

IOWA DEPARTMENT OF EDUCATION
(Cite as 26 D.o.E. App. Dec. 128)

In re: Alexander S., a child,)	
)	
Lisa S.,)	Dept. Ed. Docket No. SE-368
)	(DIA No. 11DOESE006)
)	
Complainant,)	
)	
v.)	
)	
Des Moines Independent)	
Community School District and)	
Heartland Area Education Agency 11,)	
)	
Respondents,)	Decision
)	
and)	
)	
Michael S.,)	
)	
Interested Party.)	

Course of Proceedings

This proceeding began when Lisa S. filed a Due Process Complaint on August 15, 2011, on behalf of herself and her son Alexander. Jurisdiction is based upon section 1415 of the Individuals with Disabilities Education Act [IDEA], 20 U.S.C. § 1415, and Iowa Code section 256B. The governing rules of procedure are set forth in 34 Code of Federal Regulations [CFR] Part 300 and 281 Iowa Administrative Code [IAC], ch. 41.

A prehearing conference call was held on August 24, 2011. All parties participated in the conference. The parties agreed to participate in a resolution session and agreed upon dates for the evidentiary hearing, if needed. The case was not resolved and hearing was conducted in Des Moines, Iowa on September 28, 29, 30 and October 3, 2011, before Administrative Law Judge Christie Scase.

Complainant Lisa S. participated in the hearing and was represented by attorney Bruce Stoltze. Shelly Bosovick was present throughout the proceeding as a representative for the Des Moines Independent Community School District. Cindy Yelick was present representing Heartland Area Education Agency 11. Attorney Miriam Van Heukelem

appeared as counsel for the school district and AEA. Michael S., Alexander's father, appeared and participated on his own behalf as an interested party.

School district employees Marcia Kelly, Diane Harrington, Cynthia Weisz, [SE Teacher], and Shelly Bosovich; Complainant Lisa S., her friends Dr. Toni Bauman and Richard [M.]; and interested party Michael S. testified at hearing. ChildServe employee Cathy Koster was unavailable to testify on the dates of hearing and the parties agreed to submission of her deposition in lieu of testimony. The evidentiary record was held open at the close of hearing to allow the parties to conduct and submit a copy of her deposition. A copy of Ms. Koster's deposition, taken on October 12, 2011, is included in the record.

Alexander's school records and other documents related to this proceeding were compiled in binders and submitted without objection as a joint exhibit, containing pages 1 - 1581. An additional document, labeled as pages 1582 – 1585, was added to this exhibit upon agreement of the parties during hearing. A biographical sketch of Dr. Toni Bauman was received into the record as Complainant's exhibit 1. Documents submitted by Michael S., including: a letter from Dr. Kopelman, notes about Alexander's MRI results, and information regarding various services provided by ChildServe were offered and admitted into the record without objection and have been labeled as exhibits A – I for reference purposes.

Shortly before the close of hearing on October 3, 2011, the Complainant offered as evidence videos of Alex that were taken while he was visiting Lisa S. during the summer of 2011. The Respondents and Mr. S. objected to the exhibit because it was not provided to them five days prior to hearing.¹ Mr. Stoltze acknowledged that he did not inform Ms. Van Heukelem or Mr. S. about the video exhibit until Monday, September 26th – two days before the start of hearing. I sustained the objection and offered the Complainant an opportunity to submit the videos as an offer of proof. I did not receive the proposed exhibit prior to filing this decision.

Findings of Fact

General information: Alexander S. was born on December 4, 1998. He is 12 years old. In November of 1999 Alex suffered a brain injury during an incident of intractable seizures and encephalopathy of unknown origin, possibly stemming from an antecedent viral illness coupled with unintentional exposure to excessive amounts of Tylenol and aspirin. He received medical treatment and was hospitalized for several weeks. After this incident Alex exhibited developmental delays. He has substantial deficits in the

¹ The federal regulations and state rules governing IDEA due process hearings afford each party "the right to – [p]rohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing." 20 C.F.R. 300.512(a)(3); 281 IAC 41.512(1)(c).

areas of learning, adaptive functioning, executive functioning, communication, and social interaction. He also exhibits challenging behaviors.

Lisa S. and Michael S. were married in 1984. Lisa and Michael have four children. Alex is the youngest and is their only special needs child. In the fall of 2005 Lisa and Michael separated and Ms. S. moved to the east coast. Their divorce became final in February of 2007. Mr. S. had physical custody the couple's minor children during the separation. Under the dissolution decree Lisa and Michael have joint legal custody, Michael retains primary physical custody of the minor children. Ms. S. has scheduled visitation for 5 consecutive weeks during the summer, Christmas vacation, and spring break. (Rec. at p. 1503) Michael S. testified that Lisa now has an 8 week summer visitation. (Tr. at p. 854)

Before leaving Iowa in 2005, Lisa S. was Alex's primary caretaker. Alex's prognosis for development after his brain injury was not good. Lisa and Mr. S. pursued services for Alex and in Ms. S.'s words he was "immersed" in therapy, including occupational therapy, speech therapy, physical therapy and early childhood special education. Alex's initial recovery exceeded the doctors' expectations.

The S.'s divorce was in many ways contentious. Lisa S. did not have visitation or contact with Alex until June of 2008. (Tr. p. 594) Ms. S. also received minimal communication from the school district about Alex. She did not directly participate in the annual education planning sessions held for Alex between November of 2005 and November of 2010. (Tr. p. 587)

Lisa S. again became actively involved with Alex's educational planning late in 2010. She filed a due process complaint in December 2010, seeking full access to educational records and challenging proposed placement changes. The 2010 complaint was resolved through an agreement that, among other things, called for a new Individual Educational Program (IEP) to be developed for Alex.

Ms. S. participated in IEP team meetings on May 10 and June 1, 2011. At the conclusion of the June 1, 2011 meeting all members of the IEP team, except Ms. S., agreed that Alex should be transferred to Ruby Van Meter School, a special education day school operated by the district. Ms. S. brought the current proceeding to challenge the proposal to transfer Alex to Ruby Van Meter.

Ms. S. asserts that the proposed placement violates the "least restrictive environment" provision of the IDEA because she believes an appropriate educational program can be provided to Alex at Merrill Middle School, the comprehensive neighborhood attendance center that Alex would attend if he was not disabled. Ms. S. also argues that the procedure used to arrive at the placement decision was flawed, in that a general education teacher from the middle school was not included on the IEP team, the IEP was not amended to reflect Alex's assignment to Ruby Van Meter, and she was denied

meaningful participation in the IEP development process because the IEP team did not fully consider the reports of evaluations completed during the summer of 2011 at Dartmouth Medical Center.

The school district defends the proposed transfer to Ruby Van Meter. The district asserts that Alex's IEP team carefully considered his past performance and current evaluations, observations offered by special education teachers and consultants familiar with his functioning in and out of the classroom, parent input, and several placement options – including placement at Merrill Middle School. The team concluded that Alex's cognitive limitations, social and emotional skill deficits, and challenging behaviors precluded development of an appropriate education program for him in the comprehensive middle school setting at Merrill, rendering Ruby Van Meter the least restrictive appropriate placement. The district argues that Ms. S. has not properly raised her procedural challenges and that, even if they had been raised within her complaint, these challenges would fail.

Alex's father, Michael S., is participating in this proceeding as a parent and interested party. Mr. S. has had primary physical custody of Alex since the fall of 2005 and has been considering Alex's transition from his current elementary school placement for many years. He participated in the IEP team decision-making process and strongly supports the decision for Alex to attend Ruby Van Meter.

Alex's functional ability: Alex is by all accounts an affectionate, outgoing, and likable child. He wants to please other people and shows genuine regret for misbehavior. Every person who testified about Alex during the hearing appeared genuinely to like and want what is best for him.

Unfortunately, Alex's brain injury left him with "global developmental delays." (Rec. at p. 101) Although he has learned to adapt and work around some aspects of the brain injury, he has substantial limitations in cognitive functioning. Functional evaluations were recently performed by Dr. Ronald Hilliard, Alex's treating psychologist in Des Moines, and by psychologists at the Dartmouth-Hitchcock Medical Center, where Alex was seen in the summer of 2011 at his mother's request. Alex obtained a full scale IQ score of 40 on intellectual function tests administered during both evaluations – placing his cognitive impairment in the range of moderate mental retardation on the DSM-IV-TR diagnostic scale.² (Rec. at pp. 98-99, 150-152) Alex has also been diagnosed with Attention Deficit Hyperactivity Disorder and Pervasive Developmental Disorder, Not Otherwise Specified (NOS). (Rec. at pp. 107, 135, 146)

² The *Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV)*, published by the American Psychiatric Association in 1994) and subsequent text revision (*DSM-IV-TR*), published in 2000, are widely viewed as the leading diagnostic reference tool for mental health professionals in the United States.

At age 12, a nondisabled child typically enters 7th grade. Academically, Alex is performing at the pre-kindergarten or kindergarten level. He is working on writing personal information and is able to write his first name and last initial, but not his full last name, phone number, or address. Alex has difficulty recognizing numbers and understanding comparative and time concepts, such as more and less, and yesterday, today, and tomorrow. (Tr. at pp. 483-485) He can not write the numbers 1 to 10 or the alphabet without verbal or visual prompts. He might be able to comprehend a pre-kindergarten level child's book with pictures, but his reading vocabulary is limited to about 14 or 15 words. (Tr. at pp. 498-99) Alex's occupational therapy goals include learning to tie his shoes and identify coins and their value. (Exh. C)

Alex displays great difficulty focusing his attention. The school district and Mr. S. have been consulting with the University of Iowa Hospitals and Clinics, Pediatric Psychology Neurobehavioral Clinic regarding Alex's challenging behaviors since the fall of 2007. During an evaluation conducted in May of 2008, Alex was cooperative, but displayed an attention span of less than 30 seconds. (Rec. at p. 102) He is able to maintain his focus for longer period in the classroom, but still requires frequent redirection to stay on task. [SE Teacher], Alex's lead teacher since the fall of 2010 reports that she has seen improvement in his focus this year to the point that he can stay on task with some activities without a break for 10 to 15 minutes. (Rec. at p. 486)

Alex has had difficulty learning basic social skills, such as accepting no, taking turns, waiting for what he wants, and keeping his voice level down. (Rec. at p. 485) Alex is affectionate and likes to greet people with a hug – both people he knows and people that he does not know. He does not understand personal boundaries. At school, it is not uncommon for him to run up to people walking in the halls and give them a hug. (Rec. at p. 231)

The recent evaluations confirm major delays in Alex's social skill development. Dr. Hilliard, who has observed Alex in both a counseling and evaluative testing context, noted in his October 2010 evaluation report: "He is extremely impulsive and stimulation seeking. He engages in activities for only a brief time and his play is characteristic of a much younger child. Alex does not develop imaginary play things, but seems to focus on basic physical features of toys." During the testing itself, "Alex required constant one-on-one direction to remain focused on the task at hand. He found it hard to sit in one seat for any length of time and often grabbed test materials and explored items in my office I had asked him not to touch." (Rec. at p. 98)

Lisa S. took Alex to see Dr. Abby Reineck, at the Dartmouth-Hitchcock Medical Center, during his summer visits in 2010 and 2011. Dr. Reineck conducted a diagnostic interview in August of 2010. She did not have access to reports from any of Alex's prior evaluations or testing and did not administer any tests during the diagnostic session. Her impressions were based primarily upon information provided to her by Ms. S. and

her observation of Alex during the session. Dr. Reineck summarized her impressions as follows:

Appearance: appears larger than chronological age in term of stature, but emotionally appears to function as approximately ... four years old in the office setting. Multiple attempts to run out of the office, one successfully...

Behavior: lacking in social skills, child-like, pleasant, appropriate, becomes upset easily, upset when discussing his father. Alex has no eye contact, poor boundaries, lacking social skills. ...

Intelligence/Fund of Knowledge: appears to have relatively intact intelligence, despite multiple delays, which appears to contribute to a lower frustration level. ...

Assessment/Formulation: Alex appears to be a bright, loving individual who has an obvious loving attachment to his mother and she to him. Without being privy to formalized testing, it appears that Alex's clinical picture is most consistent with Pervasive Developmental Disorder, NOS. ...

(Rec. at pp. 104-107) Pervasive Developmental Disorder, NOS (PDD-NOS) is a DSM-IV-TR diagnostic category used when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or stereotyped behavior, interests, or activities, but the criteria are not met for a specific PDD category. Other disorders in the PDD group include: autistic disorder, Rett's disorder, and Asperger's disorder.

During the summer of 2011, Alex underwent a comprehensive evaluation at the Dartmouth-Hitchcock Medical Center. A report from a neuropsychological evaluation conducted on July 12, 2011 includes the following observations:

- Alex came to testing today accompanied by his mother and although separated from her without difficulty, initially he was reluctant to engage in testing and rather focused on receiving a toy. ...
- Social etiquette was marked with multiple hugs and kisses of the examiners, repeated personal questions, and off topic comments. ...
- Spontaneous speech was easily elicited and at an appropriate tone, but volume was rather loud at times and rate fluctuated. Communication was complicated by articulation errors, missing words and unusual word choice and syntax errors ...
- He frequently asked for repetitions of directions and did not seem to understand all statements, questions, and instructions provided. ...
- His vocabulary was below average and statements immature for his age

- His level of attention and concentration fluctuated as he was distracted by many things (e.g. noises in the hallway, pictures on the wall, shoes of the examiner) he responded to redirection but needed frequent reminders which increased as the testing progressed. ...

(Rec. at p. 147) The responses provided by Lisa S. to an adaptive behavioral measure (ABAS-II) indicated his “General Adaptive Composite (GAC) was in the Extremely Low range (<1st %ile) with impairment in all skill areas (i.e., conceptual, social, practical) and most subskill areas (i.e. communication, community use, functional academics, self-care, self-direction, and social). Home living and health and safety were in the Borderline range while leisure skills were a relative strength in the Below Average range.” (Rec. at p. 149)

In July of 2011, Dr. Nathaniel Jones, a psychologist with the Dartmouth-Hitchcock Child Development Center met for a one hour session with Alex, his mother, his sister, and his summer para-professional. The doctor noted that “Alex has continued to present with challenging behaviors, aggression, defiance, and weak interpersonal skills ...” Although some growth in self-control was reported, he continues “to have some significant behavioral incidents and can become quite upset and unsafe”

During the session with Dr. Jones, Alex played well with his iPad for approximately 30 minutes. He then became somewhat agitated and left the room for approximately 20 minutes, followed by his mother. He played and walked in the waiting area and became loud and physical with his mother before returning to the doctor’s office. When he and Ms. S. reentered the office, Alex “was quite agitated, speaking loudly, and being physical with his mother including kissing her and sitting in her lap.” He was calm and behaved appropriately when focused on the iPad. “When he was agitated and moving around he could be loud, aggressive (he hit his sister at one point), and defiant.” (Rec. at pp. 157-158)

Based upon his observations and review of the other Dartmouth-Hitchcock evaluations, Dr. Jones offered the following diagnostic impressions:

- Pragmatic Language Disorder. Alex has great difficulty using expressive and receptive language skills in social interactions.
- Presumed Intellectual Disability and very-low academic skills. ...
- Significant emotional/behavioral dysregulation: Alex does not appear to have the executive skills needed to regulate his emotional or behavioral state. He can quickly become frustrated/sad or happy/giddy and then switch again. He did not demonstrate the ability to identify his emotional state or the regulation skills needed to independently return to “just right.”
- Acquired brain damage: Based on review of existing information and evaluation of Alex, DHMC pediatric neurologist Richard Morse, MD

noted a broad range of brain damage for Alex. This damage is present in most areas of his brain and Dr. Morse notes it is not surprising Alex has substantial executive skill difficulties.

- PDD-NOS: Alex continues to present symptoms consistent with a diagnosis of PDD-NOS. Given his substantial acquired brain injury from age 1, this appears to be best described as PDD phenotype, as noted by Dr. Morse.
- Given his young age at the time of his injury, it is likely impossible to know how Alex's development would have progressed without the injury. I do feel that he is presenting with social, behavioral, and communication challenges consistent with the PDD-NOS phenotype.

(Rec. 158-159)

As mentioned in Dr. Jones report, challenging behaviors also remain a concern both in school and other settings. Representatives of ChildServe – an agency that currently provides Medicaid-funded supported community living (SCL) and respite services to Alex – reported in February of 2011 that Alex's behavior was limiting his ability to meet his occupational, physical, and speech therapy goals. Improvement was noted after a behavior support plan was implemented and Alex's father began to accompany him to therapy sessions. (Exh. C – E)

Alex's behavior is sometimes dangerous both to him and to others around him. He frequently "elopes," or leaves his assigned area. Although he often only walks out of the classroom, he has on multiple occasions left the school building or grounds. (Rec. at p. 801) On one occasion in early 2011, he walked several blocks from the school. His assigned associate was following him, but was unable to convince him to return to the school and the police were called to assist. (Rec. at p. 801; Tr. pp. 487-88) Several incidents of physical aggression directed toward other students, teachers, and other adults are documented in the school records. (Rec. at pp. 801-804)

Cathy Koster, Alex's ChildServe case manager since April of 2010, testified about recent incidents. Alex began attending a summer day camp after returning to Iowa in early August of this year. His behavior was not a concern during the first week of camp, but during the second week he became agitated and increasingly aggressive on three consecutive days. His misbehavior included yelling, pounding on doors because he wanted to go outside, screaming at staff and becoming verbally aggressive – saying he was going to hit people. During a separate incident on September 26, 2011, a ChildServe SCL service provider was working after hours at the school with Alex. She told him that they would need to leave soon, so that he would be prepared for the transition. He did not want to leave. The worker told him that if he would not leave with her, she would have to call his father. As the worker was picking up her phone, Alex became very upset, grabbed the worker, and tried to grab the phone away from her. For a time he was choking her and she was concerned she might lose consciousness. She did manage to

get out of his grasp and get him to calm down, but she is not willing to work with him anymore. (Koster Dep. at pp. 7-8, 12-15, 21-22)

Prior evaluations and educational services³: Alex was first referred for Early Access intervention services in July of 2000, due to concerns about developmental delays. He was assessed and found eligible for and began receiving services from an Early Access teacher, an occupational therapist and a physical therapist. Physical therapy was discontinued when Alex began walking and he began to receive speech therapy services in 2001 in preparation for classroom programming.

The first formal educational assessment was conducted and Individualized Education Program [IEP] was developed for Alex in November of 2001, shortly before Alex turned three and became eligible for early childhood special education at the pre-kindergarten level. The assessment found Alex was functioning at the 12-18 month old level in social, emotional, eating/drinking, communication, and cognitive skills. His fine and gross motor skills were rated at the 18-24 month old level. (Rec. at pp. 88-93) Alex's IEP team recommended placement in a self-contained special class with little integration, to provide a highly structured setting with a low student/teacher ratio. In December of 2001 Alex entered a special education pre-school program with speech language and occupational therapy support services. (Rec. at pp. 467-468) The placement and services provided under the IEPs developed for Alex in November of 2002 and 2003 remained essentially unchanged. (Rec. at pp. 487-507)

Alex transitioned to [Neighborhood] Elementary School for kindergarten in the fall of 2004, when he was five. His IEP team met in November of 2004 for annual review of his educational program. Documentation from this meeting reveals growing concern regarding Alex's behavior. Behavioral scales indicated significant areas of inattentive, impulsive, and hyperactive behavior. Placement was continued in a self-contained special education with occupational and speech language therapy support services and one-to-one teaching of social, behavioral, and academic skills. Support from a one-to-one associate was added to assist Alex with academic skills, transitions, and supervision in unstructured settings. (Rec. at pp. 516-535) The placement and services provided under the IEP developed for Alex in November of 2005 remained essentially unchanged from the prior year, with the addition of specially designed one-on-one instruction for reading and math. (Rec. at pp. 536-545)

An adaptive behavior and intellectual functioning evaluation was conducted by school psychologist Diann Walls-Kipper in the spring of 2006. The assessment was triggered by Alex's lack of academic progress over the prior two-year period. His achievement level was still pre-kindergarten. (Rec. at pp. 94-97, 549-550, 554) The Wechsler Abbreviated Scale of Intelligence was administered. Alex tested with a verbal IQ of 63,

³ Ms. S. does not challenge the sufficiency of educational services provided by the school district in the past. A brief review of his prior evaluations and IEPs is included in this decision to provide a comprehensive view of context in which the challenged placement decision was made.

Performance IQ of 70, and Full Score IQ of 64. Behavioral scales were significant in the areas of inattentiveness, hyperactivity, impulsivity, anxiety, and emotional development. The evaluator recommended a neurological examination, medical evaluation for attention focusing and impulsivity problems, and continued placement in a special education self contained classroom. (Rec. at pp. 94-97) No change was made to Alex's IEP as a direct result of the evaluation. (Rec. at p. 554)

Alex's specific learning goals were revised and minor changes were made to the educational and support services provided to Alex under the IEPs developed in November of 2006 and 2007 – for his 2nd and 3rd grade years. Occupational therapy was ended as a support service in late 2006. (Rec. at p. 581) Extended school year services and an adapted keyboard to assist Alex in using a computer were added within the 2007 IEP. (Rec. at pp. 590-603, 607)

Concern regarding Alex's behavior in the fall of 2007 (including 18 instances of hitting, 33 instances of throwing things, and 28 instances of inappropriate questions) prompted a Functional Behavior Assessment (FBA), which was conducted in October. (Rec. at pp. 610-611, 616-619) Consultants specializing in challenging behavior from the University of Iowa Hospitals and Clinics were engaged to assist with development of a Behavior Intervention Plan (BIP) for Alex. (Rec. at pp. 101, 619-622).

Alex was evaluated at the University of Iowa Pediatric Psychology Neurobehavioral Clinic in May of 2008. Testing was conducted using the Wechsler Intelligence Scale for Children – 4th Edition (WISC-IV) and Vineland Adaptive Behavior Scale – 2nd Edition. Alex's performance indicated verbal and nonverbal abilities significantly below average, his adaptive functioning was rated as significantly below average, and the evaluator concluded that he met the diagnostic criteria for mental retardation (Mild to Moderate). (Rec. at pp. 101-103).

The next IEP review took place in November of 2008, during Alex's 4th grade year. He continued to struggle with basic kindergarten and pre-kindergarten math and reading concepts – such as counting (he could count orally to 10 on his own, to 15 with prompts), number recognition, writing his name, and how to form a sentence. His IEP included math and reading/language goals, behavioral/social goals regarding abiding by school rules and building relationships with other students, and a goal focusing on “functional environmental concepts” (i.e. middle, beside, hot, cold, etc). Alex's special education classroom placement continued with a modified “functional” curriculum and adult supports throughout the day. (Rec. at pp. 624-658, 679)

Alex's behavior plan remained in place. A Functional Behavioral Assessment (FBA) completed in October of 2008 reveals difficulty working independently and a continued refusal to work on non- preferred activities. “He will refuse to work if he doesn't get to work on something that he wants, will argue, yell and scream. He will leave [an] assigned area, ignore instructions and frequently cries.” The FBA describes defiant

behavior, impulsivity, a very short attention span, and attention seeking behavior. Alex displayed noncompliant behavior across all settings. (Rec. at pp. 680-683)

Planning for transition from [Neighborhood elementary]: The Des Moines school district maintains three levels of comprehensive attendance centers: elementary schools serving grades K – 5, middle schools serving grades 6 – 8, and high schools serving grades 9 – 12. Students attending [Neighborhood] Elementary typically advance to Merrill Middle School.

Alex attended [Neighborhood elementary] throughout his elementary years. From his kindergarten year forward he received all of his core subject curriculum in a self-contained special education classroom, receiving instruction in a small group and one-on-one setting, with a one-on-one assistant assigned provide prompts, reinforce instruction, and monitor behavior and social interaction. Alex had interaction with non-disabled peers at recess and lunch, during transitions to and from the bus, and at times during non-academic, or “wheel” classes, such as art, music, and physical education – to the degree that his behavior allowed.

The IEP meeting in the fall of 2009, during Alex’s 5th grade year, included discussion of transition options for Alex. Alex had made minimal academic progress during his elementary years. He continues to struggle with basic number concepts (counting, naming numerals, and naming quantity) and his math skills performance was inconsistent. (Rec. at p. 626). His reading/language skills also remained extremely limited. He continued to work on kindergarten or pre-kindergarten concepts, such as sentence construction. (Rec. at p. 650). Behavior and social interaction also remained a significant concern.

On November 13, 2009, after the IEP meeting, the school issued notice of the following transition plan:

The option proposed is having Alex start at [Neighborhood elementary] in the fall (2010); then when he turns twelve (12/4/10) he would go half days at Ruby Van Meter. After winter break he would then transition to Ruby Van Meter fulltime. We felt this would be optimal instead of having a long summer break and then going to Ruby Van Meter in the fall of [2010].

(Rec. at p. 727, *see* Tr. p. 539)

As a part of his ongoing counseling of Alex, Psychologist Ronald Hilliard, Ph.D. performed a psychological evaluation in October of 2010, focusing on intellectual ability and cognitive skills. In his report, Dr. Hilliard observed that Alex is “extremely impulsive and stimulation seeking.” “He engages in activities for only a brief time and his play is characteristic of a much younger child.” The WISC-IV was administered, showing that Alex “continues to exhibit generalized intellectual deficiency across all

domains sampled.” Alex obtained the following composite scores: Verbal Comprehension 50; Perceptual Reasoning 45; Working Memory 50; and Processing Speed 50. His Full Scale I.Q. estimate was 40. The expressive vocabulary subtest of the Kaufman Assessment Battery for Children was also administered. On this survey, Alex “demonstrated skill typical of the average child of 4 years, 2 months of age.” From his observations and the test results, Dr. Hilliard found Alex to be functioning in the range of Moderate Mental Retardation. (Rec. at pp. 98-99)

Alex’s IEP team convened on November 3, 2010, for annual review of the IEP. Michael S. was present. Lisa S. was not. Progress reports showed that he had made only minor progress toward his math and literacy (reading) goals during the prior year. (Rec. at pp. 686-688, 701-706) He showed significant improvement with functional environmental concepts, but needed additional work to increase his understanding concepts such as right and left and hot and cold. (Rec. at pp. 690-692) His progress on behavior and social skills goals was described as inconsistent and variable. (Rec. at pp. 694-699) Four goals were included on November 2010 IEP: (1) a behavioral goal focused on following directions, staying on task, and interacting appropriately with peers and adults; (2) a literacy goal focused on reading comprehension – working with kindergarten level texts; (3) a math goal aiming to improve performance on math readiness assessment – pre-kindergarten level math concepts; and (4) writing goal focused on Alex’s ability to write his personal contact information – name address, and telephone number. (Rec. at pp. 737-750) The IEP reflected Alex’s current placement at the time of the November 3rd meeting, indicating that he was attending the school he would attend if not disabled ([Neighborhood elementary]) and receiving all general curricula in a special education setting. (Rec. at p. 756) His contact with general education students was limited to recess, lunch (45 minutes daily) and library (30 minutes weekly).

During the November 3, 2010 IEP team meeting, the team also discussed and finalized plans for the transition from [Neighborhood] elementary. (Tr. at p. 153) The team reviewed IEPs, curriculum referenced tests, teacher and parent input, and the cognitive assessment done in the summer of 2010 by Dr. Hilliard, and agreed to proceed with the initial plan to move Alex to Ruby Van Meter School. The school district issued notice of a transitioned placement change for Alex to attend a special school setting at Ruby Van Meter. On December 8th, 15th, and 22nd Alex would visit the new school with his father and/or a [Neighborhood elementary] staff person. He would begin attending full time on January 3, 2011, after the holiday break. The reason given for the change was listed as: “Alex’s academic and behavior needs.” The team considered not moving attendance to the special school, but rejected this option “because the comprehensive school setting does not best meet his overall academic, behavior and social needs.” (Rec. at p. 768)

First due process complaint & resolution: Lisa S. filed an IDEA Due Process Complaint against the Des Moines Independent Community School District on December 3, 2010. Briefly stated, this initial complaint alleged that the school district: failed to provide Ms. S. with notices and information during the prior year; failed to include her in

development of the November 2010 IEP; failed to incorporate placement in the IEP; and violated the least restrictive environment (LRE) requirement by proposing to send Alex to Ruby Van Meter – a special school. (Rec. at pp.11-14)

Lisa S., the school district, and Michael S. entered into an agreement on January 13, 2011 to resolve the initial complaint. The school district agreed to include Ms. S. as a member of the IEP team moving forward and to provide Ms. S. with a copy of all past educational records regarding Alex's programming and placement. The parties agreed that Alex would remain at [Neighborhood elementary] until the IEP team issued a new IEP and planned to reconvene the IEP team during the week of May 15, 2011, unless an alternate date was agreed upon by all parties. April 15, 2011 was established as a target deadline for the submission of any outside evaluations or reports by the parents. (Rec. at pp. 25-30, 820)

The primary reason for waiting until May of 2011 to reconvene the IEP team was Lisa S.'s desire to have an extensive evaluation of Alex done by professionals at Dartmouth Hitchcock Medical Center. Her plan was to have the testing done when Alex was visiting her for spring break in March of 2011, but the break was not long enough for medication to be begun and titrated and all of the testing to be completed. Ms. S. requested an extension of the break from 10 days to 45 days to allow for the testing. Mr. S. refused to allow Alex to be gone that long, but agreed to make Alex available for evaluative testing by local professionals in Iowa. Ms. S. sought authority to extend the visit from the District Court, but the Court refused the request. (Tr. pp. 601-606. Rec. at pp. 34-70) The evaluation took place during the summer.

January 6, 2011 IEP meeting: Increased incidents of elopement and noncompliance, as well as continued incidents of aggression had been observed. During a three-day period from January 3rd through January 5th, 2011, Alex left his designated area 8 times, left the building 5 times – including twice when he left school grounds. During the same three days he had 7 incidents of verbal or physical aggression in which he pushed a student, ran in the hallway holding a telescope, hit staff, used profanity, yelled, and took a toy away from another student. (Rec. at p. 801)

Michael S. and Lisa S. participated as parents at an IEP meeting held on January 6, 2011. At the conclusion of the meeting Alex's IEP was reissued. (Rec. at pp. 801, 810) No changes were made to the IEP goals. (Tr. at pp. 169-171) The behavior intervention plan (BIP) was revised to address these incidents. Adjustments were made to reduce the locations where Alex would receive instruction, adjust his work load, and revise staff response to incidents. (Rec. at pp. 801-804, 817-818)

May/June 2011 IEP meetings: Alex's IEP team met on May 10, 2011 and June 1, 2011, for the expressed purpose of discussing placement options and transition planning for Alex. The May 10th meeting was attended by Lisa S., who participated by telephone, and Ms. S.'s attorney, Bruce Stoltze. Other participants included: Michael S.; [SE Teacher]

– Alex’s special education teacher from [Neighborhood elementary]; [Mr. G.] – a general education teacher from [Neighborhood elementary]; [Mr. B.] – Principal of [Neighborhood elementary]; Marcia Kelly – special education consultant for [Neighborhood elementary]; Diann Walls-Kipper – School Psychologist; Janet Young – special education supervisor; Shelly Bosovich – director of special education for the school district; Diane Harrington – special education consultant for Merrill Middle School; and the school district’s attorney. (Rec. at p. 811) The attorneys, Ms. Young, and Ms. Bosovich were present to observe and facilitate the meeting. They did not participate in decision-making as part of the team. (Tr. pp. 517, 524, 555-556)

The May 10th meeting included discussion of Alex’s current IEP; his goal areas, needs, and progress; and possible placement options including Merrill Middle School and Ruby Van Meter. Before this meeting, the special education consultant for Merrill, Diane Harrington, put together a general schedule of proposed classes for Alex at Merrill. After several hours, the meeting was adjourned so that the special education consultant for Merrill, Diane Harrington, could gather more detailed information about Alex’s needs and more fully develop a more specific schedule for the Merrill placement option.

The IEP team reconvened on June 1st. The same attendees participated as at the May 10th meeting, with the addition of Cindy Weisz – the Principal of Ruby Van Meter. The discussion focused on placement options for Alex, including: Merrill Middle School; Ruby Van Meter; Alex having a split day, with half of the day at Merrill and half of the day at Ruby Van Meter; and a different middle school with a special education cluster program. (Tr. at pp. 489-495, 821) Ms. Harrington presented a proposed schedule for Alex if he attended Merrill and Ms. Weisz reviewed the program and schedule available at Ruby Van Meter.

Between the May 10th and June 1st team meetings, Ms. Harrington conducted three observations of Alex in different settings at [Neighborhood elementary], met with several of Alex’s current teachers and other members of the [Neighborhood elementary] staff, and met with both special education and non-core curriculum, “wheel” teachers at Merrill to discuss how to develop a program for Alex at the middle school. (Tr. p. 326) Merrill is a comprehensive middle school, with a current enrollment of approximately 700. The regular education non-core curriculum classes at Merrill are quite large, averaging 50 to 60 students per physical education class and 25-30 for an average music class. The building itself is large, with many exits, and is located on Grand Avenue in Des Moines, a heavily traveled four lane street. There is no fence between the school grounds and the street.

Ms. Harrington’s notes from her observations of Alex at [Neighborhood elementary] are included in the record. During the 15 minutes that she observed his math class on May 10th Alex: required constant teacher prompts to finish a 10 minute task, left the classroom twice, had 9 “blurt outs” in a loud voice to get the teacher’s attention, exhibited inappropriate touching of his associate and had to be reminded eight times to

keep his hands off of the associate. He was easily distracted by other students and appeared concerned about what everyone else was doing. Harrington observed Alex at lunch, PE, and in the hallways on May 18th. He required ongoing prompts from his associate to go through the lunch line and choose his food. He went to his assigned table, ate independently, had limited interaction with peers at the table, yelled out for his book bag when he finished eating, and stayed focused on his books until he was dismissed.

Alex's physical education class consisted of him shooting baskets with the special education teacher – he was no longer attending adaptive PE with other students because he not following directions and was throwing things at or running at the other students. (Tr. at pp. 481-482) During free time and music class on May 26th, Alex again had blurt outs (2 during free time and 6 during music) and required frequent prompting about his voice volume. He generally did well on the computer during free time and during music. Both of these are preferred activities for Alex. (Rec. at pp. 1434-1435)

Harrington's observations align closely with the description of Alex's current school performance provided at hearing by his current lead teacher. [SE Teacher] has been Alex's lead teacher since the fall of 2010. She had 38 years of teaching experience, 16 in the special education setting. [SE Teacher] said that Alex is a very loving child, who is very difficult to teach. It is very hard for Alex to learn new concepts, he needs frequent review and reinforcement, and she often finds that they need to revisit a concept, even though he appeared to understand it a few days earlier. He has a short attention span, anxiety issues, and becomes easily frustrated. His behavior is variable, with some aggression and verbal threats, and elopement incidents. Alex's unique combination of learning barriers and behavior require [SE Teacher] and his other teacher's to frequently vary teaching methodology. One approach may work for a couple of weeks and then stop working, so they have had to be flexible and willing to try new alternatives. (Tr. at pp. 459-461)

Alex has an associate with his 100% of the day, from the time he gets off the bus until he gets back on the bus at the end of the day. All of his classes are in the special education setting. Most of the there are one or two other students in the classroom, but nearly all of his coursework is delivered by the teacher working one-on-one with Alex. (Tr. at pp. 464-473) To minimize distraction, Alex has a designated work space or "office area" in each class room – set up somewhat like a study carrel – so that he does not have a direct line of sight with the other students and minimize distractions. This area is used for him to work one-on-one with his teachers. (Tr. p. 164-167, 236-237) Alex goes to lunch with a group of about 8 special education students. Up to 50 other students, many of them nondisabled are eating at the same time, but Alex and his group go to lunch early, so that they are through the food line before the general education students enter the cafeteria. They sit at a table together with a teacher and associate. (Tr. at pp. 468-469)

After conducting observations and talking with Alex's current teachers to familiarize herself with the details of Alex's current functioning and talking with staff at Merrill Middle School about existing classes and options, Harrington developed a schedule for Alex at Merrill. The majority of the students attending special education classes at Merrill are functioning only about two years behind grade level – at a 5th grade or higher level – significantly above Alex's pre-kindergarten to kindergarten level of functioning. There is one student attending Merrill with cognitive functioning similar to Alex's level, but that student did not have any behavior issues. (Tr. at pp. 342-43,

The proposed schedule that Ms. Harrington presented on June 1, 2011, called for Alex to receive core curriculum – reading, math, and social studies – through individual instruction to take place in a special education classroom with a group of 10 – 12 other students. Because the other students are performing at about 2 years below grade level, they are working on much more advanced concepts than Alex. This disparity would have made it impossible for Alex to simply join one of the existing special education groups, even if he could benefit from instruction in that large a group. The initial plan was for a separate area to be set aside for Alex in the large group classroom, where he could receive one-on-one instruction for the core classes. The remaining subjects: science, physical education, family and consumer science, art, and social skills would be individualized for Alex and delivered one-to-one by the instructor, with no other students present. IEP team members were concerned that being in the classroom with 10 or more other students would be distracting to Alex and that his behavior – the blurt outs and inappropriate touching – would disrupt the other students. Eventually, the team determined that a separate room would need to be provided where Alex could receive one-on-one instruction. (Rec. at pp. 1320-1326; Tr. at pp. 326-327, 350-359)

Under the Merrill proposal Alex would spend nearly the entire day with receiving one-to-one instruction with teacher and working with his associate to reinforce the lessons. He would have had very limited interaction with other students, disabled or nondisabled, because no similar-functioning peers were available at Merrill to join small group instruction with Alex. (Tr. at pp. 350-359)

The Ruby Van Meter School serves approximately 180 students ages 12 to 21, with intellectual functioning ranging from the pre-kindergarten level to approximately the 4th grade level. Students fall into three groups: middle school, high school, and a transition group for students ages 18 to 21. Each age group uses a different area of the building for classes. Ruby Van Meter is one in a complex of three schools located off of 28th Street in Des Moines. The building is set back about one half block from the street. The school currently has 57 students in the middle school group. In addition to classroom instruction, Ruby Van Meter is designed to facilitate functional life skills training. The school has an "apartment" used to teach students basic household tasks – such as making a bed, cleaning, and cooking. The school also has an enhanced focus on social skills training geared to the needs of the students. Extracurricular activities, including Special Olympics and dances, are available to students. (Tr. at pp. 406, 414-416, 436-438, 441)

Cindy Weisz, the Principal at Ruby Van Meter School, provided the IEP team with information about the expected schedule for Alex if he attends Ruby Van Meter. The proposal was for him to join a home room group that currently has three students, one teacher, and one associate. If all joined the class there would be four students and two associates. Each student in the room has their own work area – similar to Alex’s office at [Neighborhood elementary] – and there is a designated area for group teaching. Alex would be provided one-on-one teaching and would have access to small group instruction with his home room group who are working at a similar functional level. A larger 10 student group, with a slightly broader variation of functional level, is available for both academic and nonacademic class work. Alex would have access to the larger group instruction if and when his behavior and social skills make the larger group study feasible. (Rec. at pp. 1583-1584; Tr. at pp. 384-388, 419-423, 435-436)

Although Alex could be provided with one-on-one academic instruction at Merrill, all of the educators on the team were concerned that Alex would not have a peer group at Merrill made up of other students who were functioning at a similar academic and social skill level, making it very difficult to provide him with group instruction or social skills training. The educators were worried that removal from a group classroom to work nearly exclusively with adult teachers and associates would increase, rather than decrease, his dependence on adults. There was also a concern about increased risks to Alex from the location of Merrill near heavily traveled Grand Avenue. (Tr. at pp. 240-244, 266, 359-360, 441-442, 489-492)

At the conclusion of the June 1st IEP team meeting all team members, except Lisa S., were in agreement that Merrill Middle School could not adequately meet all of Alex’s individual needs and that Ruby Van Meter would a more appropriate placement for Alex. (Tr. at pp. 247-251, 266, 362-363, 493-494) The team agreed to consider adding new goals based upon Alex’s needs. (Rec. p. 823; Tr. at p. 244-246)

Based upon the June 1st IEP meeting, prior written notice was issued by the school district later in June, proposing that Alex start at Ruby Van Meter in the fall of 2011. (Tr. at p. 567-569) The notice included the following reasons for the proposal:

Alex will be transitioning to a middle school program in the fall of 2011. The team met to determine what special education program will meet all of Alex’s academic, behavior, social, and overall functioning needs. After multiple lengthy discussions on Alex’s needs the team proposes Alex to attend Ruby Van Meter in the fall of 2011. The team established he has the following needs that are not able to be met in a comprehensive school setting:

- Peers at Alex’s current level of academic functioning are needed for small group academic work. This peer interaction will help Alex academically, socially, and also help develop his independence.

- Peers at Alex's current social/behavior level to practice and generalize newly learned social skills, which include, but not limited to, appropriate personal space, the skill of turn taking, and wait time that will help Alex become more independent.
- Building-wide social skills program "to help reinforce the specific skills that Alex needs to generalize across multiple settings.
- Functional curriculum with regular opportunities to practice life skills necessary for Alex to become as independent as possible. The team believes that it is appropriate to consider Alex's needs with regard to living, learning, and working before his 14th birthday in order to give him an opportunity to learn, practice, and master these skills. Ruby Van Meter has the facilities that Alex will need to practice these functional skills on a regular basis. Examples of the facilities available at Ruby to help Alex learn functional skills are the apartment and the test kitchen.
- Needs highly experienced and trained staff who have worked with students who have a high level of academic, social and behavioral needs and who have experience integrating functional curriculum and social skills throughout the school day.

(Rec. at p. 821) The notice included a lengthy explanation of the reasons the IEP team rejected other alternative placements and a description of the information that was considered. (Rec. at pp. 821-822)

Lisa S.'s observations: Lisa S. understands that due to his brain injury, Alex is unique in the way he processes information. She acknowledges that he has significant limitations, but she does not think that his limitations are as severe as described by the school representatives and she believes that medication management has made a large difference in Alex's behavior and ability to focus and learn. (Tr. at pp. 637-638)

Toni Bauman is medical doctor who specializes in neuroimmunology. (Exhibit 1) Dr. Baurman is a good friend of Ms. S.'s. She has spent considerable time with Alex during his visits and has taken an interest in him. Dr. Bauman agreed that Alex showed a dramatic improvement after beginning medication therapy. (Tr. at pp. 697-698)

Over the past summer Alex had routine social interaction with the Ms. S., Richard [M.] – who Ms. S. lives with and has been in a relationship with for several years, and other friends and their family members, including children in their teens. He did not have a problem being around nondisabled peers. Alex hung out with them, spent time fishing and helped teach a friend's son how to tie a fishing line. He went out to eat with the family without incident. He could sit and wait at a restaurant if he had something to hold his interest. He visited a car dealership that Mr. [M.] owns several times without incident. (Tr. at pp. 634-636)

From her own observation, Ms. S. believes that Alex can learn if information is presented in a way that works for him. Ms. S. gave Alex an iPad computer that he used extensively over the summer. The computer is loaded with games and special learning programs for reading and math skills. (Tr. at pp. 635-637, 640) She testified that he can put letters together on the computer and can read on the computer. (Tr. at p. 653)

Ms. S. believes Alex needs structured one-on-one instruction from a highly trained teacher, with modeling of behavior and reinforcement of lessons in a small group setting when he has captured a concept. She thinks that he could excel at Merrill if given a chance and the right supports. Ms. S. envisions him having a his own class room and a certified teacher assigned to work with Alex one-to-one and to tailor an educational program to suit his needs, including introducing him to both small group and large group activities with nondisabled peers. (Tr. at pp. 644-652) She believes he can complete high school, earn a diploma, and go on to college and become a productive adult - if he has all of the right things. (Tr. at p. 653)

Evaluations during the summer of 2011: Ms. S. was not confident that the evaluators in Iowa had captured a full picture of his learning capacity. Over the course Alex's visit during the summer of 2011, he was re-started on medication to help manage his behavior and provided with therapy, including behavioral therapy twice a week and speech therapy, occupational therapy, and physical therapy. (Tr. at pp. 619, 624-25) He was also seen by a psychiatrist for medication management, an educational psychologist and a neurologist. (Tr. at p. 627)

Reports of the testing and evaluation performed at Dartmouth Hitchcock Medical Center were provided to the school. The evaluations were completed without direct input from any school employees or Alex's father. Despite this limitation, the recommendations within the reports are strikingly similar to the educational program that the IEP team had proposed for Alex. The neuropsychological evaluation report included the cognitive function tests result discussed above and a conclusion that he meets the diagnostic criteria for Moderate Mental Retardation/Intellectual Disability and will need "considerable supports while managing the social and learning demands of school and the community. Language deficits, anxiety, and inattention likely interfered in his day-to-day functioning." With regard to education setting the report recommended:

Academically, given Alex's profile and diagnosis, an ideal learning situation maximizes structure and positive reinforcement and provides a non-distracting and predictable environment. Academic learning will progress at a slow pace and will likely require intense direction or behavioral instruction. Academic expectations should be realistic and data-driven continually adjusted bases on his performance. Therefore, applied behavior analysis procedures are recommended. An errorless learning model will facilitate his learning process. Additionally, functional

skills are clearly needed and should be a part of his program. This means that Alex will have great difficulty in benefiting from the positive aspects of more inclusive regular-education classrooms, even with considerable support. . . .

Socially, Alex's interests in social interaction appear to exceed his skills and understanding. Social skills group training is important but Alex clearly needs day to day assistance in applying these skills. Thus, frequent scripting and reinforcement for targeted social interactions is needed in all situations, especially in non-structured and/or social times.

(Rec. at p. 150)

Dr. Nathaniel Jones is a psychologist and child development specialist. He observed Alex, reviewed of the test reports, and offered the following recommendations for educational programming: "placement should be driven by Alex's educational goal and instructional needs," "adult supervision of Alex will likely need to be consistent while he is at school for safety reasons," "provide an educational setting where he can work intensely on his academic skills with few distractions – this will likely be done one-on-one with few or no students in sight of Alex," and "space likely needs to be designed in a fashion that discourage[s] Alex from leaving when he is frustrated or bored with a task." (Rec. at pp. 159-160)

IEP Team meetings August 17, 2011 and September 7, 2011: After the school district was provided with reports from the Dartmouth evaluations Alex's IEP team met again on August 17th , and again on September 7th to review the reports. The educational professionals on the IEP team had the opportunity to review the reports before the meetings. They agreed that the observations and recommendations in the Dartmouth evaluations provided no significant new information about Alex. All of the team members, except Ms. S., continue to believe that the proposed placement at Ruby Van Meter can meet his educational, social, and functional curriculum needs and the placement decision was not changed during these meetings. (Rec. at pp. 814-815; Tr. at pp. 260- 265, 495-497)

The IEP team had agreed during the June 1, 2011 meeting to reconvene later in the summer to consider revision of the IEP goals in the areas of functional skills and behavior/independence. District staff was prepared to discuss revision of the behavior goal during the August 17th IEP meeting. The team offered to make a change in the IEP by adding a functional goal and splitting the current behavior goal into two separate goals – one to focus on independence and the other to focus on behavior skills. Lisa S. declined to discuss any changes to the IEP until the her due process complaint proceeding was completed. (Rec. at p. 823; Tr. at pp. 246-247)

Michael S.'s observations: Alex's father, Michael S., has been Alex's primary custodian for the past six years. He has been actively involved with educational programming decision throughout this time. He describes Alex as an extremely outgoing, friendly and happy boy, who loves to play and likes trains, trucks, cars, online games, cartoons, and movies. Alex enjoys outdoor activity and played little league baseball this summer in the Miracle League, a program structured for children with disabilities that uses a larger ball, special field, and other accommodations. (Tr. at pp. 854-859) He has also participated in special needs basketball and soccer. (Tr. at p. 870)

Mr. S. is pleased by some aspects of Alex's progress. He agrees that based upon initial MRI results, the doctors thought Alex might be wheelchair bound and unable to speak. Alex has found ways to work around some aspects of the brain injury, but he faces many challenges, including: impulsivity, difficulty focusing, and rapidly escalating behavior – sometimes without an apparent reason. Alex has little sense of danger in general and virtually no sense of danger in a social setting. His cognitive skills are extremely limited. Doctors have told Mr. S. that the area of Alex's brain that was injured affects his higher order or executive function thinking. This is consistent with Mr. S.'s observation that Alex has a very limited ability to conceptualize. (Exh. B; Tr. at pp. 860-61)

During the past few years Mr. S. has consulted with Alex's doctors, school personnel, ChildServe representatives, for input regarding selection of a middle school program for Alex. Over time, he came to believe that Ruby Van Meter is the most appropriate program available for Alex. (Tr. at pp. 873-876)

This was not an easy decision for Mr. S. Alex initially rebounded better than expected from the brain injury and when he was younger, Mr. S. hoped that Alex's functioning might catch up with that of same-age peers. Over time as the peers have advanced, Alex has fallen farther behind. At this point, Mr. S. believes it is in Alex's best interest to shift the focus of education from academic skills to functional life skills that he will need to become as independent as possible as an adult. He has toured the Ruby Van Meter School, looked at the classroom layout, and spoken with the principal and other staff members. He has participated in all of the recent IEP team meetings. In the end, Mr. S. believes Ruby Van Meter is better equipped than Merrill to meet Alex's needs and he is supportive of the proposed placement at Ruby Van Meter. (Tr. at pp. 880-885)

Conclusions of Law

General LRE principles: The overriding purpose of the Individuals with Disabilities Education Act (IDEA) is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A); *see Bd. of Education of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (examining history

and purpose of the Education for All Handicapped Children Act of 1975, the first comprehensive federal statute addressing special education from which the IDEA has evolved).

In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction. 20 U.S.C. § 1412(a)(1). Participating schools must develop an individualized educational program (IEP) for each qualifying child, must comply with the Act's procedural safeguards, and must provide services to each child in the "least restrictive environment" (LRE) appropriate for the child. 20 U.S.C. § 1412(a)(4)-(6).

The core dispute in this case surrounds application of the LRE requirement.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(4).

This provision of the IDEA creates a preference for mainstream education, not an absolute requirement for mainstream education in a general education classroom with nondisabled peers or in special education classes within a comprehensive school setting with exposure to nondisabled peers. The statute and implementing federal regulations clearly allow for use of special education day schools and residential schools, as well as homebound education, "if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114. "Each public agency must ensure that a continuum of alternative placements [including special schools] are available to meet the needs of children with disabilities for special education and related services." 34 CFR § 300.115. Both classroom activities and nonacademic activities including: meals, recess periods, and extracurricular services and activities, must be considered and the public agency must ensure each child has "supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings." 34 CFR § 300.117.

Review standard: “Parents and guardians of a disabled child may challenge the procedural and substantive reasonableness of an IEP by requesting an administrative due process hearing, ...” *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 268, 1002 (8th Cir. 2011).

In a suit by an aggrieved party under the IDEA, the court inquires whether the school district met the IDEA’s procedural and substantive requirements. Procedurally, the school district must follow the procedures set forth in the IDEA to formulate an IEP tailored to meet the disabled child’s unique needs. To pass substantive muster, the IEP must be “reasonably calculated to enable the child to receive educational benefits.” If the school district has met these requirements, it “has complied with the obligations imposed by Congress and the courts can require no more.”

Renollett, 440 F.3d at 1011, quoting *Rowley*, 458 U.S. at 206-07 (other internal citations omitted); see also *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d at 163 (applying the *Rowley* two-part test for IDEA compliance to LRE challenge).

A procedural error provides a basis to set aside an IEP, only if “procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Fort Osage R-1 Sch. Dist.*, 641 F.3d at 1002-03, quoting *Lanthrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010); 34 CFR § 300.513(2). The substantive requirements of the IDEA are generally satisfied when “a school district provided individualized education and services sufficient to provide disabled children with some educational benefit.” *Fort Osage R-1 Sch. Dist.*, 641 F.3d at 1003, quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999).

The Complainant does not seriously challenge the substance of Alex’s IEP or the nature of the educational program and services that have been offered. Her challenge focuses on the placement decision and the argument that moving Alex to the Ruby Van Meter School will virtually eliminate contact with nondisabled peers and violate the LRE requirement of the act.

The United States Supreme Court has not ruled upon the proper standard or factors to be considered in making LRE decisions and minor variations are found in the analytical approach used by the various federal circuit courts to determine if a placement comports with the LRE requirement.⁴ The Eighth Circuit has accepted the approach

⁴ Compare *Daniel R. R. v. State Bd. of Education*, 874 F.2d 1036 (5th Cir. 1989) (adopting two-part test – first, can education in the general classroom with the use of supplemental aids and services be achieved satisfactorily; if not, has the district mainstreamed the student to the maximum extent appropriate); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (when segregated setting has been chosen, the reviewing court must identify what makes that

used by the Sixth Circuit in *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

The IDEA creates a preference for mainstream education, and a disabled student should be separated from [his] peers only if the services that make segregated placement superior cannot “be feasibly provided in a non-segregated setting.” *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). Nevertheless, while endorsing *Roncker*, we have emphasized that the statutory language “significantly qualifies the mainstreaming requirement by stating that it should be implemented ‘to the maximum extent appropriate.’ 20 U.S.C. § 1412(a)(5) (emphasis added), and that it is inapplicable where education in a mainstream environment ‘cannot be achieved satisfactorily.’ *Id.* (emphasis added).” *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987). Thus removing a child from the mainstream setting is permissible when “the handicapped child would not benefit from mainstreaming,” when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting,” and when “the handicapped child is a disruptive force in the non-segregated setting.” *Roncker*, 700 F.2d at 1063.

Pachl v. Seagren, 453 F.3d 1064, 1067-68 (8th Cir. 2006).

Burden of proof: “[T]he burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district.” *Sch. Bd. of Ind. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 at fn. 3 (8th Cir. 2006), citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

The Complainant argues that, because the law creates a presumption that disabled children will be educated with nondisabled peers, the school district “bears the burden to overcome the presumption of mainstreaming.” (Complainant’s Reply Brief, at p. 2) In doing so, the Complainant seeks to shift the burden of persuasion to the school district as to the propriety of the placement decision. I do not entirely agree.

The challenged placement is in a special day school where Alex will not be educated with non-disabled peers. The law does create a preference for mainstreaming. When a placement outside of the general education classroom is challenged, the school district faces the burden of producing evidence to overcome the legal preference for, or

placement superior and whether those services feasibly can be provided in a non-segregated setting); and *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (adopting four-factor test that considers the educational benefits of a full-time general education placement, the nonacademic benefits of a full-time general education placement, the effect the student has on the teacher and other children in the general education placement, and the financial cost of mainstreaming).

presumption of, a mainstream placement. As a practical matter the school district must explain and produce some evidence to support the placement. While a burden of production of evidence is placed on the district, the burden of persuasion remains upon the Complainant. *See North Penn School Dist.*, 110 LRP 26485 (PA SEA 2010); and Fed.R.Evid. 301 (“In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.”). Ultimately, the Complainant must overcome the evidence offered by the school district to support the placement.

Analysis: Ms. S.’s Due Process Complaint describes the general nature of the problem as “incorrect school placement and violation of rights to FAPE and LRE.” The following alleged violations are specifically identified: (a) the placement at Ruby Van Meter does not comply with the LRE requirement; (b) the school district policy of preferring special school program over one-on-one training in home school drove placement decision; (c) the placement decision was made without benefit of the results of the medical testing and evaluations at the Darmouth Medicial Center; . . . and (e) proper placement is at Alex’s home school.⁵

A. Procedural challenges:

1. *Predetermination of the placement.* Ms. S. asserted in her complaint that the decision to send Alex to Ruby Van Meter was based on a district policy or preference for use of a special school, rather than one-to-one instruction. The school district operates two special education day schools – Smouse Elementary and Ruby Van Meter – to serve disabled students with the greatest needs. In essence, the Complainant alleges that the existence of the special school placement options reduces the mainstream options available to students in the district, because there are fewer disabled students attending the comprehensive schools, making it difficult for students like Alex to work in a group setting in the comprehensive school. I understand the thread of the Complainant’s argument, but I do not believe that the existence of special schools in the district evidences a predisposition toward the placement of any individual student in a special school and no evidence to support a finding that the school district is predisposed to assign students to the special schools.

Not all disabled children can be educated within a comprehensive classroom or even within a comprehensive school. The IDEA “expressly acknowledges that ‘the nature or severity of the handicap [may be] such that education in regular classes with uses of

⁵ The Complaint included a fourth alleged violation: (d) the district failed to provide all education information to Ms. S. The question of whether Ms. S. received all education records was set aside and waived by the Complainant at the time of hearing and will not be further addressed herein. (Tr. p. 7)

supplementary aids and services cannot be achieved satisfactorily.’ The Act thus provides for the education of some handicapped children in separate classes or institutional settings.” *Rowley*, 458 U.S. at 181, fn4, quoting 20 USC § 1412(5) (other internal citations omitted). “The educational opportunities provided by our public school system undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom.” *Id.* at 198.

Indeed, in order to comply with the LRE requirement every school district must ensure that a continuum of alternative placements is available to meet the individual needs of students for special education and related services. 34 CFR § 300.115. The required continuum of available placements explicitly includes “special schools.” 34 CFR §§ 300.114(a)(2)(ii); 300.115(b)(1).

The fact that the school district maintains special schools is not a factor that weighs against the district. Following a detailed review of the record in this case, I am convinced that representatives of the district approached the placement decision with an open mind. After Ms. S. filed her initial complaint, the district began the decision-making process anew. They gave both parents an opportunity to submit additional information and the IEP team convened for two lengthy sessions to examine placement options. Extensive time was devoted by Diane Harrington to development of a proposed schedule to serve Alex at Merrill.

The Complainant asserts that even though she “urged one-on-one, and eventually obtained testing to support that methodology, the School District both on 6/1/11 and in the August, 2011 IEP meetings steadfastly refused it as an acceptable alternative.” (Comp. post-hearing brief at p. 12) The record simply does not provide a factual basis for this assertion. The Dartmouth evaluation reports do not support the exclusive use of one-on-one instructions. Yes, Dr. Jones notes that Alex needs a setting to work intensely on academic skills – likely “one-on-one with few or no students in sight of Alex,” but the doctor does not suggest that all of Alex’s education should be delivered one-on-one. The Dartmouth neuropsychological evaluators explicitly noted Alex’s need for social skills group training.

Proposed schedules for Alex to be served at Merrill Middle School and at Ruby Van Meter were considered at the June 1, 2011 IEP team meeting and discussed at length at hearing. Both of the schedules called for Alex to receive a significant amount of one-on-one instruction from his assigned teacher. Under the proposed schedule for Merrill Alex would have received virtually all of his teaching through one-on-one instruction. The Merrill option was rejected by the IEP team not simply because it called for a one-on-one model of instruction, but because the educators on the team did not believe that Merrill would meet Alex’s needs in other ways. The extent of isolation and adult dependence that could result from 100% one-on-one instruction did raise concerns, but Merrill also lacked a functional academic or social skill peer group to allow peer

interaction and work on social skills and lacked an established program to facilitate a largely functional curriculum.

2. The Dartmouth Medical Center reports were provided to and considered by the IEP team. The Complaint also included an allegation that the school district decision was made without the benefit of the Dartmouth evaluations. When the initial due process complaint was resolved, the parties agreed that the IEP team would reconvene in mid-May to discuss placement and agreed that the team would consider any new evaluation data submitted. I understand that Ms. S. intended to have the evaluations done before the team reconvened. But I can not fault the school district for proceeding with the IEP team meetings in May and June. Alex had been held over at [Neighborhood] Elementary during the spring semester of 2011. The team expected that he would be placed in a middle school setting and knew that this might be an extended decision-making process. It was important to complete the placement decision far enough before school reconvened in August to allow the staff to prepare for Alex's arrival at either Merrill, Ruby Van Meter, or another middle school location.

Further, as discussed within the fact findings, the evaluations were presented to the IEP team members before the team reconvened in August. Team members considered the reports, but found no significant new information that would alter the placement decision. Having reviewed the reports in detail, I agree that they include virtually no new information. The results of the cognitive function testing at Dartmouth were identical to testing done by Dr. Hilliard in Des Moines in October of 2010. There is no substantial difference between the descriptions of behavior included in the school records and the descriptions included in the evaluation reports. The recommendations for educational programming made in the evaluation reports are essentially consistent with planned program for Alex as set forth in his IEP and the June 1st Notice of the placement decision. No prejudice resulted from the team proceeding with the placement decision before the Dartmouth Medical Center testing had been completed.

3. Additional procedural claims: Complainant identifies additional potential procedural errors within her post-hearing brief. She asserts that the school district failed to amend Alex's IEP to answer questions on the form regarding LRE and special school placement and thereby failed to document the basis for removal of Alex from his home school and failed to include a general education teacher in the IEP meetings. She questions the timing of the placement decision and argues that she was denied an opportunity to meaningfully participate in the June 1st and August 17th IEP meetings. The school district counters that Ms. S. effectively waived these procedural claims by failing to raise the claims within her Complaint.

I agree that the specific procedural claims addressed in this section of the decision were not spelled out within the Ms. S.'s Complaint. The IDEA provides that "[t]he party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the [due process complaint] notice . . . unless the other party agrees

otherwise.” 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d), 281 IAC 511(4). As to pleading claims, the law provides that the due process complaint must, as a minimum, include “[a] description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem.” 20 U.S.C. § 1415(b)(7)(A)(ii)(III); 34 C.F.R. § 300.508(b)(5); 281 IAC 508(2)(e). This is a relatively liberal pleading standard, which the complaint in this case met. The Complainant’s additional procedural claims are based upon evidence submitted into the record without objection and were raised in the Complainant’s initial post-hearing brief – allowing the Respondent and opportunity to address the claims. Under these circumstances, I cannot find that these procedural claims have been waived.

a. Documentation of the placement decision. Relying upon rule 281 IAC 41.116(4), she asserts that the school district failed to amend Alex’s IEP to answer questions on the form regarding LRE and special school placement and thereby failed to document the basis for removal of Alex from his home school. Rule 41.116(4)(a) requires a team establishing the eligible individual’s placement to answer a series of questions concerning LRE. Rule 41.116(4)(b) provides that, if special education will be provided in a special school setting, the IEP or an associated document shall answer a series of questions about the selected placement. However, these requirements are not included in the federal IDEA regulations and the Iowa rules do not explain why this form of documentation is required or when it must be completed. The questions required under rule 41.116(4)(b) are included on the standard IEP form developed by the state department of education.

When Alex’s IEP was last revised in January of 2011, he was attending [Neighborhood] Elementary – the “stay put” placement when the initial due process complaint was filed in December of 2010. The IEP has not been amended since that time and the January 2011 IEP does not reflect the proposed placement at Ruby Van Meter.

The Prior Written Notice of Proposed Action issued by the school district after the June 1, 2011 IEP team meeting provides the only formal documentation of the placement decision at this time. The notice explains the reasons that placement at Ruby Van Meter was selected and other alternative placements were rejected. Another IEP meeting was scheduled to be held on August 17, 2011 to update and amend Alex’s IEP. Notice of the August 17th IEP meeting was issued on August 3rd. S. filed her Due Process Complaint on August 15, 2011 to challenge the placement proposal set forth in the June 1, 2011 Prior Written Notice. After the Due Process Complaint was filed, she declined to discuss revision of the IEP until the complaint was resolved. She did not cooperate to allow the IEP process to run its course. The team could have amended the IEP without her consent, but nothing would have been gained.

During the pendency of this action, Alex remains at [Neighborhood] Elementary. His current IEP still reflects his current placement. The Complainant and her attorney were both present during the IEP meetings in May and June that led to the decision to place

Alex at Ruby Van Meter. Ms. S. had a full opportunity to participate in the IEP team meetings and she has made no showing that this alleged procedural error had any effect on her ability to exercise her rights or Alex's ability to receive FAPE.

b. *Regular education teacher participation in IEP meetings.* The Complainant next asserts that the school district failed to include an appropriate general education teacher in the IEP meetings. The federal regulations and state rules require the public agency to ensure that the IEP team for each child includes, among others, “[n]ot less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment).” 34 CFR 300.321(a)(2); 281 IAC 41.321(1)(b).

[Mr. G.], a regular education teacher at [Neighborhood] Elementary, was present at the May 10th and June 1st IEP team meetings. (*See Rec. at pp. 812-815; 821-822*) Mr. [G.] had not taught Alex. But since Alex attended only special education classes while attending [Neighborhood elementary], none of the regular education teachers at the school Alex was attending had taught Alex. In her reply brief the Complainant asserts that a regular education teacher from Merrill Middle School should have attended the meeting because that was one location under consideration and a middle school teacher could have better address middle school concerns.

The school district complied with the requirement to include a regular education teacher on the IEP team. Placement at Merrill Middle School was an option to be considered by the team and some benefit may have derived from a regular education teacher's presence at the IEP meetings, but there is no reason to believe that the inclusion of a regular education middle school teacher on the IEP team would have resulted in a different placement decision.

Alex was not participating in a general education classes at [Neighborhood elementary], his IEP did not provide for him to attend regular education classes, and there is no evidence that anyone on the team thought that he be placed in a regular education classroom at Merrill. The primary issue under discussion at the May and June 2011 IEP team meetings was where Alex would attend special education classes. Special education consultants from both Merrill and Ruby Van Meter participated in the meetings. They were very familiar with the nature of the settings under consideration. No substantive harm flowed from the district's failure to select a regular education teacher from Merrill to attend the meetings. *See J.T. v. Bd. of Education of the School Dist. of New York City*, 716 F.Supp. 2d 270, 288 (S.D. NY 2010).

c. *Timing of the placement decision.* In addition to arguing that a placement at Merrill was appropriate for Alex, the Complainant argues that his placement should not have been changed unless or until his IEP goals were revised. The focus of Alex's education goals have not changed significantly over time – the goals in the current IEP are for him to improve his math, reading, writing, and behavior. Needed support services are

identified in Alex's IEP and BIP. The placement decision made by the team in June was based upon consideration how the proposed placements could meet Alex's needs.

The Complainant argues that the timing of the placement decision in this case was wrong, because the placement could not be properly decided until Alex's IEP goals and service-needs were updated. This argument overlooks the reason that the school district was proposing a change in placement for Alex. The placement change did not arise from a change in Alex's needs, but from the fact that he was 12 years old and it was time for him to advance from the elementary school that he was attending. There was no reason to revise Alex's IEP goals or BIP – his functional capacity was essentially the same as it had been six months early when the goals and support services in his IEP were last revised.

d. *Meaningful parent participation.* Ms. S.'s last procedural claim is that the school district denied her the opportunity to meaningfully participate in the June 1st and August 17th IEP meetings. This claim appears to be based primarily upon her perception that the school district refused to seriously consider placement at Merrill with a one-on-one instructor and did not fully consider the evaluation reports from Dartmouth.

“Parents and guardians play a significant role in the IEP process’ and a school district cannot refuse to consider their concerns or evidence in drafting an IEP.” *Fort Osage R-1 Sch. Dist.*, 641 F.3d at 1005, quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. at 53.

Consequently, when a school district predetermines the educational program to be provided to a disabled student, including the student's placement, prior to meeting with the parents and closes its mind to the concerns or evidence of the parents, the IEP is procedurally flawed and must be set aside because the parents were deprived of any meaningful “opportunity to participate in the formulation process.”

Id., quoting *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010), and citing *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2005)(collecting predetermination cases); *see also* 34 CFR § 300.322(a) (“public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate ...”).

As discussed in detail above, I do not believe that the district predetermined Alex's placement or refused to consider Merrill Middle School as a viable alternative. Nor is there any evidence that the school district refused to consider the evaluation reports when they were submitted or that Ms. S. was denied a full opportunity to participate in the IEP meetings that were held in May, June, and August of this year. The mere fact that the other members of the IEP team disagreed with Ms. S. regarding the most appropriate placement for Alex does not establish that they failed to allow her a meaningful opportunity to participate in the formulation process. *See Bd. of Educ. of Township H.S. Dist. No. 211 v. Ross*, 486 F.3d 267, 274-75 (7th Cir. 2007).

B. Substantive LRE compliance.

It is a fundamental principle of the IDEA and LRE that the needs of the child must drive the placement decision. *See* 34 CFR §§ 300.114 – 300.116 (LRE, the continuum, and placements). The free appropriate public education requirement can only be met if a child is provided with personalized instruction with sufficient supports and services for the child to benefit educationally from instruction. *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d at 163, citing *Rowley*, 458 U.S. at 203. But educational benefit is not limited to improvement of academic skills. The decision regarding a child's placement must be based upon consideration of the child's IEP goals and the supports and services necessary for the child to make progress both in the academics and in other areas of need – such as social skills or rule-compliance. “[T]he IDEA directs school districts to evaluate qualifying children ‘in all areas of suspected disability’ and customize educational programs to their specific needs.” *Fort Osage R-1 Sch. Dist.*, 641 F.3d at 1003, quoting 20 USC § 1414(b)(3)(B), (d).

Alex suffers from a combination of disabilities, including: global developmental delays related to his brain injury, ADHD, and PDD-NOS – or at least many of the social skill deficits and behaviors commonly found in children on the autism spectrum. He needs much more than the delivery of core curriculum academic content. His IEP includes goals in the areas of math, reading literacy, and writing and he needs an intensive instructional program in these areas. Under the IEP, specially designed instruction is to be provided in each of these subject areas, delivered in a small group setting. The use of the small group setting does not exclude one-on-one instruction. To the contrary, one of the benefits of placement in small-group special education classroom– is that the teacher has an opportunity to work one-on-one with each student.

Alex's IEP also a behavior goal and a behavior intervention plan. The Complainant minimizes the extent and impact of Alex's challenging behavior – stating that his behavioral issues are minor and essentially claiming that the school district is exaggerating concerns about his behavior to justify the special school placement. The record belies her position. Documented detail regarding Alex's long-standing behavioral problems is set forth within the fact findings and will not be reiterated here. While Alex's behavior, standing alone, might not justify a special school placement – the combined effect of his behavior, his low cognitive functioning, and the lack of social skills creates a very real question as to whether an appropriate educational program can be offered to him at a comprehensive middle school.

The consensus of Alex's IEP team – and the unanimous decision of all of the team members except Ms. S. – was that the program that they could devise for Alex if he attended Merrill would not meet all of his documented needs. While it would have been possible to provide Alex with high quality one-on-one special education instruction at Merrill, the Merrill placement could not provide Alex with a functionally equivalent peer

group so that he could also receive small group instruction for academics and social skills. All of the educational professionals on the IEP team, Dr. Jones – the educational psychologist who evaluated Alex at Dartmouth, and Mr. S. all believe that small group instruction is necessary for Alex.

Ruby Van Meter School offers Alex the opportunity to receive individual instruction, small group instruction with peers who are close to his functional level, and – when he is ready – larger group instruction with peers who are functioning both above and below his level. The special school can also provide Alex with access to a wide-ranging functional curriculum which the educational professionals, evaluators, and Mr. S. all agree will benefit him greatly as he continues to struggle with basic life skills.

Ms. S. correctly points out that the Ruby Van Meter placement will eliminate the potential for Alex to have daily contact with nondisabled peers. While I respect the point that disabled students gain very real benefits from contact with nondisabled peers – even outside of the classroom setting – the record establishes that nature and extent of Alex’s disabilities and social skill deficits make it difficult for him to have meaningful interaction with nondisabled peers in his current elementary school setting. It is unlikely that he would be more successful with peer interaction at the middle school.

The IEP team in this case carefully considered placement of Alex at Merrill Middle School. With the exception of Ms. S., all members of the team concluded that even with individualized instruction, a one-on-one associate, and other support services Alex’s needs could not fully be met in the Merrill placement. All members of the team except Ms. S., were confident that Ruby Van Meter would better meet Alex’s needs both now and in the foreseeable future.

Although I believe that Ms. S. is pursuing the placement that she truly believes will best serve Alex, I do not agree with her view of his capabilities and limitations. The Complainant has failed to meet her burden of proving a violation of the IDEA. Removing a child from the mainstream setting is appropriate when the marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting. For all of the reasons discussed herein, I conclude that Ruby Van Meter represents the least restrictive appropriate placement for Alex.

Decision

The Respondents have prevailed on all issues raised in this proceeding. The placement decision made by Alex’s IEP Team on June 1, 2011 is reasonably calculated to allow him to receive educational benefits in the least restrictive appropriate environment.

Issued on November 1st, 2011.⁶



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Copies to: Bruce Stoltze, Attorney for Complainant
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⁶ Personally identifiable information about the student has been removed from this redacted version of the Decision, issued on November 8, 2011.