibility rests with the family in such a situation. From the evidence presented in these proceedings there would seem to be amble reason as to why the LEA would have pursued options regarding generating monies to support Ben's program. This would have been necessary had Benjamin been attending school in Ames or in an out-of-district or an out-of-state program. There was no doubt that Benjamin continued to be a student in need of special education regardless of where he resided.

This ALJ has concerns regarding the adequacy of the IEP as developed for Ben in April-May, 2003. This includes the extent to which this IEP adequately reflected information from those who had worked with him in the residential setting, the extent to which the parents had a meaningful role in the IEP process, particularly in relation to the consideration of full continuum of programs for Benjamin. This differs from the position taken by the Appellees that any procedural irregularities were so minor that they did not

impact FAPE for Benjamin. The Appellees also seem to dismiss the professional opinions of person such as Mr. Garner, as merely reflecting the thoughts of the parents rather than Mr. Garner himself. Such an assertion, in this ALJ's opinion, seems to suggest a lack of regard for the opinions of these professionals who had been working with Benjamin over a period of time and would seem to mirror the dismissal of such opinions in the IEP process followed in April-May, 2003.

According to the Appellees the intent of a full continuum of services under the IDEA is in the sense of having such a continuum available but not necessarily to discuss such a continuum. As stated in the Appellee's Brief (p. 53):

> There was no attempt to prevent discussion of Benjamin's educational needs. Rather the use of an agenda was designed to bring about a reasoned, facilitated discussion of Ben's educational needs that focused first on the services that he required. . . . The parents wanted to discuss the **location** of services before the services were even determined.

The Appellees further assert that once it was determined by the staffing team, with the parents dissenting, that the neighborhood school would meet Ben's needs that there was, ". . . little need to rehash or review the parents' position on residential education." (p. 57, Appellees Brief) Whether the intent of the IDEA requirements for a continuum of services is intended to assert the availability of such or suggest the discussion of such, it would seem to this ALJ that, in this case, the Ames Community Schools and AEA would seem to come up short in this regard. There was no information presented in these proceedings regarding the availability of more intensive programs available for Ben including day school or residential options.

Issues surrounding the concept of "unilateral placement" have been recently dealt with in the U. S. Court of Appeal, Six Circuit (40 IDELR 31 *Berger v. Medina City School District*, October 29, 2003). This case dealt with the unilateral placement of a fifth-grader with a hearing impairment in a private school setting after the parents had signed an IEP. This court, in referencing earlier decisions in the *Burlington* and *Carter* Courts stated:

> Parents who "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risks" and the parents are "entitled to reimbursement only if a federal court concludes both the public placement violated the IDEA and that the private school placement was proper under the Act. (p. 4)

This Court goes on to state the provisions delineated in the 1997 amendments to the Individuals with Disabilities Act which clarify that the reimbursement for a private school placement may be reduced or denied if parents did not provide notice, either at the most recent IEP meeting prior to removal, or in writing 10 business days prior to removal of the child from the public school, "that they were rejecting the placement proposed by the public agency to prove a [FAPE] to their child, including stating their concerns and

their intent to enroll their child in a private school at public expense." (U.S.C. 1412 (a)(10)(C) (iii)(I)(aa) The basic foundation for this means by which parents can be reimbursed was delineated by the Fourth Circuit in the *Shannon Carter* case, in describing the intent of our federal special education statutes, states:

> The Act envisions, of course, that the primary providers of educational opportunities for handicapped children will be the public schools. When those schools fail to meet their responsibilities, however, parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children. (18 IDELR 350 *Shannon Carter v. Florence County*, U.S. Court of Appeals, November 26, 1991, p. 7)

The test of whether the school has met its responsibilities falls with the central question of whether the school has, in fact, designed and/or delivered a collection of programs and services delivering meaningful benefit for the child in question. As stated by the Sixth Circuit, ". . . reimbursement after a unilateral placement can be appropriate, upon a finding of sufficiently serious procedural failures by the school district. ". (27 IDELR 219 *Michael Doe. V. Metropolitan Nashville Public Schools*, U.S. District Court of Appeals, Sixth Circuit, January 5, 1998, p. 4). The purpose of this process was recently reiterated in the U.S. District Court, District of Columbia (Schoenbach v. District of Columbia, 2004, 41 IDELR 2):

> The purpose of these "exceptions to reimbursement" provisions is to "give the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provide in the public schools." *See Greenland Sch. Dist. V. Amy N., 358 F.3d 150, 160 (1st Cir. 2004).* (p. 9)

In this case the Appellants assert that they had informed the District numerous times of their intent to place Benjamin in a special school setting and this ongoing communication more the met the intent of those requirements of prior notice to educational authorities of an impending unilateral placement. A recent state level decision in New Jersey (40 IDELR 112, *Kingsway Regional High Board of Education*, Nov. 19, 2003) speaks to this point and states:

> . . .talking generally about residential placement is not notice of intent to proceed unilaterally on a specific course. This omission is not a minor procedural flaw, but rather the rule is intended to let the district know of its exposure in advance so that it can intelligently evaluate available options. (p. 4)

In a 2004 Decision in the Third Circuit (41 IDELR 260 *A.W. v. Highland Park Bd. Of Ed.*, Sept. 2, 2004), involving a 15 year old student with Asperger's syndrome and other disabilities, the Court reiterated the expectation that a school district is required to provide a program resulting in measurable benefit but also emphasized that the resident

district (Highland Park) should be given an opportunity to provide such a program before placing a student in an out-of-district option. In another appeal in the First Circuit involving a student with Asperger's syndrome (40 IDELR 203 *Greenland School District v. Amy N.*, U.S. Court of Appeals, First Circuit, February 23, 2004) the Court stated, in relation to the expectation that parents inform school officials of their intent to use a private school placement:

> These statutory provisions make clear Congress's intent that before parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools. (pp. 8-9)

In this case it appears that Benjamin's parents did provide an explicit notice during the time of the April-May, 2003 IEP of their deep concerns with how the process was unfolding and their intent to pursue other, out-of-district, options.

III.
Decision

This is indeed a very complex case involving a number of factors to be considered by this ALJ. As stated above the primary task at hand is to rule, in this phase of this Hearing, on the appropriateness of the IEP developed in April/May of 2002. In addition, it was agreed that this ALJ would also rule on the counterclaims asserted by the Appellees that the parents had not abided by the expectations as outlined in the IDEA for parental responsibilities with notifying the district regarding their plans to place Ben unilaterally.

The foundation for determining FAPE was well established in the *Rowley* Supreme Court Decision that reminded us that we must examine both the procedural and substantive elements affecting the provision of an appropriate program.

While the Ames School District and Heartland AEA provide an obviously skilled and competent staff to design and provide programs for students with autism spectrum disorders, this ALJ is concerned that there are several procedural matters that significantly interfere with the potential of the IEP developed in April/May, 2002 from providing FAPE for Benjamin. This includes:

a. The apparent unwillingness of the professionals involved with this IEP process to adequately consider the continuum of needs of Benjamin and the continuum of programs and services that might be needed to meet his needs. The Appellees assert that such a discussion was unnecessary in light of the conclusion of the IEP Team, except for the

parents, that Ben's needs could be met within the Ames High School. While such a conclusion may have a stronger base with many IEP team decisions, the total exclusion of such a discussion in the case of Benjamin, a student with highly complex needs who is returning home after being served in a residential setting for 18 months does not seem reasonable.

b. There are significant issues, in the ALJ's opinion, related to the apparent refusal of those responsible for holding the April/May IEP to include any representatives of the program which had been serving Benjamin and was actually continuing to serve his at the time of this IEP meeting. This seems contrary to the intent of IDEA and just does not set the scene for the most thoughtful planning regarding Benjamin's programmatic and support needs. The inclusion of team members reflecting this perspective seems particularly important in a situation, such as we have here, in which there is substantial documentation of some professional opinions, educational and clinical supporting the need for a specialized or residential program for Ben. The completion of the independent educational evaluation, as agreed to in the mediation process does not, in this ALJ's opinion mitigate the need for a more inclusive representation in the staffing process. There are also significant questions in this ALJ's mind regarding the absolute dichotomization of the staffing held at Orchard Place in January, 2003 from that conducted by the AEA and LEA in April/May of the same year.

In regard to the question of whether the parents in this matter met their responsibilities regarding prior notice before a unilateral placement under the IDEA, this ALJ believes that they did meet the substantive foundation of these expectations. Similar to the question posed with procedural and substantive components of FAPE, this ALJ was impressed with the extent to which Benjamin's parents informed the LEA and AEA over an extended period of time regarding their intent to explore alternative settings for his education. There is also evidence that there was specific notification during the development of Benjamin's most recent IEP of the parent's intent to pursue other options.

The Appellants prevail in this phase of the Appeal. Plans will need to be confirmed regarding scheduling the second phase of this Appeal dealing with the appropriateness of the Montcalm School program and issues regarding the responsibilities of the Iowa Department of Education.

C. R. S.

Carl R. Smith, Ph.D.
Administrative Law Judge

3-31-05

March 31, 2005