

Iowa Department of Education

(Cite as 23 D. O. E. App. Dec 258)

IN RE: Benjamin S.,
Ronald & Nancy S., Appellants

Decision
(Admin. Doc. SE-296)

vs.

Ames CSD
Heartland AEA 11 and Iowa Department
of Education, Appellees

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The above entitled matter was heard by Administrative Law Judge Carl R. Smith on May 13, 16, 17, and 18, 2005 at the administrative offices of the Ames Community School District. Following the completion of the Hearing the record was kept open until June 22, 2005 at which time the parties agreed on the final schedule and process for submission of briefs as well as a number of stipulations regarding the licensure of the Montcalm School and out-of-state placements at the Montcalm School which were submitted to this ALJ on June 22, 2005. Several continuances were granted to the parties in this matter with the final continuance being confirmed to extend until September 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.

The original 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 the first phase of 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)

As stated in the original Appeal, the primary issues brought forth in these proceedings are related to the unilateral placement of Benjamin in a specialized out-of-state facility serving students 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)

From a broader perspective Mr. Sytsma presented a significant general need faced by Benjamin that his parents assert as being absent in the program proposed by the local district that they subsequently believe they found in the Montcalm placement:

... his primary need is to learn interpersonal relationships. Education for Ben, special education, has no meaning at all unless he is taught interpersonal relationships.

His academic skills are too good, his math a little behind but no – not enough that we would – we'd be here or thinking of a placement or worried at all.

The reason we're worried, the reason the parents have pursued special ed, is that the young man would have no life at all. No life. He will either be institutionalized or jailed or put away somewhere in some way unless he learns to interrelate with people. That is the parental perspective and it is absolutely vital. (p 11, Transcript)

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 ALJ's March 31, 2005 decision addressed 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 first phase, 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 the first phase of the Appeal. It was also agreed that the action against the Iowa Department of Education would also be considered if the Hearing proceeded into a second phase.

In the March 31st Decision this ALJ ruled that there were significant issues impacting the provision of Benjamin's proposed program in the Ames Community Schools in such a manner as to compromise the appropriateness of the program being proposed for Benjamin. Furthermore, the ALJ concluded that a sufficient foundation had been established that Benjamin's parents had informed the LEA and AEA over an extended period of time regarding their intent to explore alternative settings for Benjamin's education. He also concluded that there was sufficient 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 second phase of this Decision will address three specific major issues related to Benjamin's education. The first of these deals with the second question to be considered in those cases involving a unilateral placement initiated by parents of a student with disabilities; that is, if it is found that the proposed placement for a student to be provided by a local LEA is not determined to provide a free, appropriate, public education, it must be determined if the program provided through the placement initiated by the parents does, in fact, provide FAPE.

The second issue to be addressed deals with the specific responsibility of the Iowa Department of Education in this situation. As alluded to above, the Appellants contend that the Iowa Department of Education failed to perform its responsibility in assuring the provision of a continuum of programming options for Benjamin.

A third issue to be addressed is what relief, if any, should be awarded to Benjamin's parents if the decision affirms the appropriateness of the program into which they placed their son. The specific time period for which this claim is being made by the Appellants is the 2003-2004 school year.

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 over the four days of phase two of this Hearing. These witnesses included:

- Ms. H. (Benjamin's grandmother)
- Dr. George Posner (A consultant who worked with the family in reviewing potential programs)
- Ms. Francis Wilke (A friend of the family)
- Mr. S. (Benjamin's father)
- Mr. Steven Muller (Administrator of Homestead, a program serving Iowans with autism)
- Ms. Lana Michelson (Bureau Chief, Iowa Department of Education)
- Ms. DeeAnn Wilson (Consultant, Iowa Department of Education)
- Ms. Melissa Bartle (Neighbor of Family)
- Mr. Norm Ostrum (Starr Commonwealth School, Albion, Michigan)
- Mr. Dana Richards (Starr Commonwealth School, Albion, Michigan)
- Dr. G-S. (Benjamin's mother)
- Ms. Sandra Winchell (Starr Commonwealth School, Albion, Michigan)
- Ms. Patricia Hiatt (Starr Commonwealth School, Albion, Michigan)
- Dr. Michael Lelwica (Psychologist in Private Practice, Ames, Iowa)

- Dr. Cindy Yelick – Director of Special Education and Assessment – Ames School District
- Dr. Martin Ikeda (Supervisor of Research, Autism and Behavior Teams – AEA)

Benjamin is a 17-year old student who is currently residing and receiving his education in an out-of-state program (Montcalm School, Albion, Michigan) purported to serve students with significant special education needs, including youth diagnosed with Asperger's Syndrome. The chronology of Benjamin's educational program is detailed in the first phase of this Hearing. To summarize here:

- Benjamin was first identified with Asperger's Syndrome in 1998 while he and his family resided in New York state.
- He and his family moved to Ames, Iowa prior to the 1999-2000 school year. Benjamin was served in general education during this year.
- In the 2000-2001 school year Benjamin was first identified as a student with special education needs.
- Prior to his eighth grade year (2001-2002), as a result of significant behavioral problems in his home setting, Benjamin was briefly hospitalized.
- Shortly after the beginning of this eighth grade year Benjamin was again hospitalized and subsequently served in the Orchard Place residential setting for much of the 2001-2002 school year and all of the 2002-2003 year.
- Benjamin's parents filed a Child in Need of Assistance (CINA) petition with the courts in order to secure services and to pay for such services at Orchard Place.
- An IEP team, composed primarily of AEA and LEA staff in addition to the parents developed an IEP in Spring, 2003 designed to be delivered at Ames High School.
- Although the IEP was developed, the record indicated that there were strong opinions from Benjamin's parents and clinical staff at Orchard Place that he still needed an intensive setting for services beyond that which could be provided at Ames High School.
- 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.
- The CINA petition for Benjamin was terminated in July, 2003 with full care and responsibility being returned to his parents.
- In August, 2003, Benjamin's parents unilaterally enrolled him in the Montcalm School.

This ALJ has ruled, as discussed above, that he believes that the proposed program originally designed to be delivered by the Ames Community Schools in Fall, 2003 was not designed in such a way as to meet the requirements of a free, appropriate, public education (FAPE).

Contrary to the assertions made by the Appellees that the initial decision regarding the school district's shortcomings in meeting FAPE requirements was reached primarily on the basis of who was invited to Benjamin's April-May, 2003 IEP meetings (p. 13, Appellee's Brief), there were more substantive facts leading to such a conclusion. As stated in the original Decision this included such findings as:

- The apparent unwillingness of the District and AEA professionals involved within the 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 failure to consider the professional opinions of those professionals, education and clinical who had been working most closely with Benjamin over an extended time.
- The dichotomization of the staffing held in January, 2003 from that conducted in April/May of the same year.

It is now our responsibility to carefully consider the second prong of the criteria for judging the acceptability of a unilateral placement; that being the appropriateness of the program into which Benjamin was placed by his parents. Following this we will consider the two other issues at hand; the responsibilities of the Iowa Department of Education in assuring a continuum of services for students with disabilities and the relevance of such a responsibility in regards to Benjamin's programmatic needs and what relief, if any, is due the Appellants.

Appropriateness of Montcalm Program

In situations such as this we are expected to carefully review the appropriateness of the program chosen by the parents as they exercised their decision for a unilateral placement. If challenged prior to placement the question would logically be stated in terms of whether said program is "reasonably calculated" to confer benefit for the student while if the question is posed after placement in the program the question can ask if the program is, in fact, conferring educational benefit and is specifically designed to meet the needs of Benjamin. The burden of proof in such a matter would seem to rest with Appellants. Mr. Sytsma, in his opening comments defined the specially designed aspects of the Montcalm program as:

... a consistent structure across environments, a small, consistent peer group, a philosophy of positive peer culture, high academic expectations, and an emphasis on special interests ... (pp. 2165-66, Transcript)

Other testimony and documents presented in this Hearing provide perspectives on the appropriateness of the Montcalm program. For example, Benjamin's parents developed a listing 23 attributes which they believed would provide FAPE for their son. (pp. 1133-1134, Record). Examples from this listing include:

- All staff . . . are certified in Therapeutic Crisis Intervention . . . A continuum of techniques are employed from de-escalation to a two-person therapeutic restraint utilizing minimum force and maximum care.
- Strength-based treatment model (Students receive asset based behavioral and educational assessment)
- Fully licensed and certified staff
- Critical mass instruction-
 - In multiple settings
 - From multiple teachers
 - Across grade levels

The Montcalm program is described in its professional literature as follows:

The Montcalm School operates on a philosophy of creating a “positive peer culture” where interpersonal relationships and peer group treatment work together to change students’ behavior and life values. Peer group meetings are held five days a week for 90 minutes and are considered be the central or “sacred” focus of the treatment day. It is within the peer group that students are able to honestly discuss their struggles and successes while encouraging and challenging their peers to continue working toward their own treatment goals. (p. 1175, Record)

The Appellees, on the other hand, take the position the Montcalm program is not appropriate from both procedural and substantive perspectives. In her opening statement Ms. Seitz asserts that the procedural flaws that were found in the IEP process used in the Ames District were also present with the Montcalm program. The District and AEA stated their appreciation of any gains Benjamin has made over the past two years but question whether similar gains could have been made in the originally proposed program at Ames High School. The Appellees furthermore contend that the Montcalm program was selected for reasons other than the educational needs of Benjamin:

. . . the placement was made by the parents due to concerns not with Benjamin’s academics and education, but primarily with Benjamin’s behavior towards his family members in the home. The family rejected resources from the Department of Human Services that were explicitly made available for just such reasons and elected to unilaterally place Benjamin at Montcalm. The program at Montcalm has primarily focused on these noneducational concerns. The District and AEA are not responsible for reimbursing for such noneducational reasons. (p. 3, Appellees’ Phase Two Brief)

The District and AEA further assert that the standard of “whether Moncalm offered a meaningful opportunity for Benjamin to receive educational benefit” must be answered in this Phase and that least restrictive educational environment issues must also be considered (p.6, Appellees’ Brief). Furthermore, they assert that the same standards that were applied in judging the adequacy of FAPE as originally applied to the proposed

District and AEA program must also be applied to the Montcalm program. They also contend that there are a number of inadequacies in the Montcalm program such as that Montcalm did not:

- Develop or implement an IEP for Benjamin
- Conduct a full and individual evaluation
- Conduct a functional behavioral assessment or write a behavioral intervention plan for Benjamin
- Administer any standardized tests other than one test done at time of admission
- Communicate any educational progress data other than grade reports
- Offer Benjamin any integration with non-disabled peers
- Write a transition plan for reintegration into his home school district. (p. 12, Appellees' Brief)

The Appellants called several witnesses attesting to what they would assert is the progress that Benjamin has made in the Montcalm program. His grandmother, Ms. H., described what she believes is a significant change in Benjamin's behavior since attending Montcalm. She provided examples of behaviors she had observed at family gatherings that had, prior to Montcalm, been settings in which Benjamin's behavior had been a significant problem.

Further testimonials regarding Benjamin's behavioral progress since attending Montcalm were provided by Ms. Wilke, a friend of the family and neighbor who described the changes in Benjamin's behavior to Mr. Sytsma in the following manner:

Q. . . . have you observed any change in Benjamin S. after his attendance at Montcalm?

A. Yes, I have.

Q. Would you describe the change that you personally observed and the basis for it?

A. Ben is more outgoing, has a better sense of humor with regards to social interaction, and I feel safer in his presence than I have had previously.

Q. Have you actually been with him to a point where you can see—what do you mean when you say he's more open? . . .

A. Usually Ben would be an observer or – for instance, he would – we would go to a movie, and Ben – we would sit in a place that he wanted to sit where Ben would just immediately keep going to the fifth front seat – and four, which what Ben would usually do.

Now Ben has an interest in sitting with us as opposed to where he wants to sit. He will have an interest with – with what books and games that we have at our home as opposed to just bringing his own and ignoring any thing we offer him. (pp. 2236-2237, Transcript)

Ms. Wilke went on to state what Benjamin now appears calmer and that she is no longer concerned about the possibility of violent behavior in Benjamin. She went on to state, "I

feel like his (Benjamin) life has changed for the better, and I - - I think that Montcalm was the right place for him . . . (p. 2238, Transcript). Further testimony was provided during this phase from professionals who were either involved with Benjamin's placement into Montcalm or who are serving him in that setting.

Dr. George Posner, an independent consultant working on behalf of families who are reviewing possible residential programs for their children, testified in these proceedings. Dr. Posner had been contacted by Benjamin's parents in 2002 and asked to look for potential settings that would be appropriate for Benjamin. He testified regarding the various programs he had reviewed as possible placements for Ben. When asked for his rationale as to why the Montcalm program was appropriate for Benjamin Dr. Posner noted:

. . . I believed that Montcalm would be able to provide - would help Benjamin in his peer relationships, help him manage his frustration better in nonaggressive ways, could develop the empathy, more - more flexibility, and could provide an educational program for a bright boy that has very special interests. (pp. 2201-02, Transcript)

Dr. Posner also stated that he believed that the particular behavioral approach used at the Montcalm program (positive peer culture) and the ability of the facility to provide crisis intervention (p. 2204, Transcript) were critical for success in working with Benjamin. On cross-examination Dr. Posner clarified that crisis intervention strategies available at the Montcalm program includes deescalation and the potential use of physical restraint. When asked to comment on the evidence base for the Montcalm program, Dr. Posner was not able to provide specific references beyond a book describing Positive Peer Culture. This difficulty in citing specific research supporting the methodology of positive peer culture was attested to by several witnesses.

Further testimony regarding the appropriateness of the Montcalm program were provided by Montcalm staff including: Norm Ostrum (Director of Admissions), Dana Richards (Lead Therapist), Sandra Winchell (Teacher) and Patricia Hyatt (Special Education Coordinator). Comments from staff regarding Benjamin's progress included:

- "I have seen immense growth in Ben in the period of time he's been here, and we still have a ways to go, but I'm just very proud of the progress and work that Ben has put in trying to improve himself." (Ostrum, p. 2487, Transcript)
- Willing to engage others, seeking them out, interacting on a variety of different topics and issues. (Richards, p. 2517, Transcript)
- Talking, seeking others out, expressing himself expanding his interests (Winchell, pp. 2741, 2742, Transcript)

A final impression of perceived improvement in Benjamin's behavior was provided in the testimony of Dr. Lelwica, a clinical psychologist who first worked with Benjamin in 1999 when Ben's family first moved to Ames. When asked to comment on his

impression of Ben's mental or behavioral health change since being served at Montcalm, Dr. Lelwica stated:

After knowing Ben for several years and seeing the condition that he was in in '99, 2000, and at periodic points throughout the past several years, in my opinion there's a noticeable difference in how he presents.

He just seems – he's less depressed. He's more clear in his thinking. He's able to tolerate more stress. He's not – on psychological testing he's not looking as disturbed as he did in the past.

That plus . . . comments and other information that I've collected from the family over time led to that impression (t. pp. 2888-2889)

Dr. Lelwica also stated that his testing results confirmed these changes in Benjamin's overall behavior. In his most recent evaluation of Benjamin (Spring, 2005) Lelwica noted:

. . . there were many indications discovered during the current evaluation process suggesting that Ben has made significant gains since his last evaluation. He is no longer showing significant signs of thought disorder, impaired reality testing, or major depression. The current testing results supported signs of mild depression and social withdrawal. There was also evidence that Ben may vacillate between overvaluing his personal worth with experiencing feelings of depression and low self-esteem when he is faced with his limitations. Ben's capacity to process emotional stimulation appears to be quite poor, and he tends to be constantly on guard given concerns about how he will manage the demands that are placed on him socially. Despite Ben's ongoing social and emotional concerns, it is very apparent that he has matured and made significant progress in his functioning. (p. 1457, Record)

On cross examination, Dr Lelwica was not definitive in the extent to which the Montcalm program is responsible for such growth as opposed to other treatment interventions in which Benjamin has participated:

- Q: On what basis did you determine that Montcalm accounted for his progress as opposed to his two-year admission to Orchard Place?
A: On logic, that it's been a good placement for him, and he's grown.
Q: And how did you know that it wasn't a good placement and he had grown when he was at Orchard Place?
A: I can't say that. I can't distinguish between the two. (p. 2901, Transcript)

The witnesses in these proceedings brought by the Appellees did not contradict the observations noted above regarding perceptions in the changes seen in Benjamin's behavior. The position taken by the LEA and AEA, rather, would seem to center around a contention that similar changes might have occurred had Benjamin been attending Ames

High School and challenges regarding the research base of the program provided at Montcalm. They also strongly assert that a similar standard should be applied in judging the appropriateness of the parent chosen option as had been applied by the ALJ to the proposed Ames High School Program. As stated in Ms. Seitz's opening remarks:

. . . we're going to have evidence that Montcalm has had no contact with the Ames or Heartland personnel to get any information from Benjamin and it's very difficult to find out how Montcalm could provide an individualized program and looking particularly at the time it was selected without having any contact with the people who educated him previously . . . (pp. 2177-2178, Transcript).

Furthermore, the Appellees suggest that follow-up activities connecting what was happening at the Montcalm School should be the responsibility of Benjamin's parents or school officials at Montcalm. As stated in an interchange between Ms. Seitz and Dr. Yelick:

Q. So you're responsible for all the assessment activities of the district, 4 to 600 IEPs, and early childhood. . . .

Q. With all of those responsibilities and time commitments, did you find it – that you had time to be tracking down Benjamin S. at Montcalm when he wasn't enrolled in the district and the parents were not making any requests that you do anything?

A. I think the record will show that when I was requested to do something or received communication, that was addressed or turned around, typically within a 24-hour period. (p. 3014, Transcript)

Dr. Yelick went on to state that she did not believe that the local school district has a responsibility to oversee an IEP for a student who has been unilaterally placed by their parents in an out-of-state program (pp. 3027-3028, Transcript).

The Appellees bring up several points regarding their concerns with the adequacy of the program being provided for Benjamin at Montcalm. For example, Dr. Ikeda indicated that he was concerned that the Montcalm program did not delineate a positive behavior support plan based on a functional behavioral assessment (p. 3070, Transcript). Expanding on this notion the Appellees assert:

. . . Montcalm conducted no functional behavioral analysis at all, even though they had Benjamin for over a year and a half at the time of the hearing in Phase Two, and they had an opportunity to observe Benjamin exhibit withdrawal, aggressive and escape behaviors in the cottage setting. (Rec. at 1227, 1230, 1272, 1283, 1285, 1291, 1302, 1304). Montcalm utilizes precisely the same treatment methodology (positive peer culture with conversational group meetings) and the same crisis intervention/behavior

treatment plan with every resident, regardless of unique needs. (p. 42, Appellees' Brief).

The Appellees go on to provide other examples of testimony from the proceedings illustrating what they believe to be the lack of individualized interventions for Benjamin. On cross examination, Mr. Dana Richards was asked to describe one-to-one therapeutic activities with Benjamin:

Q. I'm not hearing you describe any one-on-one activities with Ben. Are there any one-on-one therapeutic aspects with Ben?

A. The individual aspect of therapy here would be if there was a was a situation where he was starting to escalate over something that was going on.

The process within the positive peer culture is that the group members would be the first ones to really initiate a discussion to find out – gain the information and offer any suggestions.

If that's not being productive, then the staff members would then either continue to work through the group with that or they may take Ben to an isolated situation where they are able to discuss with him what was going on.

In that context throughout the school day or when I'm on shift, I would be a part of that as well.

Q. So the only individualized therapy is in response to crisis intervention; is that correct?

A. Individual therapy in that context is – is generally under that situation, yes. (pp. 2550-51, Transcript).

The Appellees also point out their concerns regarding the lack of transition planning in Benjamin's program:

... even though every one anticipates Benjamin going on to post high school education (Student and Family Vision Statement, May 2003 IEP, Ed. Rec. at 591), there is no reference in the Montcalm "plan" to the course work that Benjamin needs to graduate and go on to college. (p. 33, Appellees' Brief)

In summary, we are presented with a mixed picture regarding the appropriateness of the Montcalm program in meeting Benjamin's needs. We had testimony from several witnesses called by the Appellants providing testimonials regarding behavioral change in Benjamin associated with his placement at Montcalm. On the other hand, the records and testimony paint a picture of a program that uses a behavioral management system that has been integrated into all aspects of the residential program but may lack specificity regarding the content and specific outcomes of the program. Even more vague are the academic components of the program which has been stressed as critical in a program serving Benjamin.

SEA Responsibility

In his opening statement for the Appellants Mr. Sytsma described the second tier of issues regarding the responsibilities of the Iowa Department of Education in the following manner:

We do not believe that the State of Iowa has a more intense facility, a residential facility, a serious extended-day facility, for children with Asperger's or autism if they are above the MR cut-off; i.e., if they are not officially diagnosed as mentally retarded. . . . We also do not believe that the State of Iowa has a list of out-of-state facilities, approved, available, any working relationship with anyone that would provide what Iowa does have. . . . when we state that Iowa doesn't have something, that's based on our best knowledge. If it shows that Iowa does have it – and I don't know where it is or what it would be if such a claim were made – our simple position is that it is not readily accessible to the parents, either in terms of information about its existence or how to go about accessing that service and making it known to the IEP team for part of their deliberations. (pp. 2168-2169, Transcript)

In presenting the position taken by the State, Ms. Scase opened these proceedings by asserting limitations on what the state is expected to provide for students with disabilities. She indicated that having residential programs available for specialized populations strategically located across the state extends beyond federal expectations (p. 2181, Transcript). She also asserted that there is nothing that requires that the state have an appropriate program for every child within the state borders (p. 2182, Transcript). Furthermore, she stated that there is a process in place for approval of out-of-state placements when the IEP team contacts the Department of Education, completes certain paperwork and has the Department review the proposed placement for approvability. She also indicated, in these opening remarks, that the State was willing to assist parents:

. . . I also believe based upon my information I have gained from staff at the Department . . . that if inquiry is made to them by a parent that they are willing, that they do provide information, that we have large amount of resources through a variety of consultants and individuals that are involved with the state system. (p. 2185, Transcript)

Mr. Steven Muller, Executive Director of the Homestead, a program serving children and adults with autism in the Des Moines, testified that he was not aware of any Iowa facility serving adolescents with autism who do not also have mental retardation (p. 2183, Transcript). He noted that he receives phone calls from persons throughout Iowa seeking information regarding needed services and noted:

We hear all kinds of cases, but in particular there are two large unmet needs, one being people who have the most severely aggressive behaviors who end up getting kicked out of one placement or another and ultimately have no place to turn, and the other is the group that you're asking about, and that is individuals without a diagnosis of mental retardations or having an IQ of 70 or below.

So it's very challenging for those families to find any kind of supports for their children. (pp. 2285-2286, Transcript)

Mr. Muller did, however, indicate that there are providers in Iowa who serve student with higher cognitive skills with autism through community and home-based services (p. 2287, Transcript) He indicated that many providers in Iowa, who serve other persons with mental retardation, do not provide the unique services which he believes are needed for persons with autism. As he stated:

... many of the providers who are out there today are lumping a child with autism into the same kind of generic services they do for any other child with mental retardation, and for that reason the Homestead was started.

There are unique attributes of an individual who's facing this disability, and unless you address those specific needs, you're – you're not going to find a lot of success. (p. 2301, Transcript)

He was also asked to describe what he believes to be the critical components of working with such youth and answered that the structure provided for the youth is paramount. As he stated:

If a child is trying to organize what's happening in their world using a different mind-set, it's best if the staff working with that child can wrap around that mind-set rather than just assume that traditional behavior modification techniques is going to be the answer. (p. 2302, Transcript)

Ms. Lana Michaelson, Chief of the Bureau of Children, Families and Community Services for the Iowa Department of Education, testified that federal law does, in fact, require the state to address the need for a continuum of services for students with disabilities (p. 2321, Transcript). She indicated that the Department of Education has been working with Iowa's Area Education Agency Directors of Special Education in analyzing current gaps in services. She indicated that because Iowa is a non-categorical state that the analysis is taking place by level of service rather than disability designation and the status of students having to be served outside their district or outside the state(pp. 2328 – 2330, Transcript).

In regard to out-of-state placements Ms. Michaelson indicated that there are circumstance in which students do need to be served out-of-state and that the Department of Education maintains a list of previously approved out-of-state programs. As she stated:

We have a process that's outlined in our rules of special education, and the IEP team needs to inform the AEA special ed director, and they fill out the appropriate paperwork, and we approve that at the Department. . . . what we do is we ask what they're approved for by their local state. Okay? As far as looking at the 13 disability categories in federal law.

We talk about subpopulations that they serve. We talk about it they deal with public schools or nonpublic schools. We ask about the employment, the employees of the facility. We talk about costs. We talk about how long the facility has been open.

And then we ask them to read through the assurances that have been approved by our state board, the state board to education, to make sure that they are comfortable with all of these assurances.

And then we ask them to include copies of the IEP form or format that they use inside their facility, brochures on their educational program, teachers not teaching in approved areas, because that's very important to us, and documentation of that if that's required and if the facility does not meet the 34 CFR 300.153 of federal law. We ask them also to provide documentation of that.

So we have a pretty comprehensive application process. This would then be brought back into the state, and we would review that before we would approve a facility for a child. (pp. 2331, 2334-2335, Transcript)

Ms. Michaelson was asked by Mr. Sytsma as to whether the list of approved programs is available to families in Iowa. She indicated that such a list is not published by the Department of Education and is generally available through the AEA Directors of Special Education (p. 2353, Transcript).

This ALJ later asked Ms. Michaelson to further expand on the access parents have to the approved out of state list:

- Q. . . . if a parent calls the Department and requests the status of the approvability of an out-of-state program, does the Department respond to that?
- A. Absolutely. I mean we would always try to address a parent concern. If a parent called and asked "Is this program approvable by you?" we would probably send them our list or we would look at the list, and we would determine that.
- If they wanted to know if there was a way to look at a program to be approved, we would walk them through the process. (p. 2369, Transcript)

Ms. Michaelson was ask whether there were any documents clarifying the conclusions drawn regarding the availability of a continuum of services for students with varying needs. When asked by this ALJ as to the dissemination of the specific recommendations of the Continuum Task Force she testified:

These recommendations – the recommendations from the task force were given to Ted Stilwell as director of education. We also – and at that point in time, it became Ted’s responsibilities to determine whether or not – I mean how much further those were disseminated.

We have used those with the AEA special ed directors and with the LRE task force and with other groups, but specifically have we put together a document and said “Here were what the continuum task force recommendations were” and disseminated those statewide, no, not that I’m aware of.

Maybe Ted did something more than what I’m aware of. I can only talk about what I’ve done. (pp. 2371-72, Transcript)

Ms. DeeAnn Wilson, Special Education Consumer Relations Consultant for the Department of Education, provided further testimony regarding the approval for out-of-state placements. Ms. Wilson did not recall that there had, at any point, been an approval process completed for the Montcalm School (p. 2390, Transcript) while later records seem to suggest that there had been an approval process for this program. In describing the process of how out-of-state placements are shared with the AEA Directors of Special Education Ms Wilson testified:

... we do try every year to get a summary of the out-of-state information to the AEA special education directors, again, that would kind of reinforce the notion that there is that process in place, and we keep the numbers, and we know how many come from each of the AEAs.

In fact, we even give them a listing by child name and the facility to each of the AEA directors so that would keep it in their mind-set about it as well as giving – making certain that they have to forms to submit to us. (p. 2388, Transcript)

Ms. Wilson was also asked the means by which parents are informed of programs that are on the approved list and she initially indicated that she had no idea and then made reference to the general mechanisms by which parents are informed of special education issues such as the Parent-Educator Connection program.

It should also be noted that, Dr. Cindy Yelick, Director of Special Education in Ames also testified regarding her knowledge of out-of-state placements and the State Department’s Continuum Task Force. In reference to the state’s list of out-of-state programs Dr. Yelick indicated that she was not aware of such a list at the time she was working with Benjamin’s parents in reviewing out-of-state programs (p. 3018, Transcript) but had become aware of this list prior to the time of this Hearing. She also indicated that the Ames District did not, at the time of this Hearing, have guidelines for out-of-state placements (p. 3019, Transcript).

In reference to questions regarding the recommendations of the Continuum Task Force in Iowa, Dr Yelick was asked by Mr. Sytsma references from the record (pg 3009, Record) the following questions:

Q. . . . Going down to page 3009, there's a reference to developing a set of criteria that LEA must use to demonstrate that – a genuine continuum of service system.

A. Yes.

Q. Are you familiar with such criteria in your capacity at Ames?

A. No, I am not.

Q. Going a little further, a method for moving the continuum issue from the LEA level to the AEA level and then on up to the SEA level, are you familiar with any such procedure?

A. I'm not seeing how that's separate from the first question, so – so no.
(pp. 3019-3020, Transcript)

It should also be noted, that in relation to the state approved list and concerns regarding the continuum task force in Iowa that Mr. Sytsma presented the following stipulation that was agreed to by all parties in this matter. This stipulation was entered as follows:

. . . if Jule Reynolds were called to the stand, she would testify that she is the executive director of the Iowa Parent Training and Information Center, the Parent Training and Information Center of Iowa. . . .

She would testify that her job – and she is federally funded and her staff to provide advice and counsel to parents, that they do this to counsel parents on an annual basis.

She would testify that she has never, prior to last night, heard of a state list of approved out-of-state schools nor has that information been shared with her staff.

She would testify that she was a representative on the continuum task force. She would testify that she has knowledge of what from parent calls appear to be gaps in the continuum and that no one has asked her regarding those gaps since the conclusion of the recommendations. End of that stipulation (pp. 3049-3050, Transcript)

Thus it seems that there are significant misunderstandings regarding the process used in Iowa for parents seeking information regarding possible out-of-state placements. The State has asserted the position that they are not required to provide for every student within state boundaries. They have asserted that there is a process for those situations in which IEP teams choose to seek information on the approvability of specific programs to meet the needs of individual students with special education needs. Testimony has also indicated that a request for information on the approvability of programs typically is in response to AEA Directors of Special Education. On the other hand, as indicated in the stipulation above, it appears that such information is not readily available to parents who may be seeking information regarding options for their children with disabilities.

II. Conclusion of Law

As suggested above, in this Phase of the Hearing we need to review criteria for judging the appropriateness of the placement into which Benjamin was placed. We also need to review the responsibility of the Iowa Department of Education in assuring a continuum of services for students and its relationship to Benjamin's placement.

Appropriateness of Placement

In 1993 the U.S. Supreme Court addressed issues specifically surrounding the unilateral parental placement of students with disabilities and the questions that should be raised in such situations (*Florence County District Four v. Shannon Carter*, U.S. Supreme Court 1993, 20 IDELR 532). In this case the parents of a student with learning disabilities became dissatisfied with programming being offered by the local school district and unilaterally placed their daughter in a specialized setting. At the District and Circuit levels it was determined that the LEA program in which Shannon had been served did not provide FAPE. Most relevant to this phase of our hearing however, is the question of the criteria to be applied in judging whether the parent-selected program is, in fact, appropriate. In this case, the Court pointed to the assertion that appropriateness would be judged initially on the Rowley court criteria of "reasonably calculated to confer benefit". It was noted that after Shannon's placement that she had shown significant progress in the unilateral placement: a conclusion that would seem to confirm the appropriateness of the parent's choice.

A major consideration in this case is the question of whether the unilateral placement must meet the same standards as those programs provided within state, Of particular note from the *Florence County* Court in relation to a state's responsibility:

. . . although the absence of an approved list of private schools is not essential to our holding, we note that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards. South Carolina keeps no publicly available list of approved private schools, but instead approves private schools on a case-by-case basis. In fact, although public school officials had previously placed three children with disabilities at Trident . . . Trident had not received blanket approval from the State. South Carolina's case-by-case approval system meant that Shannon's parents needed the cooperation of state officials before they could know whether Trident was state-approved. As we recognized in Burlington, such cooperation is unlikely in cases where the school officials disagree with the need for the private placement . . . (*Florence County District Four v. Shannon Carter*, U.S. Supreme Court 1993, 20 IDELR 532p. 4)

In the *Florence County* case the Supreme Court made numerous references to the earlier *Burlington* decision in which this Court first dealt with issues regarding unilateral placements for children placed by their parents. This Court also dealt with the time lag that may transpire between the time action is taken by parents and the eventual resolution of matters such as reimbursement.

As this case so vividly demonstrates . . . the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. (*School Committee of the Town of Burlington, Mass. V. Department of Education*, U.S. Supreme Court, 1985, 103 LRP 37667, p. 5)

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*, 1988, 441 IDELR 130), 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 not 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*, 5th Circuit, 1997, 26 IDELR 303 *Adam J. v. Keller*, 328 F.3d, 804, 810 5th Circuit, 2003, *Lewisville Indep. School District v. Charles W.*, 5th Circuit, 2003, 40 IDELR 60) and have provided direction regarding the operational criteria for ascertaining whether a program is, in fact, appropriate. This ALJ recognizes the essential message from the *Florence County* decision regarding the expectation that all procedural and substantive standards typically applied to a typical placement decision not being prescriptive for a situation involving a parental unilateral placement. However, it does seem highly relevant in this case to apply substantive judicial standards that have been posed regarding the appropriateness of programs being provided for students with disabilities.

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 this 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.* U.S. Court of Appeals, Fifth Circuit, 2003, 40 IDELR 60, p. 3)

It would seem appropriate to apply each of these standards to the Montcalm program serving Benjamin.

At the core of the decision Benjamin’s parents made is the assertion that the program provided at Montcalm provided unique elements, important in yielding meaningful educational progress for him that were not present in the program as designed by his IEP team in April-May, 2003 to be delivered in the Ames Community School District. This suggests that the Montcalm program or equivalent is both needed by Benjamin in order to have his special education needs met and provides needed program elements beyond that which was going to be providing originally by Ames Community School District (*Independent School District No. 283 v. S.D.*, U. S. Court of Appeals, Eighth Circuit, 1996, 24 IDELR 375).

The process that was followed in developing the originally proposed program in Ames was found by this ALJ to be deficient as described in the Decision in Phase I of these proceedings. However, in viewing the overall question of the appropriateness of the Montcalm program it seems logical to factor in the original areas of concern voiced by Benjamin’s parents in regard to the proposed program to be delivered at Ames High School. Among these concerns were:

- Questions regarding the adequacy of the proposed program to meet Benjamin’s academic and transition needs
- A lack of foundation of applicable research findings to support the intensity of instruction across several dimensions
- A lack of objective measurement of goals and objectives in the social skills areas, and,
- An inadequate behavioral support plan.

While not being limited to these components, it seems that these program components are also relevant as we look more closely at the Montcalm program.

The question of the extent to which the Montcalm program is truly individualized to meet Benjamin's needs was addressed from several different perspectives during this Hearing. This includes the research or evidence-base for the strategies used by Montcalm for youth with needs similar to Benjamin, the assessment data used by the program to individually tailor the program delineated for him and the extent to which Benjamin's performance and needs have been used to make any necessary program adjustments.

The research or evidence-base for the Montcalm program was the subject of quite a bit of discussion during these proceedings. The District and AEA raised serious questions regarding the research base for the program. The Appellant's, on the other hand, contend that there is a solid base of research for the use of positive peer culture. They cite a specific professional reference reviewing research associated with this approach (pp. 1804-06, Record). In this ALJ's review of the sources cited in this reference only one of the seven cited studies appeared in a referred or peer reviewed publication and the most recent cited study was 22 years old. While not brought out in the Hearing this rather weak research base raises questions in this ALJ's mind regarding the foundation established for this particular program. It was also noted that there were not any research studies cited during these proceedings substantiating the use of positive peer culture approaches for students with Asperger's Syndrome. The need for such an individually tailored approach, with a strong research base, was at the heart of many of concerns, cited above, brought forth originally by the Appellants.

The more systematic types of behavioral and academic data that would seem essential for measuring the progress of a student with Benjamin's needs are largely absent from the record from his Montcalm placement. While not being required to meet all standards of an IEP in Iowa, the Montcalm program documents fail to provide any approximation of the content and detail that would be required in an IEP for a student with disabilities in Iowa. For example, the initial, and only document titled IEP - Initial was prepared on 9-5-03 (pp. 1215-1216, Record) cited data only from the Woodcock-Johnson Psycho-Educational Battery and the Larson-Hamill Test of Written Spelling. There is a vague reference to a need to attend to portions of his previous IEP and the importance of returning him to a high school setting. This document also includes several treatment goals (pp. 1218-1219, Record) which presumably would be similar to the goals developed within a traditional IEP format. The four treatment goals developed in September, 2003 include:

1. Ben will learn to manage his frustrations in socially acceptable ways.
2. Ben will develop helpful, positive peer relationships
3. Ben will develop the ability to view situations in a more flexible, open-minded way.
4. Ben will strengthen his relationship with his family.

After approximately one year of participating in the Montcalm program, except for the Summer of 2004 during which time Benjamin returned to live with his parents, the same four goals were stated for Benjamin (pp. 1359-1361, Record). While this ALJ is not asserting that new annual goals are always indicated for students with special education needs, he is concerned that there is no evidence of consideration of the changing needs for Benjamin over this period of time. There is also an issue regarding the specificity and measurability of such goals, which would seem to be a relevant consideration in both educational or clinical settings. To illustrate this further, it seems appropriate to provide one example of the more specifically stated objective and action steps associated with Ben's treatment plan as written in September, 2003 (p. 1218, Record). Under the goal of "Ben will learn to manage his frustrations in socially acceptable ways" the following objective and action steps are listed:

Objective: Ben will identify situations that lead to him isolating himself from others by December 31, 2003

Action Steps:

1. Ben will receive a group meeting to discuss what types of situations lead to him wanting to avoid or isolate from others.
2. Ben will make a list of suggestions that he can use rather than reading a book or trying to go to sleep.
3. The Norton group will encourage Ben to talk with them when he becomes upset or feels like isolating himself from the rest of the group.

In the same goal area in September, 2004 (pp. 1359-1360, Record), the following objective and action steps are noted:

Objective: Ben will identify situations that lead to him being frustrated by December 30, 2004.

Action Steps:

1. Ben will receive a group meeting to discuss what types of things get him upset and how he can prevent these from occurring.
2. Ben will make a list of choices he can make when he starts to become upset so that he can express those feelings more appropriately.
3. The Norton group will encourage Ben to talk about his feelings rather than trying to hold them in.

While the content within each of these action steps varies, it seems that there is a great deal of overlap across this year that leads this ALJ to question the extent to which these plans are individualized in a manner that would be considered conceptually acceptable within the context of an individualized educational program. Such documentation does seem to lend support to the questions of individualization raised by the Appellees.

Beyond these behavioral dimensions there is also a noticeable absence of any objective measures of the progress that Benjamin is making in the academic portions of his program. While his student grade reports indicate the grades and credits he is receiving, there are no measures of specific grade or age equivalent performance or any other criteria or skill related measures that would give a reader a solid idea of any academic progress Benjamin is making in the program. It should be noted that several witnesses called by the Appellants testified to the progress Ben is making in overall behavior and his parents testified to their beliefs regarding the progress both behaviorally and academically that he has made while at Montcalm. This ALJ has to pose the question, however, of why more specific objective measures of progress are not being reported in a situation in which Benjamin's placement decision has been such a serious matter for these deliberations and further important decisions as to the point at which Benjamin will be ready for transition back to his home school district; a goal advocated by this parents.

This ALJ is aware that in some cases, the comprehensive nature of service plans developed for students in residential programs including therapeutic, medical, teacher-counselors and other specialists have been held to demonstrate the individualization of particular programs yielding substantial benefits (*Knable v. Bexley School District*, Sixth Circuit, 2001, 34 IDELR 1). However, in this case, the array of services provided in the Montcalm School do not seem to demonstrate the uniqueness of approach exemplifying an individualized program for Benjamin distinctive from those programs provided for other students served at Montcalm.

As stated in a recent Hearing decision from Massachusetts (*Berkshire Hills Regional School District*, Mass. SEA, March 30, 2005, 43 IDELR 153):

... the appropriate standard to ascertain whether a residential placement should be ordered for a student is "whether the educational benefits to which the student is entitled can be obtained in a day program alone, or conversely whether these educational benefits can only be provided through round-the-clock special education (and/or related) services, thus necessitating placement in a residential facility." 24

Another program component emphasized by the District and AEA is the denial of providing a program in the least restrictive environment (LRE) by virtue of Benjamin being served in the Montcalm program. This issue was an aspect of the Appellee's position within the first phase of this Hearing.

It should be noted that various courts at the Circuit and District levels (for example, *Knable v. Bexley City*, Sixth Circuit, 2001, 34 IDELR 1) have held that we must always weigh the consideration of LRE within the larger context of what programs and services are necessary in order to provide an appropriate program for a student.

The Fourth Circuit (*Shannon Carter v. Florence County*, Fourth Circuit, 1991, 18 IDELR 350) confirms the notion that LRE considerations may become less important in those

situations in which parents are forced into seeking more specialized services for their child. As stated in 2001 by the Eighth Circuit:

Despite the statutory preference for mainstream placements, the IDEA recognizes that some disabled students need full-time care in order to receive educational benefit. (*Independent School District No. 284 v. A.C.*, Eighth Circuit, 2001, 35 IDELR 59, p. 4)

With Benjamin it would seem that his needs established the need for a more restrictive placement. However, it seems relevant to ask the question as to whether progress is being made within the Montcalm program to set the scene for Ben's return to a more inclusive environment. The record is surprisingly absent information regarding the progress Ben is making toward this goal. As stated in the Appellees' Brief

Benjamin's program at Montcalm is very isolated. He lives and is educated only with individuals with behavioral/social issues. He has no integration for education or recreation with regular peers. Even the one day a week he spends at the Cheff Center is with disabled individuals. (p. 18)

This concern regarding integration planning leads to the next element of appropriateness dealing with collaboration with critical stakeholders. This is a difficult concept to apply to this case. The Montcalm program speaks to the collaboration that takes place across the living, school and entire environmental unit. The parents testified to their integral involvement with the overall program. The staff are all involved in implementing one particular approach to behavior management and to crisis intervention.

On the other hand, there is a significant question in this ALJ's mind regarding the extent of collaboration from the Montcalm program back to the Benjamin's resident district. While in these proceedings there were significant issues of communication between Benjamin's resident school district and the Montcalm program. There is a point of disagreement regarding who carried the weight of responsibility in connecting the program provided at Montcalm with Benjamin's resident district. This ALJ can understand how such a communication breakdown occurs, particularly in a situation involving such a level of disagreement between the parents, school district and AEA. But beyond the concept of finding blame, it nevertheless seems that, with the ultimate stated goal of Benjamin returning to Ames, that there would have been more systematic efforts on behalf of the program serving Benjamin to connect his progress in the Montcalm program with local school officials.

As stated above, another key element in determining the appropriateness of a given program for a student with disabilities is the extent to which such a program is "reasonably calculated to confer benefit" (in those situations in which a program is yet to be delivered) and whether such a program is "conferring educational benefit" (in those situations in which a youngster's program is being reviewed after a period of time. The latter standard would seem appropriate in this case. As stated by Mr. Systma on behalf of

the parents, “. . . the Appellants have both recognized and embraced our duty to demonstrate that the Montcalm School was reasonably calculated to enable Benjamin to receive educational benefits . . . “ (p. 14, Appellant’s Brief).

Quite frankly, this ALJ was not overly impressed with the specific behavioral progress monitoring information that presented regarding Benjamin’s progress while a student at Montcalm. If a standard were applied that would seem appropriate in monitoring a student’s IEP in our schools the specific monitoring data presented on Benjamin’s progress in the Montcalm program would seem woefully inadequate. However, several other factors need to be considered. While it is not required that such an alternative program be a perfect match, there are enough questions in this ALJ’s mind regarding the specific and ongoing benefits being accrued by Benjamin in the Montcalm program to challenge the conclusion that such a program is, in fact, appropriate.

Recently, in a case heard in U.S. District Court in Missouri, the following assertion was made regarding balancing LRE considerations with decisions that a specialized program is needed for a child. In speaking to the presumption that students be served in the public schools the Court stated that “the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, then placement in the segregated setting would be inappropriate under the Act” (cited in *Reese v. Board of Ed.*, U.S. District Court, Eastern District of Missouri, 2002, 37 IDELR 252). In this same case, involving a student placed in a residential setting the Court was concerned with balance of academic and behavioral needs and rejected the reimbursement for the residential placement, in part, because the program was so focused on behavior rather than academics and behavior. This ALJ has a similar concern regarding Benjamin’s program.

In summary, this ALJ believes there are a number of significant areas that define the appropriateness of a program that were not established in the information presented on the Montcalm School program. We have not been presented with important information on Benjamin’s experience with the Montcalm program such as:

- Specific information regarding academic goals, achievement and progress
- Specific information on behavioral progress beyond general impressions
- Adequate progress monitoring information in both academic or behavioral areas
- Sufficient information to establish the research or evidence-base for the strategies employed within the Montcalm program
- Evidence of the program being individually designed with Benjamin’s needs in mind
- Evidence of any transition planning to help Benjamin meet requirements for graduation or to be able to transition to a less restrictive environment

It would be a mistake, in this ALJ’s opinion, to simply ignore these areas because of the general satisfaction of the parents involved or the positive reports of others such as relatives, friends and neighbors regarding Benjamin’s behavior. To do so would suggest that a program that addresses one primary element of a student’s needs (in this case in the behavioral realm), delivered in an intense environment is relieved of all responsibilities in

meeting the full range of special education needs of a student such as Benjamin. Among these needs are the dimensions of academic needs, specific behavioral support plans with progress monitoring, and the evidence-base for interventions used; all of which were first raised regarding the proposed Ames program by the Appellants in this Hearing. Even the professional opinion of Dr. Lelwica has to be assessed in light of his hesitation to draw conclusions regarding what factors over the past several years have contributed to Benjamin's positive behavioral changes.

SEA Responsibility

In a class action case from Pennsylvania (*Cordero v. Pennsylvania Dept. of Ed.*, U.S. District Court, 1992, 18 IDELR 1099) the court dealt extensively with questions regarding a state's responsibility in assisting families to secure needed placements for their children. The Court stated concluded that the state had failed to meet its obligations and went on to state:

The court is convinced that the roots of this state of affairs may be traced to the design of the system itself: the absence of procedures for identifying geographic areas within the state which are lacking an adequate continuum of placement options; the failure to investigate and encourage wider development of publicly-operated classes; the lack of monitoring to address situations where an individual or group of individuals have been waiting excessive periods for an appropriate placement; and the lack of coordination between the state's Department of Education and Department of Welfare all contribute to the problem. The delays, moreover, are recurring and continuous, and may not be rectified through the existing hearing process. (10)

The questions raised in the *Cordero* Court would seem appropriate in these proceedings. This includes the extent to which we are seeing a systemic failure within the Iowa system that has contributed to the barriers which the Appellants assert are present in his case and the second issue of what remedies are available within these ALJ proceedings.

In relation to this first question, the Fourth Circuit (*Gadsby v. Grasmick*, Fourth Circuit, 1997, 25 IDELR 621) asserted:

... Congress carefully delineated responsibilities under IDEA, delegating specific duties to the SEA and specific duties to the IDEA, while placing ultimate responsibility for compliance with the SEA. Within this scheme, the SEA has supervisory authority and is responsible, for example, for administering federal IDEA funds and establishing policies and procedures to ensure local compliance with IDEA. (14)

The Eighth Circuit (*John and Leigh T. V. Iowa Dept. of Ed.*, Eighth Circuit, 2001, 35 IDELR 29) confirmed this single agency responsibility and suggest that, without such,

there would be an possible abdication of responsibility in serving students with disabilities. The Fifth Circuit (*St. Tammany Parish v. State of Louisiana*, Fifth Circuit, 1998, 28 IDELR 194), in citing 20 U.S.C. 1412(6):

. . .IDEA places primary responsibility on the state educational agency, by providing that it “shall be responsible for assuring that the requirements of this subchapter are carried out . . .This language suggests that, ultimately, it is the [state educational agency]’s responsibility to ensure that each child within its jurisdiction is provided a free appropriate education. Therefore, it seems clear that [a state education agency] may be held responsible if it fails to comply with its duty to assure that IDEA’s substantive requirements are implemented. (7)

This continuum question has been addressed at several different levels. For example, a District Court in Kentucky (*Eva N. v. Brock*, U.S District Court, 1990, 18 IDELR 703) dealt with the relationship of the SEA to a state school. Within this context the court discussed responsibilities related to a continuum of services and concluded:

Maintaining a “continuum of placements” as required by 34 C.F.R. 300.55(a) is a responsibility of the state as a whole . . . 10

In a class action suit for New York (*Riley v. Ambach*, U.S. District, New York, 1980, 551 IDELR 668) raises issues associated with the wholesale adoption of practices that may be encouraged from a state level that may seem sensible when proponents are wanting to implement expectations such as the least restrictive mandate without adequately considered what may be unintended consequences for those students who may require a more restrictive setting. This Court cited this concern in overruling an action that had been taken by the New York Commissioner of Education that removed residential programs serving students with learning disabilities from the state approved programs. While an example given by this Court may appear dated, it seems relevant to today’s challenges:

Consider, for example a school district which recently closed its special schools for trainable mentally retarded children, and now serves them in self-contained classes in regular schools. Such a shift appears to be in the spirit of the least restrictiveness principle. However, the children and their parents still are left with only one placement option. There is no guarantee that this option will truly be appropriate for every individual child. Thus, exemplifying the proper spirit may be entirely different matter than meeting the Act’s requirements. (p. 20)

The testimony and records introduced in these proceedings certainly point to the gaps in services in Iowa for youth with very specialized needs such as Benjamin. Certainly the responsibility for developing such programs extends beyond the boundaries of the Iowa Department of Education into other state level agencies such as the Iowa Department of Human Services. Such cross-agency planning seems to be inherent to the intent that there

be interagency agreements regarding needs programs and services for students with disabilities.

The Appellants assert that a number of shortcomings have continued to be present years after an earlier due process hearing (*Jessica D.*, 2001) had taken place. In their Brief they state that a number of shortcomings in the state's responsibility continue three years after the work of the state's Continuum Task Force. This includes the lack of written reports regarding needs assessments conforming to the first recommendation of this group, the lack of specific data on the needs of students with particular disability conditions such as Asperger's Syndrome, and the lack of consumer input into ongoing continuum concerns.

The facts in this case confirm the ongoing unmet needs in Iowa regarding support for a process that assures the consideration of a full continuum of services and placements available for students with disabilities and their families. The resolution of this issue is certainly a complex challenge. The facts in this Hearing, including confusion regarding the use and access of the out-of-state approval process, affirm the ongoing concerns in this area. Testimony cited above (Stipulations from Reynolds, pp. 3049-50, Transcript) demonstrate that an understanding of the process of assuring a continuum of options and means by which families have access to such information has not been developed. In the recommendations of the Continuum Task Force from May 21, 2002 there were a number of recommendations to the state, including:

- Develop a set of criteria that LEA and or 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 SEA, and
- The AEAs and the SEA will use the monitoring process to ensure the availability of the continuum of services. (p. 3009, Record)

In a memorandum dated 12/15/04 (pp. 3010-11, Record) from Lana Michelson there are references to recommendations from a task force to address the first cited recommendation above and work that is being done on key indicators to address the second area. However, the specific actions demonstrating progress with these critical elements were not, in this ALJs opinion, presented during this Hearing. This seems to be a chronic systemic issue that may be potentially affecting many students and families in Iowa and is related to the difficulties in meeting Benjamin's special education needs in Iowa.

At this point it seems relevant to summarize the overall conclusions reached regarding both phases of this Hearing although the Decision herein rendered relates to the second phase. There were a number of substantive matters that led this ALJ to question whether the proposed program originally designed for Benjamin to be delivered in the Ames School District met the program expectations regarding appropriateness. There was significant documentation indicating the need to seriously consider a program that extended beyond that which is available in a comprehensive high school. The IEP planning process documented a refusal to consider such needs as indicated through

testimony and record. The IEP process failed to include those who were even currently working most closely with Benjamin. These were, in this ALJ's opinion, matters that rose to a level above minor procedural flaws and thus impacted the delivery of FAPE. Hindsight is always an easy route for all of us but it seems that these shortcomings could have been overcome through a more inclusive process of considering the needs of a student returning to their resident school district after being served in a residential program for close to two school years and through a process documenting the careful consideration of those other professionals, including clinically trained staff, in planning for the program needs of a student such as Benjamin.

Despite these perceived shortcomings, we have an obligation to carefully review the specialized program into which the parents chose to unilaterally place their son. In this case, a number of concerns, as described above, lead this ALJ to conclude that this placement has not met the standard of FAPE for Benjamin. Consequently, to order reimbursement for the total costs of the Montcalm program for the 2003-2004 school year does not seem justified.

Meeting the needs of a student like Benjamin is indeed a challenge for parents, educators and others who both care and are responsible for designing a program "reasonably calculated to confer educational benefit". This situation points to the need for leadership across local districts, areas education agencies and the Iowa Department of Education in developing a reliable process for guiding the means by which the complex needs of students like Benjamin are met. The basic recommendations regarding a clearly understood and disseminated process for providing options for students and families remains an unmet need.

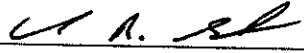
III. Decision

The Appellants responsibility of establishing the appropriateness of the Montcalm program has not been met in these proceedings. Thus the second necessary prong to be met in supporting the reimbursement of a parent's unilateral placement is not supported.

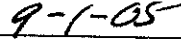
The second component of the Appellant's Appeal regarding the responsibilities of the Iowa Department of Education in assuring a continuum of program options is supported by the facts presented in this case. Counsel representing the Appellants and the Iowa Department of Education are asked to prepare a settlement agreement to address proposed work to be done by the Department to address the continuum concerns raised in these proceedings. This agreement should be forwarded to this ALJ by October 1, 2005.

This ALJ is concerned that the systemic issues of a continuum of service and program options has been an ongoing issue with settlement agreements related to this overall issue being signed in May, 2001 (*Jessica D.*) and again in January, 2005 (*Tanner E.*) with, what appears to be, minimal progress. Serious consideration should be given to whether

administrative remedies have been exhausted and whether further involvement at this level is futile and that alternative courses may need to be pursued.



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



September 1, 2005